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OBHRAI'S
LIMITATION & PRESCRIPTION
VOL. III

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OBHRAI'S LIMITATION & PRESCRIPTION

BEING

An Exhaustive, Critical, Analytical, and Explanatory Commentary

on

The Indian Limitation Act, IX of 1908

(with Amendments up to date)

BY

RAI BAHADUR DIWAN CHAND OBHRAI,

Advocate, High Court, Lahore

&

Judicial Commissioner's Court, N.-W.F.P., Peshawar

AUTHOR OF

"The Punjab References," and "The Punjab Ready Referencer" Series,

"The Privy Council References" also

"The Law Relating to Mercantile and Legal Arbitration",

"The Principles of the Law Relating to Negotiable Instruments",

"The Law Regulating Court-Fees and Jurisdiction "

&

The Lectures on the Law of Arbitration in British India.

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1801-2747

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SUPPLEMENTARY NOTES.

PART III.

Article 124.

195. *Add to § 1892, at pp. 1831-1833:—*

Where a person is in possession of the office of the shebait which was held by another for more than 12 years, and adversely to such person, Art. 124, Limitation Act applies. As the office is extinguished by adverse possession, the right to claim a turn is barred by 12 years' adverse possession.^{26-a}

Right to office extinguished by 12 years' adverse possession.

Article 125.

196. *Add to F. N. 20:—*

Rajagopala Konar v. Ramanuja, (1936) 165 I.C. 448=1936 M.W.N. 339.

197. *Add to § 1903, at p. 1847:—*

This article cannot apply to suits instituted after the death of the female or females. Where after the death of the last male holder his widow in whom the property vested and her daughter made an alienation, and after the death of the widow the plaintiff alleging that he was the adopted son of the daughter sued for a declaration that the alienation was void, *held*, that the suit was not governed by Art. 125, but by Art. 120, Limitation Act.^{20-a}

198. *Add to § 1903: Scope and application, at pp. 1846-1847:—*

Article 125, Limitation Act applies only when possession is that of a Hindu or Muhammadan female as such, that is to say, by virtue of her being Hindu or Muhammadan, and does not apply if her possession is by virtue of a grant or transfer made *inter vivos* or by virtue of a bequest or in other words when her possession is irrespective of her being a Hindu or Muhammadan female.^{23-a}

199. *Add to § 1912: Alienation, meaning of, at pp. 1855-1856:—*

26-a. *Haripada Roy v. Gopinath Roy*, 1936 Cal. 29.

20-a. *Rajagopala v. Ramanuja*, (1936) 165 I.C. 448=1936 M.W.N. 339.

23-a. *Kanhyalal v. Hirabibi*, 1936 Pat. 322 (331)=15 Pat. 151=163 I.C. 940.

Where a deceased had made a gift of his land to certain person, and the daughter of the deceased objected and contested its alienation in alienee's name, but the land was registered in alienee's name, a suit by the reversioners to set aside alienation is not governed by Art. 125, but by Art. 120, Limitation Act.^{41-a}

Article 127.

200. *Add to § 1927, at pp. 1871-1872:—*

Where a person claims partition of an estate as a co-parcener, the suit is governed by Art. 127, Limitation Act, and the mere fact of the plaintiff being in possession of the land, admittedly with the permission of the defendant, is of no avail.^{34-a}

Articles 128 and 129.

201. *Add to § 1940: Scope and application, at pp. 1887-1888:—*

Add to § 1940, at p. 1887:—

The word "Hindu" in Arts. 128 and 129, Limitation Act, does not refer to the religious persuasion of the plaintiff. It is inconceivable that the legislature ever intended to provide one period of limitation for a plaintiff of a particular religious faith, and another period if he belongs to another faith. Those two articles apply where the maintenance is claimed not on the basis of contract, but on the basis of status of the plaintiff under Hindu law, and a suit for maintenance by even a Hindu under contract is governed by Art. 115, Limitation Act.^{44-a}

202.

Art. 128 refers to cases in which the claim of a Hindu is based upon his right as a Hindu to avoid an alienation by a female who is in possession as a Hindu, and does not apply to cases where the possession and the claim are independent of the status of the parties.^{1-a}

Claim independent of status of parties.

Article 130.

203. *Add to § 1946: Starting point, at p. 1894:—*

As between landlords and tenants when the tenant holds land without payment of rent, limitation against the landlord would only arise twelve years after the landlord has come to know that defend-

41-a. *Damar Mahton v. Jagdip*, 1936 Pat. 535 (536).

34-a. *Ratan Singh v. Jairam Singh*, 1936 Nag. 80 (85)=31 N.L.R. Supp. 191.

44-a. *Ramjidas v. Mahamaya Prasad Singh*, (1936) 161 I.C. 478.

1-a. *Kanhyalal v. Mt. Hirabibi*, 1936 Pat. 323 (331)=15 Pat. 151.

ant possesses land without payment of rent.^{33-a} Thus, a suit for assessment of rent instituted within 12 years from the date of the final publication of the record of rights recording that the tenants have not been paying rent, but are liable to pay the same is not barred by Art. 130, when there is nothing to show that the landlord had knowledge about the tenant holding land without payment of rent.^{33-b}

Knowledge of landlord about tenant possessing land without rent.

Article 131.

204. *Add to § 1948: Scope and application, at p. 1896:—*

Where the particular Art. 102 applies, the more general Art. 131 will be excluded.^{40-a}

205. *Add to § 1949: Illustrative cases, at pp. 1897-1898:—*

(4) There is a distinction between a suit to establish a periodical recurring right, and a suit for the realisation of sums of money due on the basis of that right, and the latter claim is not governed by Art. 131.^{10-a} The right to recover *manibham* from a Zemindar, an annual allowance from and out of the revenue collections is a periodically recurring right, and a suit for recovery of such allowances is governed by Art. 131, Limitation Act.^{10-b}

Claim for money under recurring right.

Article 132.

206. *Add to § 1980, at p. 1930:—*

Where a part of the purchase-money is left with the vendee by the vendor at the time of sale of his property to him, with a direction to the vendee that he should pay off a prior encumbrance a statutory charge for the implied purchase-money is created in favour of vendor under S. 55 (4) (b), Transfer of Property Act.^{5-a}

Vendor's lien.

207. *Add to F. N. 6 and 8, at pp. 1930-1931:—*

Ram Chander v. (Pandit) Ram Chander, 1936 All. 870 (873) (Suit for the enforcement of the charge can be brought within twelve years from the date of sale, under Art. 132, Limitation Act).

208. *Add to § 1983, at p. 1932:—*

33-a. *Chandra Kumar De v. Mukherjee*, 1936 Cal. 289 (291); Reld. 1922 P.C. 272; 40 Cal. 173 (P.C.); Dist. 10 M.I.A. 214 (P.C.) and 1915 Cal. 590.

33-b. *Ibid.*

40-a. *Shivram Joishah v. Nagappaya*, 1936 Mad. 149 (150).

10-a. *Ramjidas v. Mahamaya Prasad*, 1936 Pat. 158=16 P.L.T. 789=161 I.C. 478.

10-b. *Chinna Thambiar v. Rama Iyer*, 1936 Mad. 704=1936 M.W.N. 742=44 M.L.W. 250=164 I.C. 794.

5-a. *Ramchander v. Ramchander*, 1936 All. 870 (873); Reld. on 1934 All. 406.

The Madras High Court has held that the right to enforce a charge under S. 95, Transfer of Property Act, accrues on the date of payment and the article applicable is Art. 132, Limitation Act.^{18-a}

Article 132.

209. *Add to § 2008: Application of Art. 134, at p. 1971:—*

A suit for ejectment against the mortgagees of property dedicated to an endowment, does not come under Art. 134, as a Hindu Religious Endowment does not constitute a "trust" within the meaning of the article, and secondly the suit is not for possession but for ejectment.^{15-a}

Where this article does not apply.

cated to an endowment, does not come under Art. 134, as a Hindu Religious Endowment does not constitute a "trust"

Article 134-B.

210. *Add to § 2027: Alienation of sacred property, at pp. 1992-1993:—*

The remedy to set aside transfer by former manager of trust property is governed by Art. 134-B, Limitation Act.^{11-a}

211. *Add to § 2033: Starting point, at p. 1998:—*

Their Lordships of the Privy Council have held that a permanent lease of debutter property by a *dharmkarta* when not justified by the necessity for the preservation of the endowment is valid during the tenure of office of the *dharmkarta*, and is not void *ab initio* so as to make the possession of lessee adverse from the date of the lease. The proper date from which the adverse possession generally runs in such cases is the date of death, resignation, or removal of the *dharmkarta* from the office. However, each *dharmkarta* can authorise, create or continue a new tenancy, and by permitting the lessee to continue in possession and receiving rent during his tenure of office, the possession of the lessee does not become adverse till anything happens which takes the case out of the operation of this principle.^{40-a}

Adverse possession of permanent lessee of debutter property.

permanent lease of debutter property by a *dharmkarta* when not justified by the necessity for the preservation of the endowment is valid during the tenure of

Article 138.

212. *Add to § 2056: Scope and application, at p. 2023:—*

The word "*purchaser*" in Art. 138 is limited to a stranger, *i.e.*, to a person who is not a party to the decree and who is not a decree-holder.^{25-a}

18-a. *Srcceramulu v. Ramakrishnayya*, (1936) 162 I.C. 828=1936 M.W. N. 266.

15-a. *Dwarkadas v. Rikhi Ram*, 1936 Lah. 784.

11-a. *Jagathambal v. Periatambi*, 1936 Mad. 188.

40-a. *Pannambala v. Periyanan*, 1936 P.C. 183 (P.C.).

25-a. *Obiter in Hukm Chand v. Mir Hassan*, 1936 Pesh. 85.

Article 141.

213. *Add to § 2102: Suits not under this article, at p. 2070:—*

A suit by reversioners for a declaration of ownership of certain lands decreed in their favour on payment of a certain amount found to have been taken by the alienor-widow for necessity, being not a suit for possession is not governed by Art. 141, and falls under the residuary Art. 120, Limitation Act.^{33-a}

Suit for declaration of ownership.

214. *Add to § 2103: Article explained, at pp. 2070-2071:—*

A suit by reversioner to set aside a sale by a Hindu female brought within 12 years of her death is within time under Art. 141.^{34-a}

Suit to set aside sale by a Hindu female.

Article 142.

215. *Add to §§ 2134-2138: Onus probandi:—*It cannot be said that in every suit for possession where the plaintiff had established his title, it lies on the defendant to prove his adverse possession even though the plaintiff had come into Court alleging his possession and dispossession.^{5-a}

Where in a suit for possession, plaintiff alleges ownership and prior possession and the defendant puts forward a title to the land by way of a transfer, no presumption can arise in favour of the continuance of plaintiff's anterior ownership and if he wants to succeed, he must prove that he had been in possession within 12 years of suit.^{5-b}

216. *Add to § 2155: Attachment by Magistrate not dispossession, at pp. 2134-2135:—*

Where an order under S. 145, Criminal Procedure Code, was made by the Magistrate for attachment of the disputed property, and the Tahsildar was appointed as Receiver of the property, and the owner brought a suit for mere declaration of title to the property, it was *held*, that there being no suggestion of the plaintiff's dispossession or discontinuance of possession, Art. 142 did not apply.^{9-a}

Suit for declaration of title.

33-a. *Ishar Das v. Ghulam Mohd.*, 1936 Lah. 835 (836).

34-a. *Maina v. Bhagwati Prasad*, (1936) 164 I.C. 193=1936 All. 557.

5-a. *Sher Muhd Shahbaz Khan v. Sher Muhd. Banne Khan*, (1936) 162 I.C. 330=1936 Lah. 208.

5-b. *Ma Pyan Gyi v. U Shwe Kyun*, 1936 Rang. 124; Reld. on 1929 Rang. 153.

9-a. *Partab Bahadur Singh v. Jagatjit Singh*, (1936) 164 I.C. 118=1936 Oudh 387 (395)=1936 O.L.R. 412=1936 O.W.N. 784.

Article 144.

217. *Add to § 2171: Immoveable property, interest in—*,
at pp. 2158-2162:—

Although the equity of redemption in the case of a possessory mortgage is an intangible thing, yet it is an estate in land, and is fully capable of possession. A claim for possession of equity of redemption is a claim for possession of an interest in immoveable property within the meaning of Art. 144, Limitation Act^{37-a}

218. *Add to § 2170-2172: Scope and application*, at p. 2154:—

Article 144 only applies to a case in which the defendant is holding adversely to the plaintiff without title.^{16-a}
Adverse possession.

219. *Add to § 2170 (2)*, at p. 2154:—

A suit for possession by the minor co-parceners on attaining majority, involving the ancillary relief for cancellation of the deed of alienation by the manager, is governed by Art. 144 and not by Art. 44, or Art. 91, of the Limitation Act.^{16-b}

220. *Add to § 2170 (3)*, at p. 2154:—

Where a suit comprises a prayer for declaration and for possession the whole suit cannot be governed by Art. 144.^{20-a}

221. *Add to § 2170-A: Illustrative cases*, at pp. 2155-2158:—

(15) A suit by mortgagee-auction-purchaser for the possession of certain land which was leased out by the mortgagee after its mortgage, is governed by Art. 144, it not being necessary to sue or pay for cancellation of the lease, Art. 120 has no application.^{7-a}
Suit by mortgagee-auction-purchaser for possession.

222. *Add to § 2170: Illustrative cases*, at pp. 2155-2158:—

(16) The principles laid down in *Vidya Varuthi's case* (48 I.A. 318) are not inapplicable to the case of an alienation by the manager of a temple, in so far as Art. 144 is concerned.^{7-b}
Permanent lease by manager of temple.

37-a. *Udai Bhan Singh v. Sheoamber Sahai*, 1936 Oudh 168=1936 O. L.R. 119=160 I.C. 920=1936 O.W.N. 243.

16-a. *Mohammad Yusuf v. Mohamad Wahced*, 1936 Pat. 147=161 I. C. 585; Follid. 1931 P.C. 196 (P.C.).

16-b. *Chhajumal v. Multan Singh*, 1936 Lah. 996 (998).

20-a. *Swamikone v. Sankara Vadia*, 1936 Mad. 804 (807)=1936 M. W.N. 351.

7-a. *Tulsi Ram v. Manakuar*, (1936) 162 I.C. 225=1936 O.W.N. 399 1936 R.D. 168.

7-b. *Daivasikhamani v. Periyannan Chetti*, (1936) 162 I.C. 465 (P.C.).

223. *Add to § 2170: Illustrative cases, at pp. 2155-2158:—*

Suit for partition as co-owner. A suit for partition of estate as co-owner, and not as co-parcener, falls under Art. 144, Limitation Act, and not under Art. 127, Limitation Act.^{7-c}

224. Article 144 applies to cases where the possession of the purchaser is adverse to the plaintiff, and a purchaser from the *de jure* guardian of a minor does not hold the land under a title adverse to the minor, but on the contrary he derives his title from the minor, and has a good title until it is shown that in selling the land to him the guardian exceeded his powers.^{16-g}

225. *Add to § 2177: Adverse possession, at pp. 2169-2170:—*

Add to F. Ns. 4 and 5, at p. 2170:—

Partab Bahadur Singh v. Jagatjit Singh, 1936 Oudh 387 (396)=1936 Oudh L.R. 412=1936 O.W.N. 784=164 I.C. 118. [Adverse possession—requisites of.]

226. *Add to F. N. 8, at p. 2170:—*

Partab Bahadur Singh v. Jagat Jit Singh, 1936 Oudh 387 (396)=1936 Oudh L.R. 412=1936 O.W.N. 784=164 I.C. 118.

227. *Add to F. N. 24, at p. 2173:—*

Partab Bahadur Singh v. Jagat Jit Singh, 1936 Oudh 387=164 I.C. 118, *supra*.

228. *Add to F. N. 27, at p. 2173:—*

Partab Bahadur Singh v. Jagat Jit Singh, 1936 Oudh 387=164 I.C. 118, *supra*.

229. *Add to § 2185: Illustrative cases, at pp. 2182-2185:—*

(17) In order to constitute adverse possession, the possession must be adequate in continuity in publicity and in extent of area to show that it is adverse to the real owner.^{11-a} It must be actual, exclusive and uninterrupted.^{11-b} The kind of possession must no doubt depend largely upon the character of the land, but no presumption of possession can be made in favour of a trespasser. His possession must be confined to the land actually occupied by him.^{11-c} Thus, in the case

7-c. *Ratan Singh v. Jairam Singh*, 1936 Nag. 80 (85)=31 N.L.R. Supp. 191=162 I.C. 577.

16-g. *Koya Ankamma v. Kameshwaramma*, 1936 Mad. 346 (347)=70 M.L.J. 352=161 I.C. 797=1936 M.W.N. 74.

11-a. *Partab Bahadur Singh v. Jagatjit Singh*, 1936 Oudh 387=164 I.C. 118=1936 O.W.N. 784=1936 O.L.R. 412; also see S. 2177 at p. 2169.

11-b. *Ibid.*, 1936 Oudh 387=164 I.C. 118; also see S. 2177 at p. 2170.

11-c. *Ibid.*, 1936 Oudh 387=164 I.C. 118; also see S. 2178, p. 2173.

of *parti land*, the establishment of adverse possession regarding one portion of the plot cannot lead to any presumption in respect of the other portion.^{11-d}

230. *Add to § 2182, at pp. 2178-2179:—*

Where the land remaining submerged whether for the whole year or only for some months during the rainy season, no possession can be deemed to continue with the trespasser so as to be made available towards the acquisition of title by adverse possession. During this period the possession of the true owner must be deemed to have revived constructively.^{14-a}

231. *Add to § 2183, at pp. 2179-2181:—*

Where there is a close connection and inter-dependence between the part proved to be in actual possession, and the other part in regard to which strict proof of actual possession may be wanting, and possession is in assertion of title, the part in regard to which strict proof of actual possession is wanting cannot be excluded from the whole in operation of the adverse possession.^{32-a}

232. *Add to § 2238: Starting point, at pp. 2278-2281:—*

Nature of defendant's possession. The starting point of limitation under Art. 144, is the date when the possession of the defendant becomes adverse. To apply this article it must be determined first what was the nature and effect of defendant's possession. This would depend upon the nature and extent of the rights asserted by the overt acts or express declaration of the person relying on it.^{14-a}

233. *Add to § 2238: Starting point of limitation, at pp. 2278-2281:—*

Cause of action—Death of previous manager of temple. Where the plaintiff a *pujari* and manager of a temple instituted a suit to set aside a permanent lease granted by the defendant's father, the former *pujari* and manager of the temple, and to recover possession, *held*, that the lease not being void *ab initio* but only voidable, the cause of action for the suit arose only on the death of the plaintiff's father.^{21-a}

Article 148.

234. *Add to §§ 2273-2276: Scope and application, at p. 2136:—*

11-d. *Partab Bahadur Singh v. Jagat Jit Singh*, 1936 Oudh 387=164 I. C. 118.

14-a. *Partab Bahadur Singh v. Jagat Jit Singh*, 1936 Oudh 387 (398) =164 I.C. 118=1936 O.L.R. 412.

32-a. *Durga Ram v. Amrita Chandra*, 164 I.C. 452=62 C.L.J. 234; Refd. 24 C. 256=1 C.W.N. 804.

14-a. *Upendranath Roy v. Jitendranath*, (1936) 164 I.C. 61=62 I. C. 921.

21-a. *Veerana Goundan v. Sellappa Goundan*, (1936) 162 I.C. 325=1936 Mad. 262=1936 M.W.N. 476.

Where a tenant created a mortgage on his holding and subsequent to the mortgage transferred the holding by way of sale to a third person, it was held that a suit by the vendee against the mortgagee for possession of the mortgaged property subject to redemption was governed by Art. 148, Limitation Act.^{30-a}

Tenant mortgaging holding to another.

Article 149.

235. *Add to § 2289: Illustrative cases, at pp. 2334-2335:—*

(7) Where certain lands belonging to a Railway Company are transferred by the Railway Company to a person for cultivation under a license a suit by the Railway Company and the Secretary of State, for ejectment of the licensee after the expiry of the license and for rent and mesne profits is governed by Art. 149, and not by Arts. 109 or 116, inasmuch as the Railway Company is merely the managing agent on behalf of the Government.^{45-a}

Suit by railway company and Secretary of State for ejectment of licensee.

Article 152.

236. *Add to § 2301: Date of decree, pp. 2346-2347:—*

The period for preferring an appeal against a decree to the Court of the District Judge is 30 days from the date of the decree. The last mentioned words do not mean the date when a decree is prepared or signed. It means the date when the judgment is delivered in accordance with the provisions of O. 20, R. 7, Civil Procedure Code.^{48-a}

Article 158.

237. *Add to § 2320: Application to set aside an award, at p. 2363:—*

Article 158 does not apply to the case of an application under para. 20, Sch. 2, Civil Procedure Code. The application contemplated by Art. 158 is the application which is mentioned in para. 16, Sch. 2, Civil Procedure Code.^{46-a}

238. *Add to § 2320, at p. 2363:—*

Objection to award in answer to application.

Article 158 cannot apply to an objection to an award, in a written statement which a defendant is required to fill in answer to an application for the purpose of having the award made a rule of Court.^{46-b}

30-a. *Baijnath Prasad v. Muneshwar Singh*, 1936 Pat. 63.

45-a. *B. N. W. Ry. v. Janki Prasad*, 1936 Pat. 362 (369)=13 P.L.T. 206=163 I.C. 525.

48-a. *Kedarnath Moyra v. Gollam Hossein Molla*, 165 I.C. 53=40 C.W.N. 83.

46-a. *Lachhu Singh v. Ganeshdas*, 1936 Pesh. 135 (136); Reld. on 13 I.C. 520; 70 I.C. 985.

46-b. *Manghooram v. Girdharilal Ramchand*, (1936) 162 I.C. 124=1935 Lah. 951.

Article 159.

239. *Add to § 2325: Summary procedure:—*

<p>Rangoon Cause Court 1922, R. 101.</p>	<p>Small Rules.</p>	<p>Rule 101 of the Rangoon Small Cause Rules is <i>ultra vires</i> to the extent that it conflicts with the provisions of Art. 159, Limitation Act.^{37-a}</p>
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Article 163.

240. *Add to § 2337: Scope and applicability:—*

When an order setting aside an *ex parte* decree has been passed in the absence of the plaintiff, no notice to plaintiff of the date fixed for hearing is necessary. Where on the date so fixed the plaintiff is absent, and his suit is subsequently dismissed, the limitation for filing an application for restoration of suit is governed by Art. 163, Limitation Act, and this cannot be avoided by recourse to S. 151, Civil Procedure Code.^{22-a}

Article 166.

241. *Add to § 2370: Scope and applicability, at p. 2416:—*

A sale in execution which is void as being entirely beyond the jurisdiction of the Court does not require to be set aside at all. Objection to such is governed not by Art. 166, but by the residuary Art. 181, Limitation Act.^{8-a}

Void execution sale.

Article 167.

242. *Add to § 2379: Scope and application, at pp. 2430-2431:—*

Where certain properties were sold in execution of a decree, but the auction-purchaser decreeholder was obstructed in possession thereof, held that an application to the High Court for removal of obstruction was governed by Art. 181, Limitation Act, and not by Art. 167 of the Act.^{48-a}

243. *Add to § 2461, at p. 2506:—*

37-a. *Ratanlal Jammadas v. Pragjee*, (1937) 166 I.C. 148; Reld. on 8 Rang. 380=1930 Rang. 228=127 I.C. 161 (F.B.).

22-a. *Mt. Karam Bhari v. Jagannath*, 1936 Lah. 495=163 I.C. 274.

3-a. *Ramanand Ganpatrai v. Rakhal Mandal*, 1936 Pat. 496 (497, 498)=163 I.C. 34.

48-a. *British India Steam Navigation Co. v. Jivandas*, 1936 Sind 111.

(4) Whatever may be the view of the High Courts, it is clear that in Madras, where a decree directs payment of mesne profits an application for the ascertainment of mesne profits should be made and such an application is governed by Art. 181, Limitation Act.^{42-a}

Application for ascertainment of mesne profits.

244. *Add to § 2481, at pp. 2538-2541:—*

A sale in execution, which is void as being entirely beyond the jurisdiction of the Court does not require to be set aside at all. Objection to such sale is governed not by Art. 166, but by the residuary Art. 181, Limitation Act.^{34-a}

Article 181.

244-A. *Add to §2483 (iii): Illustrative cases, at pp. 2544-2547:—*

(12) (a) Where an execution case is pending but cannot be proceeded further by reason of an injunction, and has been struck off the file, or removed from the list of pending cases, the decree-holder is not bound to apply for revival of the said proceedings after the removal or discharge of the said injunction. An application conveying to the Court an information that the bar has been removed is not a fresh application for execution, and Art. 181 does not apply to it.^{19-a}

Execution stayed by injunction.

245. *Add § 2490-A: Starting point:—*

Held, that an obstruction to light and air is a continuing wrong, and no period of limitation is applicable to an application for execution of injunction decree, as fresh period starts running every day.^{3-a}

Obstruction to light and air.

Article 182.

246. *Add to § 2497: Application for execution, at p. 2569:—*

An application for leave under O. 21, R. 50 (2), falls under Art. 182 and not Art. 181 of the Limitation Act.^{34-a}

247. It is not open to the parties to extend by their agreement the period of limitation laid down as applicable to execution

42-a. *Munnalurie Rama Rao v. Tadi Kanda*, (1936) 164 I.C. 670=71 M.L.J. 388=1936 M.W.N. 575.

34-a. *Ramanand Ganpatrai v. Rakhul Mandal*, 1936 Pat. 496.

19-a. *Kristo Kamini Debi v. Girish Chandra*, 1936 Cal. 239 (243)=39 C.W.N. 1030=63 Cal. 57.

3-a. *Moti Ram v. Hansraj*, 1936 Lah. 334.

34-a. *Kishinchand Butamal v. Dhaniram Jamnadas*, 1936 Sind 138=164 I.C. 1011=30 S.L.R. 88.

matters.^{35-a}

248. *Add to § 2507: Amendment of execution application, at p. 2583:—*

In an application for execution of decree, the time begins to run against the decree-holder from the date of the decree and not from the date of the amendment, as the amendment does not enure to the benefit of the decree-holder so far as an execution petition is concerned.^{40-a}

Clause (2).

249. *Add to § 2527:—*

Art. 182, sub-clause (2), does not refer exclusively to appeals against a decree; it refers to "*an appeal of any sort*", and covers an appeal against an order allowing an application for review.^{2-a}

Appeals from orders under O. 47, R. 4, C. P. Code.

250. *Add to § 2532: Final order disposing of appeal, at p. 2602:—*

When an appellate Court makes an order which has the effect of finally disposing of an appeal, time runs from the date of that order, and not from the date of the decree against which the appeal was preferred.^{25-a}

Clause (3).

251. *Add to § 2549: clause (3), at p. 2615:—*

The words "*decision passed on review*" mean a decision passed in review proceedings under O. 47, R. 4, and orders made in appeal against such orders. Whatever such a decision is, it gives a fresh starting point of limitation.^{26-a}

Decision passed on review.

252. *Add to § 2573: Application in accordance with law:—*

An application for execution including in it two decrees against the same judgment-debtor, which being defective in respect of one of them was rejected without notice to judgment-debtor, was however, one according to law within Art. 182, and

Unsuccessful application.

35-a. *Sarda Prosad Ghose v. Rokheya Khatun Bibi*, (1936) 164 I.C. 416=39 C.W.N. 1036; Folld. 54 All. 573; 1932 A.L.J. 365=138 I.C. 583 (2)=1932 All. 273.

40-a. *Administrator-General, Madras v. Radhakrishna*, 1936 Mad. 434=1936 M.W.N. 158=43 I.W. 390=70 M.L.J. 700=161 I.C. 969.

2-a. *Narayan Ganpat v. Radhabai Krishnaji*, 1936 Bom. 162=38 Bom. L.R. 215=162 I.C. 223.

25-a. *Bank of Upper India v. Srikishan Das*, 161 I.C. 122 (Lah.).

26-a. *Narayan Ganpat v. Radhabai Krishnaji*, 1936 Bom. 162=38 Bom. L. R. 215.

hence as a new start for limitation arose from the order rejecting the application, the subsequent application for execution within three years of this, was not time-barred.^{31-a}

253. *Add to § 2576: Application not by or against a proper person, at p. 2644:—*

Presentation of an application for execution of a decree by a pleader to whom a *vakalat* has not been executed by the decree-holder to act on his behalf is not valid and an application so presented is not an application in accordance with law for the purposes of limitation.^{6-a}

254. *Add to § 2581: Application to proper Court, at pp. 2651-2653:—*

An application for execution made to a Court passing a decree in respect of property situated outside its territorial jurisdiction is an application to a proper Court in accordance with law, and is effective to constitute a fresh starting point of limitation, although the Court has no jurisdiction to carry on such execution. It has jurisdiction to entertain the application.^{26-a}

Application to Court passing decree for execution in respect of property outside its jurisdiction.

255. *Add to § 2595: Step-in-aid, at p. 2665:—*

An order made on application for transferring the decree for execution to another Court is a step-in-aid of execution, and gives a fresh start to the decree-holders under Art. 182 (5), Limitation Act.^{34-a}

256. What is clearly contemplated by Art. 182 (5) is that a judicial order is to be made on an application by the decree-holder, being a step-in-aid of execution, and in order that an application for transfer should benefit the decree-holder it must be in essence in continuation.^{35-a}

Judicial order on application by decree-holder.

257. *Add to § 2621: What is not a step-in-aid, at pp. 2691-2695:—*

(21) An execution petition filed without the leave of the Insolvency Court against a person whose property has vested in the Official Receiver appointed by that Court is not an applica-

Insolvency of judgment-debtor.

31-a. *Muhammad Shakir Dad v. Nand Kishore*, (1936) 163 I.C. 841 =1936 All. 467=1936 A.L.J. 571.

6-a. *Nandamani Ananga v. Madanamohana Deo*, (1936) 165 I.C. 659 =1936 M.W.N. 957=44 L.W. 578=71 M.L.J. 604.

26-a. *Arjundas Bisumal v. Uka Ya*, (1936) 163 I.C. 403=1936 Rang. 271.

34-a. *Bhagwat Sahay v. Ram Sukrit Ram*, 62 I.C. 984=1936 Pat. 313; Folld. 1922 Pat. 301; Dist. 1927 P.C. 73 and 1934 Pat. 662.

35-a. *Bhagwat Sahay v. Ram Sukrit Ram*, 1936 Pat. 313 (314), *supra*; Ref. 34 All. 396; Doubt. 1922 Pat. 301.

tion in accordance with law.^{26-a}

258. *Add to § 2622: Final order*, at pp. 2695-2697:—

The words "*final order*" in cl. 5 of Art. 182, do not necessarily mean an order which finally adjudicates upon the right of the decree-holder on one hand and the judgment-debtor on the other.^{32-a}

259. *Add to § 2622: Illustrations*, at pp. 2696-2697:—

(8) An order passed in the following terms without notice to the parties, namely, "*execution struck off for partial satisfaction of the decree, costs on the judgment-debtors*," cannot be construed only as a provisional order suspending the application for execution, but it should be considered as a final order passed on an application made as referred to in cl. (5) of Art. 182.^{39-a}

260.

(9) Where the Court intends to dispose of the matter completely and no longer keeps it pending on its file, and does not merely suspend the execution or consign the record to the record room for the time being, the order must be deemed to be a final order which will give a fresh start for purposes of limitation, and that the proceeding not being pending, there would be in such a case no question of revival.^{39-b}

261. *Add § 2622-A: Starting point*, at p. 2697:—

Under Art. 182 (5) as it stood before amendment of 1927, if an execution was returned, the failure to re-present a petition does not affect the rule that the statute runs from the filing of the petition.^{39-c}

Article 183.

262. *Add to Art. 183: Revivor*:—

An order of the master of the High Court for transmission of a decree to another Court for execution does not constitute a revivor within the meaning of Art. 183; nor does the notice issued by the master, and served upon the judgment-debtor before the order for transmission operates as a revivor.*

26-a. *Jagadish Pillai v. Narayan Chettiar*, 1936 M.W.N. 364=162 I.C. 376=1936 Mad. 284.

32-a. *Moahmmad Taqi Khan v. Raja Ram*, 1936 All. 820=1936 A.L.J. 1140 (F.B.).

39-a. *Mohammad Taqi Khan v. Raja Ram*, 1936 All. 820=1936 A.L.J. 1140=166 I.C. 106 (F.B.); *Reld. on Abdulla Asghar Ali v. Ganeshdas*, 142 I.C. 326=1933 P.C. 68=60 Cal. 662 (P.C.) and *Gobardhan Das v. Din Dayal*, 1932 A.L.J. 365=138 I.C. 583=1932 All. 273=54 All. 573 (F.B.).

39-b. *Ibid.*, 1936 All. 820=1936 A.L.J. 1140 (F.B.).

39-c. *Kesavuloo v. Official Receiver*, 1936 Mad. 613 (614).

*. *Sarju Singh v. Bhagwat Prasad*, 1936 Pat. 398=15 Pat. 102=17 P.L.T. 317=163 I.C. 411.

THE INDIAN LIMITATION ACT IX OF 1908

VOLUME III.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
121.	To avoid incumbrance or under-tenures in an entire estate sold for arrears of Government revenue, or in <i>patni taluk</i> or other saleable tenure sold for arrears of rent.	12 years.	When the sale becomes final and conclusive.

SYNOPSIS

- 1861. Corresponding provisions.
- 1862. Legislative changes.
- 1863-1870. **Scope and application.**
- 1863. Suits by auction-purchaser.
- 1864. Suits by assignee of auction-purchaser.
- 1865. "To avoid", explained.
- 1866. Notice to avoid an incumbrance or under-tenure whether necessary.
- 1867. Adverse possession whether an incumbrance.
- 1868. Adverse possession *after* creation of *patni* tenure.
- 1869. *Onus probandi* on plaintiff.
- 1870. Application of Arts. 142 and 144, Limitation Act.

NOTES.

1861. CORRESPONDING PROVISIONS.—The corresponding provision in Act XIV of 1859, is to be found in cl. 12 of S. 1 of that Act, which gave a period of twelve years also, for such suits.

Act IX of 1871.

Under Act IX of 1871, Arts. 119 and 120, provided as follows:—

"Art. 119. By an auction-purchaser or any one claiming under him to avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, the estate being, by virtue of such sale, freed from incumbrances and under-tenures—Twelve years—when the sale becomes final and conclusive."

"Art. 120. To avoid incumbrances of under-tenures in a *Patni Taluq* or other saleable tenure sold for arrears of rent, the taluq or tenure being, by virtue of such sale, freed from incumbrances and under-tenures—Twelve years—when the sale becomes final and conclusive."

Act XV of 1877.

Art. 121 of Sch. II of Act XV of 1877, was the same as the present article.

1862. LEGISLATIVE CHANGES.—It would be noticed that the wording of Arts. 119 and 120 of Act IX of 1871 was changed, by omitting the words "*By an auction-purchaser or any one claiming under him,*" and, "*the estate being, by virtue of such sale, freed from incumbrances and under-tenures,*" in the first column of Art. 119; and by omitting the words "*the taluq or tenure being, by virtue of such sale, freed from incumbrances and under-tenures,*" in Art. 120, of Act IX of 1871.

1863. SCOPE AND APPLICATION.—This article contemplates suits "by an auction-purchaser or any one claiming under him," although these words have been omitted from Art. 119 of Act IX of 1871, when amended by Art. 121 of Sch. II of Act XV of 1877. An auction-purchaser enjoys a privilege at sales for arrears of Government revenue.

"The principle under which purchasers of estates at revenue-sales acquire such estates in the condition they were in at the Permanent Settlement is equally recognized by the Sale Law (Act XI of 1859) as by the laws previous to it, and applies as much to actual encroachments on the Taluq or estate by neighbours as to incumbrances or under-tenures created on it by the old proprietor, or by his laches."²⁶

An **auction-purchaser** of the rights of Government in a talook sold for arrears of revenue is **not privy in estate to the defaulting proprietor**. He does not derive his title from him, and is bound neither by his acts nor by his laches. The purchaser moreover is bound by no limitation which would not bind or affect the Government.²⁷

26. *Goluck Monee Dossee v. Hurq Chunder Ghose*, (1867) 8 W.R. 62.

27. *Buzloul Rahman v. Prandhan*, (1867) 8 W.R. 222; also see *Radha*

"The only **advantage** which he gains by the character of *auction-purchaser* is that he is relieved from any difficulty arising from the law of limitation, and that he is not conclusively barred by the acts or the omissions of the former *Zemindar*, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the *Zemindari*."²⁸

Proceedings between the defaulting proprietor and third parties with respect to the title to the land are irrelevant in a subsequent suit brought by the auction-purchaser as against him.²⁹ An auction-purchaser at such a revenue sale is not bound by a judgment passed in a suit previous to the sale, to which the defaulting proprietor may have been a party.³⁰ A sale by the Collector beyond the statutory authority vested to sell the share of a defaulting proprietor, cannot, however, prejudice the rights of the plaintiffs in respect of the share not in default.³¹

1864. This article is not limited in its operation to suits by auction-purchasers only, but has been held to be applicable to suits by the assignee of the auction-purchaser.³² When an auction-purchaser at a sale for arrears of revenue creates a putnee, he cannot sue to annul an under-tenure within that putnee, as his whole power under Act XI of 1859 passes to the putneedar who alone can institute such a suit.³³

1865. The words "*to avoid*", etc. indicate that the article contemplates suits where the "incumbrance or under-tenure in an entire estate sold for arrears of revenue," is not void *ipso facto* by reason of the auction-sale, but where the auction-purchaser is required *to avoid* the same being *voidable* in character.³⁴ Further, that the avoidance is to be as the result of the institution of the *suit* by the auction-purchaser, and not by any other steps such as the service of notice, etc.³⁵ Where the incumbrance stands avoid-

Gobind Koer v. Rakhal Das, (1885) 12 Cal. 82 (Auction-purchaser does not derive his title from the defaulting proprietor).

28. *Kooldeep v. The Government*, (1871) 14 M.I.A. 247=11 Beng. L.R. 71 (P.C.); also see *Syamlal Sahu v. Lachman*, (1888) 15 Cal. 353 (355) (Presumption of title with plaintiff).

29. *Radha Gobind v. Rakhal Das*, (1885) 12 Cal. 82.

30. *Gokul v. Harsasundari*, (1904) 9 C.W.N. 383.

31. *Ganga Pershad v. Irshad Ali*, (1912) 13 I.C. 959=15 C.L.J. 54.

32. *Koylas v. Jubur*, (1874) 22 W.R. 29; *Wahid v. Rahat Ali*, (1908) 12 C.W.N. 1029; also see *Koilash Bashini v. Gokulmoni*, (1881) 8 Cal. 230=10 C.L.R. 41 (The plaintiffs alleged the fact of the purchase at a revenue sale by the assignee).

33. *Sreemunt Ramdey v. Kookoor Chand*, (1871) 15 W.R. 481.

34. Dr. Pal's Limitation, p. 820.

35. *Ibid.* See S. 1866; *Sabodora v. Sarbosobha*, (1915) 27 I.C. 258=42 Cal. 638 and *Manmohan Chowdhry v. Turner, Morrison & Co.*, 1930 Cal. 69=57 Cal. 434.

ed by any steps taken *before* the institution of the suit, this article will not be applicable.³⁶ In the case of a sale for arrears of rent under **Bengal Tenancy Act**, the procedure is laid down by **S. 167** of that Act, giving the steps necessary to be taken within the period prescribed. Art. 121 shall have no application to such steps.³⁷ The sale of a patni tenure for its own arrears under **Ss. 59 and 60, Bengal Act VIII of 1869**, does not *per se* avoid the *darpatni* tenures, but only renders them voidable at the option of the purchaser. In the case of *Unnoda Churn Das v. Mothura Nath Das*,³⁸ there was a difference of opinion between the learned Judges constituting the Division Bench as to whether the purchaser was bound to give notice of his intention to cancel the under-tenure, and Garth, C.J., held, on a reference to the Full Bench, that it was not necessary: and this was understood to lay down as law, that under **S. 37 of the Rent Law**, the incumbrances, including under-tenures, were absolutely avoided by the sale. This impression was corrected by Garth, C.J., explaining in another **Full Bench** case of *Titu Bibi v. Mohesh Chunder*,³⁹ that a sale under 'Ss. 59 and 60 of Bengal Act VIII of 1869 had not the effect of avoiding incumbrances irrespective of any act done by the purchaser in order to the exercise of the right of avoidance.

Notice to avoid an incumbrance or under-tenure not necessary.

1866. A **Full Bench** of the **Calcutta High Court** has laid down the rule in the case of *Titu Bibi v. Mohesh Chunder*,⁴⁰ that

"the effect of a sale for arrears of revenue under Regulation VIII of 1819 is substantially the same as that of a sale for arrears of rent under **S. 37** of the **Rent Law**. In either case the under-tenures are not *ipso facto* avoided by the sale, but are voidable only at the option of the purchasers".

The view taken in *Unnoda Churn v. Mothura Nath*,⁴¹ by Garth, C.J., agreeing with Prinsep, J., was confirmed that

"it is not necessary, for the purpose of avoiding an under-tenure or other incumbrance, that the purchaser should give any notice, or to do any act before bringing his suit; and that his suit must be brought within the time prescribed by the **Limitation Act**".

It was observed by their Lordships of the **Privy Council**, in *Raja Suttosurrun v. Mohesh Chunder*,⁴² that justice and sound policy

36. Dr. Pal's *Limitation*, p. 820.

37. *Jnanendra Mohan v. Umesh Chandra*, (1922) 26 C.W.N. 985.

38. 4 Cal. 860=4 C.L.R. 6 (F.B.).

39. (1883) 9 Cal. 683 (688)=12 C.L.R. 304 (F.B.); O.R. 4 Cal. 860=4 C.L.R. 6 (F.B.).

40. (1883) 9 Cal. 683=12 C.L.R. 304 (F.B.); cf. *Unnoda Churn v. Mothura Nath*, 4 Cal. 860=4 C.L.R. 6 (F.B.).

41. 4 Cal. 860=4 C.L.R. 6 (F.B.).

42. (1869) 11 W.R.P.C. 10.

alike require that the option of avoidance should be exercised "within a reasonable time", and their Lordships believed that the object had been in some measure secured by the Limitation Act. A sale for arrears of revenue being voidable at the option of the purchaser, it is necessary that the purchaser must, by some unequivocal act, indicate his intention to avoid under-tenure if he desires to do so. But a formal written notice is not essential.⁴³ It is sufficient if the auction-purchaser under Revenue Sale Law, brings a suit in ejectment which it must be held is an unequivocal expression of the intention of the auction-purchaser to take possession of the property by annulling incumbrances. The only thing necessary for him to do is to express his intention by word or deed to avoid the incumbrance.⁴⁴

In the case of tenures sold under Bengal Tenancy Act, 1885, procedure is laid down for steps, by way of notice etc., to be taken by the auction-purchaser, under S. 167 of that Act. The service of the notice avoids the incumbrance, and the suit to realize the subject-matter of the incumbrance or under-tenure cannot be fitly described as a suit "to avoid" within the terms of Art. 121 of the Limitation Act.⁴⁵ Where the purchaser, proceeding under Bengal Tenancy Act, S. 167, has not annulled any incumbrance within the period of one year laid down therein, his right would be taken as lost, and a suit could not be brought under Art. 121 to obtain relief.⁴⁶

1867. The term "encumbrance" was not new in the Bengal Tenancy Act, but had a well-recognised sense in the statutory provisions of Revenue Sale Law of 1841 and 1845.⁴⁷ Section 37 of Revenue Sale Law, 1859 reproduced the same phraseology, and has been repeatedly interpreted to signify that the interest acquired by an adverse possessor was an encumbrance.⁴⁸ Similarly, under S. 11 of the Putni Regulation, 1819, it has been frequently held that the interest acquired by a trespasser, who has been in adverse possession of part of the lands of the *taluk* for the statutory period is an "incumbrance"

43. *Sabodora Mudiali v. Sarbosobha*, (1915) 27 I.C. 258=42 Cal. 638=20 C.L.J. 494=19 C.W.N. 1030.

44. *Manmohan Chowdhury v. Turner, Morrison & Co.*, 1930 Cal. 69=57 Cal. 434.

45. *Unnoda Churn Dass v. Mothura Nath Dass*, (1879) 4 Cal. 860 (863).

46. *Jnanendra Mohun v. Umesh Chandra*, (1922) 26 C.W.N. 985.

47. *Lukhmeer Khan v. Collector of Rajshahye*, 1851 Ben. S. D. A. 116 and *Ramsunkur v. Bejoy Govind Boral*, 1852 Beng. S. D. A. 824.

48. *Goluck Monee v. Huro Chunder*, 8 W.R. 62; *Thakore Das v. Nubeen Kishen*, 15 W.R. 552; *Narain Chander v. Tayler*, 4 Cal. 103=3 C.L.R. 151; *Karmi Khan v. Brojonath*, 22 Cal. 244 and *Moizudi Biswas v. Ishan Chandra Das*, 7 I.C. 849=15 C.W.N. 706.

that has accrued upon it by the act of the defaulting *putnidar*.⁴⁹ In *Mahomed Askur v. Mahomed Wasuck*,⁵⁰ a like construction was put on S. 16 of the **Sales of Under-Tenures Act, 1865**: and the same principle was applied to the case of a sale under S. 105 of the Bengal Rent Law, 1859.¹ A similar view has been adopted with reference to Ss. 70 and 71 of the **Assam Land and Revenue Regulation, 1886**.² This is supported by the decision of the Judicial Committee in *Surja Kanta v. Sarat Chandra*,³ where it was ruled that the period of limitation for adverse possession against the purchaser at a sale for arrears under the Revenue Sale Law, 1859, only commences to run from the date of sale. It was held therefore, that the word "*encumbrance*" in Ss. 159 and 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding, and such an encumbrance cannot be annulled in any manner other than what is provided in S. 167 of Bengal Tenancy Act.⁴

1868. Their Lordships of the **Privy Council** have held, approving of the principle explained by the High Court of Calcutta, that the adverse possession contemplated in cases to avoid incumbrances in *putni taluqs* sold for arrears of rent, is possession which commenced after the creation of the patni tenure.

"The principle is that the purchaser of the *patni-taluq* at such a sale takes the taluq in the state in which it was initially created"; and that "the purchaser takes the property not free merely of all incumbrances that may have accrued upon the tenure by the act of the defaulting proprietor, his representatives or assignees, but also free of the interest acquired by an adverse possessor who has been able to acquire such interest by the inaction of the defaulting proprietor".⁵

1869. The **Privy Council** ruling approves the *dictum* that "in case in which the proprietor of the estate is out of possession, he cannot merely by the device of the creation of a subordinate taluq arrest the effect of the adverse possession which has already commenced to run

Onus probandi.

49. *Khantomoni Dasi v. Bijoychand*, 19 Cal. 787; *Gopendro Chunder v. Mokaddam Hossein*, 21 Cal. 702; *Nuffer Chandra Pal v. Rajendra Lal*, 25 Cal. 167; *Prodyote Kumar Tagore v. Rakhal Chandra Sarkar*, 5 I.C. 243=11 C.L.J. 209=37 Cal. 322=14 C.W.N. 487 and *Kalikonda Mukherjee v. Bipro Das*, 26 I.C. 436=21 C.L.J. 265=19 C.W.N. 18.

50. 22 W.R. 413.

1. *Ramesh Chunder v. Raj Narain*, 10 W.R. 15.

2. *Mahomed Nasim v. Kasi Nath Ghose*, 26 Cal. 194; *Aptor Ali v. Brojendra Kishore*, 23 I.C. 119=20 C.L.J. 210.

3. 25 I.C. 309=20 C.L.J. 563=18 C.W.N. 1281 (P.C.).

4. *Ishan Chandra Bakshi v. Safatulla Sikdar*, (1922) 68 I.C. 219 (Cal.).

5. *Bipradas Pal v. Kamini Kumar Lahiri*, 1922 P.C. 48 (50)=48 I.A. 499=49 Cal. 27 (P.C.).

against him, and such possession would be effective not only as against the subordinate tenure-holder, but also as against the superior proprietor. Consequently, if a plaintiff relies upon Art. 121 of the Limitation Act, has to establish that the incumbrance which he seeks to annul is due to adverse possession which commenced after the creation of the *patni*.”⁶

Similarly, it was observed in *Hurryhur Mookhopadhya v. Madub Chunder*,⁷ by their Lordships, that

“if this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it (the burden of proof) lies upon the plaintiff to prove a *prima facie* case”.

Where the adverse possession of the defendant is arrested by the sale of the *patni*, before it has been perfected, it does not constitute an incumbrance which it is necessary for the plaintiff to annul under the provisions of S. 167 of the Bengal Tenancy Act.⁸ Thus, it is for the plaintiff to show that the Zemindar was in possession of the lands before the creation of the *patni*, and that the possession of the defendant commenced after the *patni* came into existence, or that such possession was not adverse.⁹ An auction-purchaser of a *patni taluk* in its entirety gets the taluk free of all incumbrances; therefore, in a suit brought by the auction-purchaser to recover possession of land situated within the *taluk* against a trespasser who alleged to have held the disputed land adversely, the period of limitation would begin to run from the date when the sale becomes final and conclusive.¹⁰ Where in a suit brought by the auction-purchaser of an estate at a sale under Bengal Tenancy Act XI of 1859, to avoid an under-tenure, the defendant raises the plea of limitation, the plaintiff should produce evidence to show when, as a matter of fact, the sale becomes final and conclusive.

1870. In *Karmikhan v. Brojonath*,¹¹ where the defendant set up adverse possession, as an incumbrance subject to which the plaintiff, as a proprietor whose estate had been sold, took it on re-purchase, it was held that the case should be remanded to determine if such adverse possession was sufficiently long to bar the suit by limitation. An interest acquired in an estate by adverse possession for the statutory period before its sale under S. 70 of the Assam Land and Revenue Regulation, 1886, is an

6. *Bipradas Pal v. Kamini Kumar Lahiri*, 1922 P.C. 48 (50)=48 I.A. 499 (P.C.).

7. 14 M.I.A. 172 (P.C.).

8. *Monmothanth Mitter v. Anath Bundhu Pal*, (1921) 61 I.C. 469 =25 C.W.N. 106; also see *Harek Chand v. Bejoy Chand*, (1905) 9 C.W.N. 795 (800) and *Womesh Chunder v. Raj Narain*, (1868) 10 W.R. 15.

9. *Monmothanth Mitter v. Anath Bandhu Pal*, (1921) 61 I.C. 469=25 C.W.N. 106.

10. *Nuffer Chandra v. Rajendra Lal*, (1897) 25 Cal. 167.

11. (1894) 22 Cal. 244; Relied upon in *Nuffer Chandra v. Rajendra Lal*, 25 Cal. 167.

incumbrance within the meaning of Art. 121 of the Limitation Act.¹² Some earlier rulings, however, held that by adverse possession, a person can acquire the right of joint proprietorship of an estate, and if his estate is sold for arrears of revenue he cannot plead that he is an incumbrancer, whose incumbrance ought to have been set aside within the period provided under Art. 121.¹³ In such cases a suit to recover possession was held to lie under Art. 142 of the Limitation Act, period of limitation beginning to run from the date when the purchaser was put in symbolical possession by the Collector.¹⁴ A suit by an auction-purchaser at a revenue sale under S. 80 to recover possession of the purchased property is governed not by Art. 121, but by Art. 142 or 144 and the fact that symbolical possession was obtained is a good defence so far as any defaulting proprietor was concerned if the suit is brought within 12 years from such possession.¹⁵ The view is taken in *Monmotha Nath v. Anath Bandu*,¹⁶ that the interest acquired by a person in adverse possession, would be an "incumbrance" only when the defendant has continued to be in possession for the statutory period, and in other cases, the purchaser can recover the properties by a suit filed within 12 years from the date of the sale becoming final under Art. 121 of the Limitation Act.

Where the patni comes to an end not by reason of any sale for arrears of rent, but by **voluntary relinquishment** by the tenureholder, in favour of the Zemindar, the case falls under Art. 144, and is not governed by Art. 121, Limitation Act. The cause of action arises from the date when the defendant's possession became adverse to the plaintiff.¹⁷

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
122.	Upon a judgment obtained in British India on a recognisance.	12 years.	The date of the judgment or recognisance.

12. *Prasanna Kumar Dutt v. Janakendra*, (1915) 31 I.C. 801=43 Cal. 779; Relied on *Karmi Khan v. Brojo Nath*, 22 Cal. 244 and *Nuffer Chandra v. Rajendra Lal*, 25 Cal. 167.

13. *Moraffer Wahid v. Abdus Samad*, (1880) 6 C.L.R. 539; *Mir Wasir-ud-din v. Lala Nandan*, (1907) 6 C.L.J. 472; also see and cf. *Kumar Kulnand v. Syed Sarafat Hossein*, (1908) 12 C.W.N. 528 and *Rahimuddi v. Nilini Kanta*, 1 I.C. 81=13 C.W.N. 407 (Where the question was not considered).

14. *Mahin Chandra v. Piyari Lal*, (1916) 44 Cal. 412=39 I.C. 213.

15. *Baikuntha Nath v. Sheikh Azidulla*, 1928 Cal. 870=115 I.C. 606=32 C.W.N. 778.

16. (1919) 61 I.C. 469=25 C.W.N. 106.

17. *Govindanath v. Surjakanta*, (1899) 26 Cal. 460.

SYNOPSIS.

- 1871. Corresponding provisions.
- 1872. English law.
- 1873-1879. **Scope and applicability.**
- 1873. Judgment when enforceable by suit.
- 1874. Decree not declaratory, not enforceable by suit.
- 1875. Allahabad cases.
- 1876. Bombay.
- 1877. Calcutta.
- 1878. Madras.
- 1879. Suit based on an award.
- 1880. Recognizance-bonds.

NOTES.

1871. CORRESPONDING PROVISIONS.—This article is the same as Art. 122 of Sch. II of Act XV of 1877: and corresponds to Art. 121 of Act IX of 1871.

Under Act XIV of 1859, S. 1, Cl. (16), applied to suits upon judgments obtained in British India, giving a period of six years for such suits.

As to foreign judgments, *see and compare* Art. 117, *ante*.

1872. ENGLISH LAW.—Judgments and orders in the nature of judgments may be enforced under English Law, by different modes of execution and analogous processes appropriate to their nature.¹⁸

A judgment in rem, which determines status, does not call for specific enforcement. The same may be said of merely declaratory judgments, without consequential relief. The principle recently adopted in England appears to be that an action lies on judgment which finally establishes a debt, whether the judgment be English, or Foreign, but that it is an abuse of the process of the Court to bring an action upon an English judgment if it can be enforced in some other way. See *Pritchett v. English and Colonial Syndicate*¹⁹; *Grant v. Easton*²⁰; *Nouvion v. Freeman*²¹; *Pemberton v. Hughes*²²; and *Hodsoll v. Baxter*.²³ The principle on which an action is allowed to be maintained on a judgment was concisely explained by Baron Parke in *Williams v. Jones*,²⁴ thus: "The principle . . . is, that, where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment

18. Halsbury, Vol. 18, p. 219.

19. (1899) 2 Q.B. 428=86 L.J.Q.B. 801=47 W.R. 577.

20. (1883) 13 Q.B.D. 302; 53 L.J.Q.B. 68=32 W.R. 239.

21. (1889) 15 A.C. 1=59 L.J. Ch. 337=38 W.R. 581.

22. (1899) 1 Ch. 781=68 L.J.Ch. 281=47 W.R. 354.

23. (1858) E. B. and E. 884=28 L.J.Q.B. 61=6 W.R. 686.

24. (1845) 13 M. and W. 628=67 R.R. 767=14 L.J.Ex. 145; cited in *Kali Charan v. Sukhada*, (1915) 30 I.C. 824 (Cal.).

may be maintained." Similarly, action on an order is an abuse of the process, if the amount ordered to be paid can be obtained by execution.²⁵ The right to sue on a judgment becomes statute barred in twelve years, under provisions of the Real Property Limitation Act, 1874 (37 and 38, Vict., C. 57), S. 8.²⁶

1873. SCOPE AND APPLICABILITY.—It has been observed in the case of *Ramaswami v. Muthiah Chetty*,²⁷ that

Judgment when enforceable by suit.

"at common law, actions on judgments lie whether the remedy by execution is available or not". "In India, it is settled that **no action lies on an executable judgment**, the only remedy being execution, the principle being embodied in S. 47, Civil Procedure Code, 1908 (S. 244 of the Code of 1882)".

Reviewing the case-law, it was held, by Ramesam, J., in this case, that

"ordinarily the Indian Courts pass judgments which are to be enforced in execution and even when they create new relation involving fresh rights and obligations, they provide for working out the rights in execution. Rarely do they create a new obligation without providing for its execution and indicating a suit as the only method of enforcing it. But when they do, as in this case, the suit is maintainable".²⁸

This was a suit by a partner to recover money due in respect of partnership, held maintainable as a suit on a judgment, when there was no other remedy to enforce the right. An action on what may be called a domestic as distinguished from a foreign judgment is permissible only where the judgment cannot be enforced in some other way.²⁹

"Art. 122 of the Schedule to the Limitation Act shows that the Legislature contemplated the possibility of suits upon judgments obtained in British India, though we are not unmindful that the Limitation Act cannot give rise to a cause of action where none exists independently of the provisions thereof; as Sir Richard Couch observed in *Harinath v. Mathuramohan*,³⁰ the intention of the law of Limitation is not to give a right where there is not one but to interpose a bar after a certain period to a suit to enforce an existing right."^{30-a}

The Courts, however, are by no means agreed as to the circumstances under which a suit may be instituted in this country based upon a previous judgment or order of a Court.

25. Halsbury, Vol. 18, p. 219.

26. *Ibid.*; also see Lightwood, p. 166.

27. (1924) 48 Mad. 482=47 M.L.J. 829=1925 Mad. 279.

28. *Ibid.*, 48 Mad. 482=1925 Mad. 279.

29. *Kali Charan Nath v. Sukhada Sundari Debi*, (1915) 30 I.C. 824=20 C.W.N. 58=22 C.L.J. 272.

30. 20 I.A. 183; 21 Cal. 8.

30-a. *Khunni Lal v. Kunwar Gabind*, 10 I.C. 477=15 C.W.N. 545=38 I.A. 87=33 All. 356=21 M.L.J. 645 (P.C.); also see *Jivi v. Ramji*, (1879) 3 Bom. 207 (209) (This article ought not to be construed as enabling suits to be brought upon all judgments obtained in British India for the Limitation Act is not intended to define or create causes of action).

In *Sandes v. Jomir Shaikh Ali*,³¹ (Sir Barnes Peacock and Hobhouse, JJ.), held

“that a suit cannot be maintained in a Small Cause Court in the mofussil to recover the unsatisfied balance of a decree of such Court”. “There would be no end to a case if a fresh suit may be maintained upon a decree.”

Attormoney Dossee v. Hurry Doss Dutt,³² was a case under Act X of 1877, which contained nothing preventing a suit from being instituted on a decree of the High Court. *Moonshi Golam Arab v. Curreembux*,³³ was a decision of the Calcutta High Court based on the practice of the Bombay High Court, that no suit will lie in the High Court on a decree of the Small Cause Court. This was referred to in the Bombay case of *Fakirappa v. Pandurangappa*,³⁴ where the view was taken that a suit may be brought in the High Court of Bombay upon judgment obtained in the Court of Small Causes of Bombay, but the execution of the decrees in such suits must be rigorously confined to immoveable estate. In *Bhavani Shanker v. Pursadri*,³⁵ reference was made to the principle that a suit will not lie in the Courts of India upon the judgment of any Court in British India: and the only exception to this rule was in the case of judgments of a Court of Small Causes on which suits were permitted to be brought in the High Court in order to obtain execution against immoveable property. This exception based on the ground that “where an action on the judgment will give a higher or better remedy, the case is different,” is now obsolete (S. 94 of Act XV of 1882).³⁶⁻³⁷ It was held in *Merwanji Naoroji v. Ashabai*,³⁸ that a judgment-creditor in the Court of Small Causes had not before the 1st of July, 1882, the right to sue in that Court on his judgment: “The provisions of the Civil Procedure Code precluded a judgment in a Court regulated by that Code being enforced by separate suit.” The law laid down in *Mancharam Kallianadas v. Bakshe Sahib*,³⁹ and *Fakirappa v. Pandurangappa*,⁴⁰ was agreed to in *Merwanji Naoroji*’s case: and the decision in *Attormoney Dossee v. Hurry Doss Dutt*,⁴¹ was differed from, where Wilson, J., held in an undefended case that a suit may be instituted in the High Court on its own previous decree. Similar view was expressed by the **Madras High Court**, in *Ramayya v. Venkataratnam*,⁴² that

31. (1868) 9 W.R. 399.

32. (1881) 7 Cal. 74=9 C.L.R. 357.

33. (1879) 5 Cal. 294=4 C.L.R. 477.

34. (1881) 6 Bom. 7.

35. (1882) 6 Bom. 292.

36-37. See *Ramaswami v. Muthiah Chetty*, (1924) 48 Mad. 482=47 M. L.J. 829=1925 Mad. 279.

38. (1883) 8 Bom. 1 (3).

39. (1869) 6 Bom. H.C. 231.

40. (1881) 6 Bom. 7 (10).

41. (1881) 7 Cal. 74=9 C.L.R. 357.

42. (1893) 17 Mad. 122=4 M.L.J. 52.

"under the Civil Procedure Code no second suit will lie upon a previous judgment, the remedy provided being its execution in the manner therein prescribed".

This had reference to the provision in Civil Procedure Code, 1882, S. 244 (now S. 47, Civil Procedure Code, 1908), dealing only with matters relating to execution of decrees. In *Periasami Mudaliar v. Seetharama Chettiar*,⁴³ it was remarked that

"as against the judgment-debtor himself or against his legal representative it has long been held that under the Indian processual law, the remedy is only by way of execution of the decree, and that no suit could be brought on the judgment".

The decision in *Annoda Prasad Bannerjee v. Nobo Kishore Roy*,⁴⁴ shows that a **suit is maintainable on a judgment where no mode of execution** (other than proceedings in contempt) **is available**. Sale, J., says that that was the practice of the Court, referring to *Attormoney Dossee v. Hurry Doss Dutt*.⁴⁵ Where the suit is instituted on an unsatisfied order of the Insolvent Court, there is no bar under the Civil Procedure Code to maintaining a suit on the judgment or order of the High Court on a new cause of action.⁴⁶

1874. A decree which is not merely declaratory, and can be enforced in execution under the provisions of the Civil Procedure Code cannot be made the basis of a fresh suit on the judgment or order.

Decree not declaratory not enforceable by suit.

1875. The Allahabad High Court has held in *Ramanand v. Jairam*,⁴⁷ an elaborate review of the case-law, that where in a pre-emption suit according to a compromise decree, plaintiff is to obtain possession of property if he pays a certain amount within a particular time but in case of default the suit is to stand dismissed, and the plaintiff pays the required amount within the specified time but does not obtain possession either through Court or privately, and after the lapse of the period of limitation for the execution of the decree files a fresh suit for the possession of the property, such suit should be held to be barred under the provisions of S. 47 of the Civil Procedure Code. This follows the view taken by a **Full Bench** of five Judges in *Doobee Singh v. Jowkeeram*,⁴⁸ where the rule of law was enunciated as follows:—

43. (1903) 27 Mad. 243=14 M.L.J. 84 (F.B.).

44. (1905) 33 Cal. 560=9 C.W.N. 952.

45. (1881) 7 Cal. 74=9 C.L.R. 357.

46. *Annoda Prasad Bannerjee v. Nobo Kishore Roy*, 33 Cal. 560=9 C.W.N. 952.

47. 1921 All. 369=43 All. 170.

48. (1868) N.-W.P.H.C. 381 (F.B.).

"Where a decree is merely declaratory and does not require to be carried into effect by process of execution, the right thereby declared and ascertained exists independently of any process for enforcing it. But when the nature of the decree requires that it should be executed, a decree-holder cannot, after allowing the limitation period to lapse without issuing process of execution, seek by a fresh suit on the decree to obtain that which he should have sought for by execution."

The same principle was re-affirmed by the majority of the Judges in *Ram Jus Rae v. Ram Narain*,⁴⁹ that a decree-holder has no right to recover in a subsequent suit founded on his decree what he could enforce by execution in the ordinary way. Another Full Bench decision in *Sheikh Ghulam Hosein v. Mt. Allah Rakhee*,⁵⁰ extended the same principle even to a redemption suit, and it was again laid down that where by a former adjudication persons became entitled to a remedy by process of execution for the recovery of possession, and by their own neglect they have lost their remedy, they cannot be permitted to revert to the position which they held prior to the institution of that suit and to ask for a remedy by suit. The case

of Dhanraj Singh v. Lakhrani Kuar,¹ is distinguishable. There it was held that the mere fact that a plaintiff obtained a decree for possession of a certain land would not entitle him to get possession of that land in a second suit if he had never been in possession within twelve years, but *if after the decree the plaintiff gets into possession*, otherwise than in execution, and is dispossessed within twelve years of the second suit, he has a cause of action irrespective of the previous decree and is entitled to bring a second suit for possession, the previous decree being part of his title.

1876. It has been observed that a practice existed at one time in the Bombay High Court, (following an old English rule), under which suits on judgments of Small Cause Courts were allowed, but this became obsolete after the enactment of S. 94 of Act XV of 1882. (See S. 1873.²) But as for suits on decrees of an ordinary Civil Court the Bombay High Court does not appear to have permitted them.³ In the case of *Mancharam Kalliandas v. Bakshe Saheb*,⁴ a suit for

49. (1870) N.-W.P.H.C. 382.

50. (1871) N.-W.P.H. 62 (F.B.) ; Followed in 1921 All. 369 (370) = 43 All. 170.

1. (1916) 35 I.C. 601 = 38 All. 509 (516).

2. *Ramaswami v. Muthiah Chetty*, (1924) 48 Mad. 482 = 47 M.L.J. 829 = 1925 Mad. 279; also see *Ramanand v. Jairam*, (1921) 43 All. 170 = 1921 All. 369 and *Fakirappa v. Pandurangappa*, (1881) 6 Bom. 7 and *Bhavani Shanker v. Pursadri*, (1882) 6 Bom. 292; Cf. *Merwanji Naoroji v. Ashabai*, (1883) 8 Bom. 1 (3).

3. *Ramanand v. Jairam*, (1921) 43 All. 170 = 1921 All. 369 (371).

4. (1869) 6 B.H.C. 231.

possession which had been granted by an unexecuted decree was held not to be maintainable. In the case of *Kisan Nandram v. Anandram Bachaji*,⁵ the plaintiff's father had obtained a decree for possession which, however, was never executed. It was held that the remedy by a separate suit was barred by S. 11 of Act XXIII of 1861. Similarly, in *Sayad Nasruddin v. Venkatesh Prabhu*,⁶ S. 11 of Act XXIII of 1861 was held to shut a plaintiff, who has failed to obtain execution of a decree in his favour, from making that decree the basis of a further suit, or from obtaining, by means of a subsequent suit, that which, by adopting the proper means, he might have obtained in execution. The practice of the Bombay High Court to entertain suits upon judgments of Courts of Small Causes was peculiar, and it was perhaps based on the fact that the Code of Civil Procedure had not been applied to the Bombay Court of Small Causes; but it was held in *Fakirappa v. Pandurangappa*,⁷ that no suit would lie upon a decree the execution of which was barred by limitation. Most of the earlier cases on this subject were reviewed in *Merwanji Naoroji v. Ashabai*,⁸ where it was decided that even before the prohibition contained in S. 94 of Act XV of 1882, a judgment-creditor in the Court of small causes had not the right to sue on his judgment, and that the provisions of Civil Procedure Code preclude a judgment in a Court regulated by that Code being enforced by a separate suit. In the case of decrees payable by instalments, as the command of the Judge prescribes, a term for the performance of the several parts of his order, it is to be construed as becoming a judgment for purposes of limitation as to each instalment only on the day when payment is to be made.⁹ A decree, which merely declares the rights of parties, is not capable of execution; and a separate suit may lie on such a judgment.¹⁰

1877. The earlier Calcutta cases took the view that no suit lies on a judgment, where a decree is enforceable by execution. See *Sandes v. Jomir Shaikh*,¹¹ and *Moonshi Golam Arab v. Currcembux*,¹² but in *Attormoney v. Hurry Doss*,¹³ it was held in an undefended suit that as a general rule a suit lies upon a decree, unless the right is taken away by statute, and Wilson, J., held that nothing in Act X of 1877 prevented such a suit. The learned Judge's attention was

5. (1873) 10 B.H.C. 433.

6. (1879) 5 Bom. 382.

7. (1881) 6 Bom. 7.

8. (1883) 8 Bom. 1.

9. *Sakharam Dikshit v. Ganesh Sathkar*, (1878) 3 Bom. 193; Followed in 12 Bom. 65.

10. *Madhavrao v. Ram Rao*, (1896) 22 Bom. 267.

11. (1868) 9 W.R. 399.

12. (1879) 5 Cal. 294=4 C.L.R. 477.

13. (1881) 7 Cal. 74.

not directed to S. 244 (c) of Act X of 1877. In the case of *Ashi Bhusan Dasi v. Pelaram Mandal*,¹⁴ a decree had been obtained against an alleged adopted son (as the representative of the wrong-doer) under the guardianship of the deceased's widow, but the adoption was found in another suit to be invalid. Mukerji, J., suggested that

"the remedy of the decree-holder might possibly be by way of a suit against (the widow), if it be still open to him to sue her successfully in view of the provisions of the Statute of Limitation".

Where, one of the defendants having died, a co-defendant was substituted in his place as his legal representative, and a decree was obtained; but the property being found in possession of the widow, who had not been impleaded as a representative, the decree could not be executed, and the plaintiff brought a suit for a declaration that the estate in the widow's possession was liable to pay the decretal amount, it was held that the suit was not maintainable as a suit on a judgment.¹⁵ In *Kali Charan Nath v. Sukhada Sundari*,¹⁶ the question raised was

"whether the decree obtained against the ostensible representatives should be allowed to be executed against the estate in the hands of the executrices though objection is taken before execution has been issued, or whether the decree-holders should be limited to their remedy by way of a decree against the executrices, either by re-opening the suit or by instituting a fresh suit on the judgment previously obtained,"

and it was held that "there cannot be a reasonable doubt that a suit would lie on the judgment". The principle of English law was accepted as a sound proposition subject to the qualification that an action is permissible only where the judgment cannot be enforced in some other way: and it was held accordingly that the decree-holders were not entitled to execute their decree against the estate in the hands of executrices. In both these cases, where the decree could not possibly be enforced, the remarks made *obiter*

"can be no authority for the proposition that a second suit on a judgment is maintainable in spite of the provisions of S. 47 of the Code of Civil Procedure".¹⁷

Their Lordships of the Privy Council have held that where the terms of a decree in accordance with an award were that "the parties will collect rents and other profits and each of the two parties will deliver respectively to each other all the Zemindari papers which they may have in their possession, that it was an executable decree and precluded a fresh suit for the possession of the properties concerned by one of the parties".¹⁸

14. (1913) 21 I.C. 519=18 C.L.J. 362=18 C.W.N. 173.

15. *Kalikanand Mukerji v. Bipradas*, (1914) 26 I.C. 436=21 C.L.J. 265=19 C.W.N. 18.

16. (1915) 30 I.C. 824=20 C.W.N. 58=22 C.L.J. 272.

17. *Ramanand v. Jairam*, 1921 All. 369 (372)=43 All. 170.

18. *Sasi Sekhreshwar Ray v. Lalit Mohan Maitra*, (1925) 52 Cal. 314=52 I.A. 79=48 M.L.J. 20=1925 P.C. 34 (P.C.),

1878. The Madras High Court has taken the view in a number of cases, under S. 11 of Act XXIII of 1861, (to which S. 47 of the present Code corresponds), that the right of suit is taken away to enforce a liability specifically imposed by the decree of a civil Court. See *Sanjee Viyah v. Nanjiyan*¹⁹ and *Muthuvelu Pillai v. Vythilinga*.²⁰ And the same principle was followed in *Rangan Asary v. Shappani Asary*,²¹ where the landlord was required to seek possession of the land in execution and not by separate suit, when the decree awarded him possession on default in payment of rent. Also see *Sungara Narayana v. Sandira Pillay*.²² In the **Full Bench** case of *Periasamy Mudaliar v. Seetharama Chettiar*,²³ which was not a case of suit on a judgment, but one to enforce a Hindu son's pious obligation to discharge his father's debts, it was held that as against the judgment-debtor himself or against his legal representative, the remedy was only by way of execution of a decree, and that no suit could be brought on the judgment. The decision in *Ramaswami v. Muthiah Chetty*,²⁴ concerned a particular case where a new obligation was created without providing for its execution, and where, accordingly, the suit was held maintainable. Where a former suit ended in a declaratory judgment, and the decree was not framed in an executable form, a suit was held to lie to enforce the rights so declared, and such a suit was governed by Art. 122 of the Limitation Act.²⁵

1879. Where the terms of a decree based on an award were as follows: "It is ordered that this suit be decreed in the terms of the award annexed herewith"; and, with reference to these terms the decree obtained was executable, their Lordships of the Privy Council upheld the defence that the party concerned ought to have executed the decree which he got and not have allowed that decree to become null by reason of limitation.²⁶ A decree made on award stands precisely in the same position with regard to its execution as any other decree of the Court, and operates as a bar to any subsequent suit on the same cause of action.²⁷

19. (1869) 4 M.H.C. 453.

20. (1870) 5 M.H.C. 185.

21. (1870) 5 M.H.C. 375.

22. (1870) 6 M.H.C. 13.

23. (1903) 27 Mad. 243=14 M.L.J. 84 (F.B.).

24. (1924) 48 Mad. 482=47 M.L.J. 829=1925 Mad. 279.

25. *Rathanchand Kumaji v. Amichand*, 40 L.W. 792=1934 M. W. N. 539=1934 Mad. 665=67 M.L.J. 413.

26. *Sekhareswar v. Lalit Mohan*, (1924) 52 I.A. 79=52 Cal. 314=48 M.L.J. 20=1925 P.C. 34 (P. C.); On appeal from *Lalit Mohan v. Sekhareswar*, (1922) 70 I.C. 300=1922 Cal. 73.

27. *Lalit Mohan v. Sekhareswar*, 70 I.C. 300=1922 Cal. 73.

1880. See Chapter XLII of the Criminal Procedure Code, **Recognizance bonds.** Ss. 513 to 516. Such recognizances are taken from complainants, witnesses, accused persons and their sureties under the above provisions of the Code.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
123.	For a legacy, or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	12 years.	When the legacy or share becomes payable or deliverable.

SYNOPSIS.

Title I: Previous History.

1881. Corresponding provisions.

1882. Legislative change.

Title II: Scope and Application.

1883. Suit against Executor, or representative.

1884. Suit against Executor *de son tort*.

1885. Suit by heir against tenant-in-common.

1886. Suit by heir against stranger.

Title III: Article explained.

1887. Suit for a legacy.

1888. Suit for share of residue.

1889. Suit for distributive share of intestate.

1890. Starting point of limitation.

—"Payable" and "deliverable".

NOTES.

TITLE I: PREVIOUS HISTORY.

1881. **CORRESPONDING PROVISIONS.**—Under Act XIV of 1859, suits for recovery of a legacy were governed by S. 1, cl. 11, which gave twelve years' limitation.

Art. 122 of Sch. II of Act IX of 1871, provided only for suits "for a legacy; or for a distributive share of the *moveable* property of a testator or intestate".

Art. 123 of Act XV of 1877 was altered to its present form as applying to suits for a legacy or for a share of residue bequeathed by a testator or for a distributive share of the property of an intestate.

1882. **LEGISLATIVE CHANGE.**—In *Treepoora Soondery Dossee v. Debendranath Tagore*,²⁸ Pontifex, J., had expressed a doubt whether the word "legacy", applied to a share of residue

28. (1876) 2 Cal. 45,

and held, on the analogy of English law (S. 13 of Law of Property Amendment Act, 1860,—23 and 24 Vic., c. 38) that cl. 122 applied not only to a legacy, but also to a distributive share of the *moveable* property of a testator or intestate. It was observed that the resulting trust under the settlement being undisposed of *immoveable* estate, was not covered by the terms of the said clause. Art. 123, as appearing in Act XV of 1877, applies equally to both moveable and immoveable property, which can descend and be treated as coming under the same law.²⁹

TITLE II.

1883-1886. SCOPE AND APPLICATION.

Suit against executor
or representative.

1883. As observed by their Lordships of the Privy Council in *Ghulam Muhammad v. Ghulam Husain*,³⁰

"there is a long series of decisions in India, dating at least from 1882, that this article only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate".³¹

In *Mahomed Riasat Ali v. Hasin Banu*,³² where a **Muham-
madan widow** having a customary life-
21 Cal. 157: 20 I.A. interest in the estate of her deceased
155 (P.C.). husband brought a **suit against the
brother of the deceased**, for declaration of her right to possess
for life the estate of the latter, with an order for possession, it was
held to be governed by **Art. 120**, not being a suit for a distributive
share of property within the meaning of Art. 123, and also not a
suit for specific moveables wrongly taken within Art. 49 of the
Act. It has been held in several cases, by the High Courts, that
Art. 123 refers to a suit in which a plaintiff seeks to obtain his
share from a person who, either as an executor, or as an adminis-
trator, represents the estate of a deceased person and is under a
legal obligation to distribute shares to those entitled to them.³³ It
was applied to cases in which the property sought to be recovered
was not only a **legacy**, but was also **sought to be recovered as**

29. *Maung Po Kin v. Maung Shwe Bya*, (1923) 76 I.C. 855=1 Rang. 405 (Reasons for change, with reference to law applicable to devolution of property in India); also see *Hemangini v. Nobinchand*, (1882) 8 Cal. 788 (799).

30. 59 I.A. 74=1932 P.C. 81=136 I.C. 454=54 All. 93 (P.C.).

31. *Issur Chunder v. Juggut Chunder*, (1883) 9 Cal. 79; *Keshav Jagannath v. Narayan Sakharan*, (1890) 14 Bom. 236; *Umardaras Ali Khan v. Wilayat Ali Khan*, (1897) 19 All. 169=(1897) A.W.N. 34; *Khadarsa Hajee Bappu v. Puthen Veetil*, (1911) 34 Mad. 511=6 I.C. 50 and *Mahomed Riasat v. Hasin Banu*, (1893) 21 Cal. 157=20 I.A. 155 (P.C.).

32. (1894) 21 Cal. 157=20 I.A. 155 (P.C.).

33. *Sithamma v. Narayana*, 12 Mad. 487; *Umardaras Ali Khan v. Wilayat Ali Khan*, (1897) 19 All. 169=(1897) A.W.N. 34.

such from a person who is bound by law to pay such legacy, either because he was the executor of the will or otherwise represented the estate of the testator.³⁴ Accordingly, in the case of a Maho-

Not applied to heirs of a Muhammadan intestate. median dying intestate, where the estate is at once vested in the heirs as tenants-in-common, and there is no one charged by

law with its distribution, Art. 123, was held inapplicable³⁵; and **Art. 144** was applied when the property was immoveable, and **Art. 120**, when it was moveable property.³⁶

In *Maung Tun Tha v. Ma Thit*,³⁷ a Burmese Buddhist claimed one-quarter share in the estate of his father, against the defendants who were his mother, and other children. Art. 123,

1916 P.C. 145: 44 I.A. 42 (P.C.).

was apparently applied by their Lordships of the Privy Council, but the question as to which article of the Limitation Act was applicable to cases like the one in question was not raised in Burma Courts, and was not discussed by their Lordships with reference to the Indian case-law on the subject. The **Bombay High Court**, appears to have considered, in *Shirin Bai v. Ratna Bai*,³⁸ that after the decision in *Tun Tha v. Ma Thit*,^{38a} the Indian authorities had been overruled. "But, in two later cases

the same High Court refused to apply Art. 123 to claims by Mahomedan heirs."³⁹ In *Nuruddin Najubuddin v. Bu Umrao*,⁴⁰ it was held that when

Not applied to suit by a Mahomedan heir.

members of a Mahomedan family con-

tinued to live as tenants in common without dividing the estate of a deceased ancestor, limitation would not run from the time of his death and that a suit for a distributive share of the deceased's estate would be governed by Art. 144, and not Art. 123.

"The specific question was considered by a **Full Bench of the Allahabad High Court**, in 1928,—*Rustam Khan v. Janki*,⁴¹ another case between Mahomedan heirs where the same conclusion was come to as in *Nurudin Najubuddin v. Bu Umrao*, the article applicable being held to be Art. 144, and not Art. 123."

34. *Issur Chunder Doss v. Juggut Chunder*, (1883) 9 Cal. 79; *Keshav Jagannath v. Narayan Sakharan*, (1890) 14 Bom. 236.

35. *Khadarsa Hajee Bappu v. Puthen Vettil*, (1910) 6 I.C. 50=34 Mad. 511; *Umardaraz Ali Khan v. Wilayat Ali Khan*, 19 All. 169.

36. *Ibid.*, (1910) 6 I.C. 50=34 Mad. 511.

37. 1916 P.C. 145=38 I.C. 809=44 I.A. 42=44 Cal. 379 (P.C.).

38. (1919) 43 Bom. 845=51 I.C. 209.

38-a. 1916 P.C. 145=44 I.A. 42.

39. *Nuruddin v. Buumrao*, (1920) 45 Bom. 519=59 I.C. 780; *Kallan Gowda v. Bib Shaya*, (1920) 44 Bom. 943=58 I.C. 42; also see *Bai Jivi v. Bai Bibanboo*, (1929) 118 I.C. 785=1929 Bom. 141=31 Bom.L.R. 199 (Art. 144, applied to suit by Muhammadan co-heir for recovery of his share).

40. (1920) 45 Bom. 519=22 Bom.L.R. 1429=59 I.C. 780.

41. 1928 All. 467=111 I.C. 809=51 All. 101 (F.B.).

And it is added, that

- “their Lordships have no doubt that it was not intended by the judgment in *Maung Tun Tha v. Ma Thit*, to overrule the decisions to which they have referred, and they think that at all events in cases from the Indian Courts, these authorities should be allowed”.⁴²

This authoritative pronouncement must be taken to have overruled all the decisions, in the Indian High Courts, to the contrary, where Art. 123 has been applied to persons other than executors or administrators, or to executors *de son tort*, or against the representatives of the executor, *i.e.*, to some person not legally charged with the duty of distributing the estate.⁴³

1884. In the **Full Bench** case of **Madras High Court**, in *Rajah Parthasarathy v. Rajah Venkatadri*,⁴⁴ Schwabe, C.J., held
**Suit against executor
de son tort.**

“that an executor *de son tort* takes all the liabilities of an executor, and it would be a curious thing if claims to legacies against an executor were not barred until the lapse of 12 years but **claims against executors *de son tort*** were barred in a shorter period”.

Similarly, Kumarasami Sastri, J., observed that

“the wording of Art. 123 is general. It refers to a suit for a legacy or for share of a residue bequeathed by a testator, and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administrator. I think it will be reading into the article words which are not there, namely, that the suit should be for a legacy or for a share of a residue against an executor or administrator”.

Reliance was placed on the **Privy Council** decision in *Maung Tun Tha v. Ma Thit*,⁴⁵ which had been interpreted by the **Bombay High Court**, in *Shirin Bai v. Ratan Bai*,⁴⁶ to hold that Art. 123 applies to suits for legacies against any person rightly or wrongly in possession of the estate of the deceased. The **Madras** decision in *Sithamma v. Narayana*,⁴⁷ was overruled by the **Full Bench**, but

42. *Ghulam Muhammad v. Ghulam Husain*, 59 I.A. 74=1932 P.C. 81=136 I.C. 454=54 All. 93 (P.C.); also see *Hari Charan v. Kamal Kumari Dasi*, 1931 Cal. 670=132 I.C. 684=35 C.W.N. 307 (Article 123, applied to suit for arrears of maintenance granted under a will, which were to come out of income of particular property left by the testator in possession of the defendants as executors or representatives of the deceased).

43. *Raja Parthasarathy v. Rajah Venkatadri*, 46 Mad. 190=43 M.L.J. 486=1922 Mad. 457 (F.B.); *Robson v. Administrator-General*, 1929 Lah. 753=30 P.L.R. 503; *Gopala Chetty v. Narayana*, 1926 Mad. 681=95 I.C. 33; *Khetramoni Dossee v. Dhirendranath Roy*, (1914) 41 Cal. 271=25 I.C. 370.

44. 46 Mad. 190=1922 Mad. 457=43 M.L.J. 486 (F.B.).

45. 1916 P.C. 145=38 I.C. 809=44 I.A. 42=44 Cal. 379 (P.C.).

46. (1919) 43 Bom. 845=21 Bom.L.R. 384=51 I.C. 209.

47. (1889) 12 Mad. 487 (Article 123, held not applicable when the suit was by a legatee against an executor *de son tort*).

it would now be again good law, in view of the **Privy Council** decision, 59 I.A. 74 (P.C.). The Privy Council pronouncement in *Ghulam Muhammad v. Ghulam Husain*,⁴⁸ that

"Article 123, Limitation Act, only applies to a suit brought against an executor or administrator or some person legally charged with the duty of distributing the estate,"

also takes away the binding force of authorities where Art. 123 was applied to a suit by a residuary legatee against the legal representatives of an executor⁴⁹; or to the son of a deceased executor⁵⁰; or to a suit against a third person remaining in management of the estate, without the consent of an executor, whose position may be taken to be that of an executor *de son tort*.¹ Such rulings are based on the theory adopted by the **Madras Full Bench** decision in *Raja Parthasarathy v. Rajah Venkatadri*,² that this article "applies to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased". The affirmance of the Full Bench decision by the Privy Council on appeal³ on another point does not imply the approval of the decision as a whole.

1885. A Full Bench of the Allahabad High Court has laid

Suit by heir against a tenant-in-common. down in *Rustam Khan v. Janki*,⁴ that a suit by one of the heirs of a deceased Mahomedan against his co-heirs for recovery of possession of his share out of the joint property left by the deceased is governed by Art. 144, Limitation Act. This Full Bench decision has been expressly approved by their Lordships of the Privy Council in *Ghulam Muhammad v. Ghulam Hosein*,⁵ where the Bombay interpretation of the earlier Privy Council decision in *Maung Tun Tha v. Ma Thit*,⁶ accepted by the Madras Full Bench in *Rajah Parthasarathy v. Venkatadri*,⁷ has been dissented

48. 59 I.A. 74=1932 P.C. 81=136 I.C. 454=54 All. 93 (P.C.).

49. *Khetramoni Dasse v. Dhirendranath*, (1914) 41 Cal. 271=25 I.C. 370.

50. *Rajamannar v. Venkatakrishnayya*, (1902) 25 Mad. 351=12 M.L.J. 5.

1. *Gopala Chetti v. Narayanaswami*, (1926) 95 I.C. 33=23 L.W. 528=1926 Mad. 681; also see *Gurbaksh Singh v. Bhagwan Singh*, 75 I.C. 934=1924 Lah. 561.

2. 46 Mad. 190=43 M.L.J. 486=1922 Mad. 457 (F.B.).

3. *Venkatadri v. Parthasarathi*, 48 Mad. 312=48 M.L.J. 627=87 I.C. 324=1925 P.C. 105 (P.C.).

4. 1928 All. 467=111 I.C. 809=51 All. 101 (F.B.).

5. 1932 P.C. 81=59 I.A. 74=136 I.C. 454=54 All. 93 (P.C.) (Not approved *Shirin Bai v. Ratnabai*, 1918 Bom. 54=51 I.C. 209=43 Bom. 845).

6. 1916 P.C. 145=38 I.C. 809=44 I.A. 42=44 Cal. 379 (P.C.).

7. 46 Mad. 190=70 I.C. 689=1922 Mad. 457 (F.B.).

from. The **Allahabad High Court** had taken the same view in *Umardaraz v. Wilayat*.⁸ The **Lahore High Court** has held in several cases that where a Muhammadan dies intestate his estate vests in his heirs as tenants-in-common and no one is charged by law with its distribution, and if a suit is brought by one of the heirs to recover his share, Art. 123, Limitation Act, does not apply, but Art. 144 will apply in the case of immoveable property.⁹ In the case of a Mahomedan dying intestate, where the estate is at once vested in the heirs as tenants-in-common, and there is no one charged with its distribution, there can be no scope for the application of Art. 123, Limitation Act.¹⁰ Article 144 only is applicable where an heir, *e.g.*, a Muhammadan widow, sues for recovery of possession against another heir, who has excluded the plaintiff from the common possession and enjoyment¹¹; and the cause of action starts not from the date when her share became deliverable on the death of the persons to whom the property originally belonged, but from the date of her exclusion or dispossession.¹² Article 123 governs the distribution of the estate left by an intestate,¹³ but, immediately upon the death of a person who was in possession of certain property, the right to possession vests in his heirs, and where subsequently, they fail in their attempt to realise rent by reason of the successful intervention of another person, it must be taken that they are dispossessed.¹⁴ The **Rangoon High Court** has observed in *Ma Non Thu v. Ma Shwee Mi*,¹⁵

"that the heirs of a deceased person very often leave the estate undivided and either enjoy the profits jointly living in commensality or divide the profits among themselves".¹⁶

Where in such a case one of the heirs is excluded from the enjoyment of the profits and sues to recover his share of the estate,

8. 19 All. 169.

9. *Mt. Zainab v. Ghulam Rasul*, 73 I.C. 425=1923 Lah. 519=4 Lah. 402; *Mt. Jano v. Narsingdas*, 1929 Lah. 549=117 I.C. 803=11 Lah. 29; also *Mt. Ghulam Bibi v. Mt. Sarar Bibi*, 1933 Lah. 784 (2)=14 Lah. 794=35 P.L.R. 121.

10. *Khadarsa Hajee Bappu v. Puthen Vettil*, (1910) 6 I.C. 50=34 Mad. 511 (F.B.); Followed in *Marian Beeviammal v. Kadir Meera*, (1915) 29 I.C. 275 (Mad.) (Art. 144, Limitation Act applicable if the property is immoveable, but if it is moveable Art. 120 is applicable).

11. *Azizul Hak v. Mt. Mariyam Bibi*, (1914) 24 I.C. 45=1 O.L.J. 225=17 O.C. 157.

12. *Abdul Kader v. Aishamma*, (1892) 16 Mad. 61=2 M.L.J. 200 (F.B.).

13. *Ma Non Thu v. Ma Shwee Mi*, (1925) 88 I.C. 609=4 Bur. L. J. 76=1925 Rang. 233; Relied on *Maung Po Kin v. Maung Shwee Bya*, 1 Rang. 405=76 I.C. 855.

14. *Lalu Sahu v. Ghunaria*, 2 I.C. 381 (Cal.).

15. (1925) 88 I.C. 609=4 Bur. L. J. 76=1925 Rang. 233.

16. *Abdul Kader v. Aishamma*, 16 Mad. 61=2 M.L.J. 200 (F.B.); *Kallangoeda v. Bibishaya*, 58 I.C. 42=44 Bom. 943=22 Bom. L. R. 936 and *Nurdin Najbuddin v. Umrao Bu*, 59 I.C. 780=45 Bom. 519=22 Bom. L. R. 1429.

"Art. 123 is inapplicable for the reason that the heirs have taken their shares; but that, instead of dividing the property and enjoying their shares they have agreed to enjoy the whole property jointly. There is, therefore, no property of the intestate left to be distributed, and Art. 123 cannot apply. When under such circumstances, one of the heirs is excluded from joint enjoyment, he sues to recover, not a share in the estate of the deceased, but his share in joint property."¹⁷

The reasoning which applies to such cases is thus put by Mr. Justice Heaton in *Kallangowda v. Bibi Shaya Shah Mahommed Khan*.¹⁸

"We have here the very common case of Muhammadans who succeeded to the property of a deceased relative, and by agreement amongst themselves instead of distributing that property by shares, hold it in common. They are entitled under our law to do this. They are not under an obligation to at once divide the property according to their shares. They can hold and continue to hold, it in common, and having done so they hold it under an agreement. They can continue to do so for an indefinite period, but when they wish they can put an end to this common holding, and ask that there shall be a partition."

To a suit for partition, Art. 142, or 144 of the Limitation Act will apply.¹⁹ Article 123 has no application to suits where defendant is not under obligation to distribute estate.²⁰ As explained by the **Rangoon High Court**, in *Maung Po Kin v. Maung Shwe Bya*,²¹

"though Art. 132 applies to a distributive share of the corpus of the estate as left by the intestate, a different question may arise where the co-heirs including the plaintiff claiming a share have gone into possession and the plaintiff is subsequently ousted and refused his share, and that in such a case Art. 142 or 144 may apply to the immoveable property depending on the circumstances of the case".

1886. Article 123, has no application where though the suit is brought by the plaintiffs as heirs of their deceased father, the contesting defendants are alleged to have no right or title to, or to represent the estate of the deceased, and where the plaintiffs are in substance seeking to recover possession of the property from

17. *Ma Nan Thu v. Ma Shwe Mi*, (1925) 88 I.C. 609=4 Bur. L. J. 76=1925 Rang. 233; Relied on *Kallangowda v. Bibi Shaya*, 58 I.C. 42=44 Bom. 943=22 Bom. L. R. 936.

18. 58 I.C. 42=44 Bom. 943.

19. *Kallangowda v. Bibi Shaya*, 58 I.C. 42=44 Bom. 943=22 Bom. L. R. 936.

20. *Ma Pwa Thin v. U Nyo*, 12 Rang. 409=152 I.C. 768=1934 Rang. 318.

21. (1923) 76 I. C. 855=1 Rang. 405; also see *Mang Shwe An v. Maung Tok Pyu*, 1928 Rang. 6=5 Rang. 582 (Suit by co-heirs for share in the corpus of an inheritance is governed by Art. 123; but, if property is held by one on behalf of all, article applicable is Art. 142 or Art. 144) and *Ma Bi v. Ma Khatoon*, (1929) 7 Rang. 744=1930 Rang. 72 (Owner dying leaving several heirs, all become co-owners and tenants-in-common).

these defendants as trespassers.²² Article 123 only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate.²³ So a suit by the plaintiff to recover possession of certain Government Promissory notes in accordance with the terms of a will left by the original owner against the defendant alleged to have notes in his custody contrary to the terms of the will is not governed by Art. 123, as the defendant is not charged with any duty of distributing the estate.²⁴ Article 123 is inapplicable when plaintiff sues to recover the property, not *as a legacy*, but as property belonging to him and *wrongfully* detained by the defendant.²⁵ Article 142 or Art. 144 would apply to a suit for possession by an heir against a stranger who took possession of the property on the death of the last owner asserting a title of his own.²⁶

1887. ARTICLE EXPLAINED.—Article 123 of the Limitation Act comprises two classes of suits: **Suit for a legacy.** the first is a suit for a legacy or for a share of a residue bequeathed by a testator, and the second is a suit for a distributive share of the property of an intestate.

This article applies only when the property sought to be recovered is a legacy or a share of residue, and is also sought to be recovered as such from a person who is bound by law to pay such legacy either because he is the executor of the will, or otherwise represents the estate of the testator.²⁷ Thus a suit for a legacy means a suit for payment of legacy as such, brought by beneficiaries under a will, against an executor or representative of the testator bound to pay it. Article 123, has no application, where during the lifetime of the deceased testator or owner, a third person was in

22. *Mohamed Chootoo v. Abdul Hamid Khan*, 1932 Rang. 55=10 Rang. 82=137 I.C. 200.

23. *Ghulam Muhammad v. Ghulam Hosein*, 59 I.A. 74=1932 P.C. 81=136 I.C. 454=54 All. 93 (P.C.).

24. *Swarnamoyi Dossee v. Probadh Chandra Sarkar*, 36 C.W.N. 758=55 C.L.J. 420.

25. *Issur Chunder v. Juggut Chunder*, (1883) 9 Cal. 79; *Keshav Jagannath v. Narayan Sakharan*, (1890) 14 Bom. 236; also see and cf. *Sithamma v. Narayana*, (1889) 12 Mad. 487 (Suit against an executor *de on tort*).

26. *Hulaso v. Salamat*, (1914) 23 I.C. 521 (All.) and *Kartick Chunder v. Saroda Sundari*, (1891) 18 Cal. 642 (646); also see *Lalu Sahu v. Ghumaria*, (1909) 2 I.C. 381.

27. See S. 1883, *ante*; *Ghulam Muhammad v. Ghulam Husain*, 59 I.A. 74=1932 P.C. 81=136 I.C. 454=54 All. 93 (P.C.); Approving *Issur Chunder v. Juggut Chunder*, (1883) 9 Cal. 79; *Keshav v. Narayan*, (1890) 14 Bom. 236; *Umardaraz v. Wilayat*, (1897) 19 All. 169=1897 A.W.N. 34; *Khaderza v. Puthen Veetil*, (1911) 34 Mad. 511=6 I.C. 50; also see *Kally Churn v. Dukhee*, (1879) 5 Cal. 692; *Mahomed Riasat v. Hasin Banu*, (1893) 21 Cal. 157=20 I.A. 155 (P.C.) and *Sourab v. Abbas*, (1925) 91 I.C. 725=1926 Cal. 480.

possession of the property or the estate as owner, and time had already begun to run against the deceased testator or intestate.²⁸ Where an **amount of maintenance allowance** granted under a will is to come out of the income of a particular property and the defendants are in possession of the property under the will, the arrear of such maintenance is a "legacy" within Art. 123, Limitation Act.²⁹ The mere want of assent of an executor to a legacy does not debar the legatee from suing to recover the legacy. A suit to recover a legacy is governed by Art. 123 whether or not the suit involves the administration of the whole estate.³⁰

Article 123 is not applicable where the object of the suit is not to recover the legacy, but to have it defined what that legacy really is.³¹ But, where the claim is substantially for payment of a legacy, Art. 123 will apply, although the plaintiff prays for an administration of the estate, that prayer being only ancillary to his claim for the legacy.³² A creditor or a general legatee may, for the purpose of recovering his debt or his legacy, bring a suit for administration and in that suit claim an account from the representative of the deceased executor, and payment of whatever is found due. Such a suit when brought by a legatee is one to recover a legacy, and is governed by Art. 123.³³ A **suit for accounts** brought by the legatee against the executors of a will, was held not to fall under Art. 123, so as to extend the taking of accounts for a period of 12 years, though the principal object of suit was to be put in possession of a legacy.³⁴ In a suit for accounts the plaintiff is not entitled to go back more than six years. But, a plaint was allowed to be amended where the suit was treated as a suit for recovery of legacy under Art. 123.³⁵

1888. This article applies to suit for a share of the residue bequeathed by a testator. The word "*share*" does not show that the clause was not intended to apply to the *whole* residue. In

28. Rustomji, p. 597; citing *Lord St. Leonard's Handybook*, p. 292; also see *Trilochan v. Nobo Kishore*, (1878) 2 C.L.R. 10; *Mohin Chunder v. Mohesh*, (1888) 16 Cal. 473=16 I.A. 23 (P.C.) and *Muhammad Aamullah v. Badan Singh*, (1889) 17 Cal. 137=16 I.A. 148 (P.C.).

29. *Hari Charan v. Kamal Kumari*, (1931) 132 I.C. 684=35 C.W.N. 307=1931 Cal. 670.

30. *Salebhai Abdul Kader v. Bai Safiabau*, (1911) 12 I.C. 702=36 Bom. 111=13 Bom. L. R. 1025.

31. *Hemangini Dasi v. Nobin Chand Ghose*, (1882) 8 Cal. 788 (802)=11 C.L.R. 370.

32. *Rajamannar v. Venkatakrishnayya*, (1902) 25 Mad. 361.

33. *Chunduru China v. Neralla Venkata*, (1917) 41 I.C. 605=33 M.L. J. 195=6 L.W. 85.

34. *Gajanan Vinayak v. Waman Shamrao*, (1910) 8 I.C. 189=12 Bom. L. R. 881 (Art. 120 applied).

35. *Cursetji v. Dadabhai*, (1896) 19 Mad. 425; Relied on *Saroda Pershad v. Brojonath*, 5 Cal. 910 and *Hemangini v. Nobinchand*, 8 Cal. 788.

the English Act of the 23 and 24 Vict. C. 38, S. 13, upon which the Indian Act was probably founded, no difference is made between a person entitled to a share and the person who is entitled to the whole residue.³⁶ Article 122 of Act IX of 1871 applied only to *moveable* property, but Art. 123 of Act XV of 1877 omitted the word "moveable"³⁷; and the present article is similarly not restricted to moveable property.³⁸ A suit by a residuary legatee to recover the legacy or share falls under Art. 123 of the Limitation Act of 1908, and is not barred if brought within 12 years from the time when the share became payable.³⁹ A part of the residue not disposed of by will, or which fails as being void, as well as a share of the residue bequeathed by the testator is governed by this article.⁴⁰

1889. It was held by their Lordships of the Privy Council in *Mahomed Riasat Ali v. Mt. Hasin Banu*,⁴¹ that where a Mahomedan dies intestate, his estate at once vests in his heirs as tenants-in-common and there is no one charged by law with its distribution. A suit by one of the heirs against other tenants-in-common is, therefore, not a suit for a distributive share within the meaning of Art. 123, Limitation Act. This view is approved by their Lordships in the case of *Ghulam Muhammad v. Ghulam Hosein*,⁴² where the early High Court cases supporting this view are noticed.⁴³ Their Lordships expressly approve of the **Full Bench** ruling of the **Allahabad** High Court in *Rustam Khan v. Mt. Janki*,⁴⁴ where it was held that a suit by a Mahomedan co-heir against another co-heir for possession of his legal share is governed, for purposes of limitation not by Art. 123 of Sch. I, but by Art. 144 of the said Schedule. The **Privy Council** ruling in *Mg. Tun Tha v. Ma Thit*,⁴⁵ which apparently applied Art. 123 to a suit for a share of property on the death of an intestate did not consider the question of limitation from the point of view of Indian rulings regarding the scope

36. *Kherodemony Dossee v. Doorgamony Dossee*, (1878) 2 C.L.R. 112; on appeal, 4 Cal. 455; also see *Mt. Bolo v. Mt. Koklan*, 1930 P.C. 270 = 11 Lah. 657 (P.C.).

37. *Hemangini Dassee v. Nobin Chand*, (1882) 8 Cal. 788 (799).

38. *Maung Po Kin v. Maung Shwee Bya*, (1923) 76 I.C. 855 = 1 Rang. 405.

39. *Khetramani Dasi v. Dhirendra Nath Roy*, (1914) 25 I.C. 370 = 41 Cal. 271.

40. *Hemangini v. Nobin Chand*, (1882) 8 Cal. 788 (805); *Treepoorasundary v. Debendro Nath*, (1876) 2 Cal. 45 (54); also see *Kally Churn v. Dookhee*, 5 C.L.R. 505.

41. 21 Cal. 157 = 20 I.A. 155 (P.C.).

42. 1932 P.C. 81 = 59 I.A. 74 = 136 I.C. 454 = 54 All. 93 (P.C.).

43. See S. 1883: "Suit against Executor".

44. 1928 All. 467 = 111 I.C. 809 = 51 All. 101 (F.B.).

45. 1916 P.C. 145 = 38 I.C. 809 = 44 I.A. 42 = 44 Cal. 379 (P.C.).

of Art. 123, Limitation Act.⁴⁶ The **Bombay High Court** had differently interpreted this Privy Council decision⁴⁷; and the **Rangoon High Court** had held, following the same in several cases, that where a disputed share in the estate of a deceased person is claimed, whether against an administrator or a co-heir or a person merely in possession, Art. 123 applied.⁴⁸ However, there was an exception drawn in the case of co-heirs in possession, who had been subsequently ousted and refused their share.⁴⁹ Recently, it has been held in *Ma Bi v. Ma Khatoon*,⁵⁰ that when a Mahomedan owner dies leaving several heirs, they all become co-owners, and tenants-in-common, having a legal title to retain possession of joint property. Where the co-owner in actual possession dispossesses any one of the other co-owners, the suit is not a suit for a distributive share of the property of an intestate, but is a suit to recover possession of the defined, though undivided, share of the co-owner in the possession of other co-owners. And, again in *Ma Pwa Thin v. U Nyo*,¹ it has been held that Art. 123 has no application to suits where defendant is not under obligation to distribute estate. The word "distributive", has under English Law, a very peculiar meaning, being applied to the division of the *personal* estate of an intestate which vests in the executor or administrator and is transferred to the persons beneficially interested by the distribution.² The present article does not apply to a case of heirs who continue to own as tenants-in-common the estate of the deceased intestate. In *Baijivi v. Bai Bibanboo*,³ the Bombay High Court has observed that

"the expresion 'distributive share' is foreign to Mahomedan law, and is found only in the Indian Succession Act, a statute with which this has no connection."

The same view has been taken by the **Lahore High Court**, that Art. 123 applies only when the suit is brought for a share of an estate which it is the legal obligation of the defendant to distribute.⁴ The **Madras High Court** held in *Kasmi v. Ayishamma*,⁵ that a suit

46. See S. 1883: "Suit against Executor".

47. *Shirinbai v. Ratnabai*, 43 Bom. 845 and cf. *Kallan v. Bibi Shaya*, 44 Bom. 943 and *Nuruddin v. Bu Umrao*, 45 Bom. 519.

48. *Maung Po Kin v. Maung Shwe Bya*, 1 Rang. 405=76 I.C. 855=1924 Rang. 155; *Ma Nan Thu v. Ma Shwe*, 88 I.C. 609=1925 Rang. 233; *Maung San Shin v. Maung Maung*, (1926) 95 I.C. 514=1926 Rang. 95; *Ma Tok v. Ma Yin*, 92 I.C. 489=3 Rang. 77=1925 Rang. 228; *Maung Shwe An v. Maung Tok Byu*, 1928 Rang. 6=106 I.C. 828=5 Rang. 582.

49. *Ibid.*, *supra*.

50. 1930 Rang. 72=7 Rang. 744=121 I.C. 785.

1. 1934 Rang. 318=12 Rang. 409=152 I.C. 768.

2. *Nurdin Najbudin v. Umra Bu*, (1921) 59 I.C. 780=45 Bom. 519=22 Bom. L. R. 1429.

3. 1929 Bom. 141=118 I.C. 785=31 Bom. L. R. 199.

4. *Jano v. Narsingh Das*, 1929 Lah. 549.

5. 15 Mad. 60 (61).

by a Mahomedan widow for her share in her husband's property is one for a distributive share of the property of an intestate, and is governed by Art. 123, Limitation Act: but it was overruled by the Full Bench decision in *Abdul Kader v. Aishamma*.⁶

1890. **STARTING POINT OF LIMITATION.**—A Full

Suit for legacy or share of residue. Bench of the Madras High Court held in *Raja Parthasarathy v. Rajah Venkatadri*,⁷ on an interpretation of the will, that the

legacies were to bear interest, at a given rate, from one year after the death of the testatrix. The facts of the case are extremely complicated, but there was no doubt that apart altogether from the intention of the testatrix, there was no obligation on the executors to pay the legacies until they had effective possession of the assets of testatrix. This was never obtained until the fructifying of the final decision of the Privy Council, which was not till some years after the judgment. In view of these facts and considerations, it was held that the legacies became *payable* after the termination of the proceedings when their Lordships of the Privy Council reversed the decrees of both the lower Courts.

"A suit either by a residuary or pecuniary legatees for the purpose of recovering a legacy will not lie until the expiration of one year from the testator's death."⁸

Further,

"that until the right of the testatrix to dispose of the fund was recognized by the Privy Council, the legatees could not enforce their claim to the legacies, and that the cause of action did not accrue until that date."⁹ "It is difficult to see who would have purchased a claim which was negatived by the subordinate Judge and the High Court".¹⁰

The principle of the decisions in *Rameshvar Singh v. Homesvar Singh*¹¹; and in *Lakhan Chander v. Madhusudan*,¹² was applied to hold

"that circumstances may exist which would render a suit or application infructuous, and that a party should not be compelled to sue until the impediment is removed".¹³

6. 16 Mad. 61 (63) (F.B.).

7. 46 Mad. 190=43 M.L.J. 486=1922 Mad. 457 (F.B.).

8. *Raja Parthasarathi v. Rajah Venkatadri*, 1922 Mad. 457 (476) (F.B.); Relied on *Cursetji Pestonjee v. Dadabhai*, (1896) 19 Mad. 425; also see S. 337 of the Indian Succession Act, XXXIX of 1925, under which an executor or administrator is not bound to pay or deliver any legacy until the expiration of one year from the testator's death).

9. *Ibid.*, 1922 Mad. 457 (476) (F.B.); Per Sastri, J.

10. *Ibid.*

11. (1921) 48 I.A. 17=59 I.C. 636 (P.C.).

12. (1908) 35 Cal. 209=7 C.L.J. 59=12 C.W.N. 326.

13. *Raja Parthasarathi v. Rajah Venkatadri*, 1922 Mad. 457 (477) (F.B.).

On appeal to the Privy Council, this view was affirmed: Sir John Edge referring to the interpretation to be given to the words "payable", and "deliverable", as used in the article, observed

"that a share in the property of an intestate would not be deliverable until the administrator, to whom letters of administration had been granted, had in his hands the share to be delivered, and similarly a legacy or share in a legacy does not become payable until the executor or other person liable to pay it has in his hands money with which it could be paid".¹⁴

The conclusion arrived at was

"that the testatrix intended that the legacies should be payable, and be paid after the final determination of the suit which she (plaintiff) had brought for a declaration that the adoption (in question) was invalid, and to establish her right to the income of the estate. That litigation was not finally determined until the judgment of the Board was delivered in 1913, and these suits were within the time allowed by Art. 123."¹⁵

Where the plaintiff sued the defendant for her distributive share of the property of her intestate deceased husband, and the defendant applied for Letters of Administration to the estate of the deceased, and obtained the order upon contest: it was held that until the contest as to the right to obtain letters of administration was determined, the person entitled to represent the estate was unknown, and that time began to run at the earliest from the date of the judgment directing the issue of the letters of Administration to the defendant.¹⁶

A bar of suit to recover the share of the property, under this article, affects the right to sue which becomes extinguished under S. 28, Limitation Act.¹⁷ In *U Tun Hlaing v. Maung Sein Win*,¹⁸ where the claim preferred by the plaintiff to vested right of inheritance was barred by limitation long before date of suit, it was held that the claim had been extinguished by the time it was asserted in Court.

14. *Rajah Venkatadri Appa Row v. Rajah Parthasarathy*, 48 Mad. 312=48 M.L.J. 627=87 I.C. 324=1925 P.C. 105 (P.C.).

15. *Ibid.*

16. *Fayez Ali Khan v. Sitara Begam*, (1910) 7 I.C. 704=13 C.L.J. 239=15 C.W.N. 107.

17. *Nowroji v. Pzrozebai*, 23 Bom. 80.

18. (1915) 158 I.C. 118=8 R.R. 149.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
124.	For possession of an hereditary office.	12 years.	When the defendant takes possession of the office adversely to the plaintiff:

Explanation.—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.

SYNOPSIS.

- 1891. Corresponding provisions.
- 1892. Hereditary office.
- 1893. Non-hereditary office.
- 1894. Suit for property.
- 1895. Adverse possession against office-holder.
- 1896. Adverse possession against next in succession.
- 1897. Adverse possession against person competent to sue.
- 1898. Adverse possession among co-owners.
- 1899. Void alienation of hereditary office, and endowed property.
- 1900. Tacking possession of adverse holders.
- 1901. Starting point of limitation.

NOTES.

1891. CORRESPONDING PROVISIONS.—Under Act XIV of 1859, suits of this nature were governed by S. 1, Cl. (12). An hereditary office according to Hindu Law, is immoveable property, and in the absence of a definition of immoveable property, in Act XIV of 1859, offices which could be held by Hindus only were treated as immoveable property, while a suit for the recovery of an hereditary office which could be held by Hindus as well as by other persons was governed by six years' rule under Act XIV of 1859.¹⁹

19. *Venkatasubbaramayya v. Sarayya*, (1880) 2 Mad. 283; also see *Raoji v. Bala*, (1890) 15 Bom. 135.

The corresponding provision in Act IX 1871, was made by Art. 123 of that Act, which contained the words "or some person through whom he claims," after the word defendant. In Art. 124 of Act XV of 1877, these words were omitted, in view of the definition of the word "defendant" in S. 3, which includes also any person from or through whom a defendant derives his liabilities to be sued. The word "took" in Art. 123, Act IX of 1871, was altered to "takes". Art. 124 of the present Act is the same as Art. 124 of Act XV of 1877.

1892. HEREDITARY OFFICE.—

Definition. "Hereditary succession, is succession by the heir of the deceased under the law; the office must be transmitted to the successor according to some definite rules of descent which by their own force designate the person to succeed."²⁰ "There need be no blood relationship between the deceased and his successor but the right of the latter should not depend upon the choice of any individual."²¹

The Law of Limitation, Sch. I, Art. 124, provides for a suit for possession of an *hereditary office*, and if the **appointment to the office** of a shebait, etc., is by **succession through inheritance**, a suit for possession of such office would be covered by this article.²² The intention of Art. 124 was to treat hereditary offices like land for the purpose of barring suits for possession of the office and extinguishing the right to possession after a certain period. The inheritor of such an office cannot, therefore, be entitled to deny that he derives his right from or through his predecessor.²³ A suit to recover the hereditary managership of a temple and its properties is governed by Art. 124, Limitation Act.²⁴ According to Hindu Law, when the worship of a *Thakur* has been founded, the office of a *shebait* is held to be vested in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise, provided that there has not been some usage, course of dealing or circumstance, showing a different mode of devolution. The consecrator or founder of the worship of a deity becomes the *shebait*, and he and his heirs are presumed to be the proprietor and high priest of the establishment.²⁵ A suit for the proper conduct of

20. Per Krishnan, J. in *Parmananda v. Radhakrishna*, (1926) 97 I.C. 437=51 M.L.J. 258=1926 Mad. 1012.

21. *Ibid.*, (1926) 97 I.C. 437=51 M.L.J. 258=1926 Mad. 1012.

22. *Jagannath Das v. Birbadhra Das*, (1892) 19 Cal. 776 (779).

23. *Monohar Mukherjee v. Bhupendra Nath*, 1932 Cal. 791=37 C.W. N. 29 (F.B.); Per Rankin, C.J.

24. *Gnana Sambandha v. Velu Pandaram*, (1899) 23 Mad. 271=27 I.A. 69 (P.C.); also see *Muthukumaraswamia v. Subbarayya*, 1931 Mad. 505 (511)=133 I.C. 193=1931 M.W.N. 8.

25. *Gossami Sri Girdhariji v. Ramanlalji*, (1889) 17 Cal. 3=16 I.A. 137 (P.C.); also see *Monohar Mukherjee v. Bhupendra Nath*, 1932 Cal. 791

the Thakur's worship, resting as much on the right of the Thakur to have the conduct of his worship and his own custody placed in the right hands as upon the personal right of the plaintiff to property is a suit which would fall under Art. 124, or Art. 144 of the Limitation Act; the starting point being the unlawful possession, or adverse possession.²⁶ Where a mutwalli, or trustee of dedicated

Mutwalli, or trustee. property was constituted by a donor whose deed gave property for maintaining the worship of a *thakur*, and keeping up the *thakurbari*, the property is always the property of the *thakur*, under the management of the *mutwalli*, and, on that view, the **managership must revert to the**

Reversion of managership to founder. heirs of the person who endowed the property.²⁷ Where a *shebait* does not appoint his or her successor as provided in the will of the founder, and where there is no other provision for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder and the limitation applicable to a suit for possession of such an office is twelve years under Art. 124, Limitation Act.²⁸ In the case of a Hindu religious endowment the devolution of the trust upon the death or default of each trustee depends upon the terms upon which it was created or the usage of each particular institution where no express trust deed exists.²⁹ Taken with the recognised principle that when the worship of an idol is founded, the office of *shebait* is held to be vested in the heirs of the founder in default of evidence to show that he has disposed it of otherwise,³⁰ it necessarily follows that where a *shebait* appointed by the founder fails to nominate a successor in accordance with the conditions or usages of the endowment, the management reverts to the representatives of the founder.³¹ This proposition is fully supported by the **Privy Council** decision in *Gossammee Girdhariji v. Ramanlalji Gossami*,³² by the

(F.B.) (The office of *shebait* is hereditary and it is regarded in Hindu Law as immoveable property).

26. *Gossami v. Ramanlalji*, 17 Cal. 3=16 I.A. 137 (P.C.).

27. *Pret Koonwar v. Chutter Dharce*, 13 W.R. 296; Relied in 17 Cal. 3=16 I.A. 137 (P.C.), *supra*.

28. *Jagannath Prasad v. Runjit Singh*, (1897) 25 Cal. 354; also see *Girdhariji v. Ramanlalji*, 16 I.A. 137=17 Cal. 3 (P.C.) and *Jai Bansi Kunwar v. Chatterdhari*, 5 B.L.R. 181=13 W.R. 396, *supra* and *Sitaldas Babaji v. Pertap Chander*, (1909) 11 C.L.J. 2 (12)=3 I.C. 408.

29. *Sital Das Babaji v. Pertap Chunder*, (1909) 11 C.L.J. 2 (12)=3 I.C. 408; Relied on *Greedhars Doss v. Nundo Kishore Doss*, 11 M.I.A. 405=8 W.R. 25 (P.C.); *Muttia Ramalinga v. Perianayagam*, 1 I.A. 209; *Janaki v. Gopal*, 10 I.A. 32=13 C.L.R. 30=9 C.L.R. 766 (P.C.) and *Gendapuri v. Chattarpuri*, 13 I.A. 100=9 All. 1 (P.C.).

30. *Gossami Girdhariji v. Ramanlalji*, *supra*.

31. *Sitaldas Babaji v. Pertap Chander*, (1909) 11 C.L.J. 2 (12)=3 I.C. 408.

32. 17 Cal. 3=16 I.A. 137 (P.C.).

Calcutta decisions in *Peet Koonwar v. Chuterdharee Singh*,³³ *Ranjit Singh v. Jagannath Prosad Gupta*,³⁴ and *Jaganath Prosad v. Ranjit Singh*.³⁵ The same view has been repeatedly taken by the learned Judges of the Allahabad High Court³⁶; and substantially to the same effect is the view held by the Madras High Court in *Gajapati v. Bhagwan Doss*,³⁷ in which it was ruled that in the absence of a deed of endowment the obligations of the head of a *math* to the representatives of the founder can only be deduced from the usages of the institution. A Full Bench of the Madras High Court held in *Boidyo Gauranga v. Sudevi Mata*,³⁸ that it is competent to the heir of the founder of a religious or charitable trust, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees.

Where plaintiffs instituted a suit for a declaration that they were the *khadims* of a certain *durga*, and as such, entitled to perform the duties attached to that office, and the claim for *khadimi* rights was based partly by inheritance and partly by purchase, it was held that the relief claimed was a suit for an hereditary office

falling under Art. 124.³⁹ Where the testator appointed his wife trustee, and the plaintiff as joint trustee and directed that the succession thereafter should be hereditary, it was held that the office was hereditary subject to a temporary incumbency by a person not in direct line of succession.⁴⁰ A suit to

establish the plaintiff's right to receive the customary dues is quite different from a suit to recover a *certain sum* of money due as an emolument of an hereditary

office.⁴¹ This article applies only to cases where the defendant is himself at the time in wrongful possession of the office sued for⁴² and does not apply to suit for a declaration that the appointment of the defendant as an additional office-holder is invalid.⁴³

33. 5 B.L.R. 181=13 W.R. 396.

34. 12 Cal. 375.

35. 25 Cal. 354.

36. *Sheoratan Kunwari v. Ram Pargash*, 18 All. 227; *Chandra Nath v. Jadabendra*, 28 All. 689=A.W.N. (1906) 173 and *Sheo Prasad v. Aya Ram*, 29 All. 663=A.W.N. (1907) 210=4 A.L.J. 565.

37. 15 Mad. 44; also see *Sathappayyar v. Periasami*, 14 Mad. 1.

38. (1917) 41 I.C. 589=40 Mad. 612 (622) (F.B.).

39. *Sarkum Abu Torab v. Rahman Buksh*, (1896) 24 Cal. 83.

40. *Narayana Mudaliar v. Nagappa Mudaliar*, (1926) 93 I.C. 923=22 L.W. 870=1926 Mad. 245.

41. *Rathna v. Tiruvenkata*, (1899) 22 Mad. 351.

42. *Jalandhar v. Jhornla*, (1914) 42 Cal. 294 (P.C.); *Mohd. Sayid v. Jhiruddin*, (1926) 101 I.C. 771 (Oudh); *Chinnaswamy v. Srirangam*, (1928) 109 I.C. 771=1928 Mad. 377.

43. *Lakshmi Narayanappa v. Venkataratnam*, (1893) 17 Mad. 395.

1893. **NON-HEREDITARY OFFICE.**—In view of the definition of an hereditary office (*see* S. 1892, above) in *Parmananda v. Radhakrishna*,⁴⁴ it has been held that where the succession is by nomination by the holder

Succession by nomination.

Succession under a will.

in office of his successor, it is a **non-hereditary succession**. Intestate succession and succession under a will are two distinct and entirely different conceptions known to law. A person who succeeds under a will does not inherit as heir on an intestate succession. If a particular chela's title to succeed depends on his being preferred to the rest and nominated, by a voluntary act of the incumbent, such a claim cannot be described as a claim to an hereditary office.⁴⁵

Art. 120 applies where the claim to office, and the property appurtenant thereto is non-hereditary.⁴⁶ Art. 120, application of. Art. 124 is not applicable where the appointment to an office is not by succession through inheritance, but is made by nomination.⁴⁷ Where the plaintiff had held possession as *shebait*, and managed the properties connected with the endowment on the nomination of Hindu residents of the locality, it was held that Art. 120 applied to the suit for possession of an office, the appointment to which is made by nomination.⁴⁸ **A suit to recover possession as dharmakarta, based on prescription, and not on an hereditary title, is a suit for the possession of non-hereditary office, governed by Art. 120, Limitation Act.**⁴⁹ In the case of *Tammirazu Ramazogi v. Pantina Narsiah*,⁵⁰ it was held that when a suit was brought for an office, namely, the office of *dharmakarta* of a temple, to which certain immoveable property was attached, the article applicable was Art. 120, and not Art. 144, on the ground that the right to the land was only secondary to and dependant on the right to an office. This was relied upon in *Venkata Subbaramayya v. Surayya*,¹ for the view that the **office of karnam or village accountant** is an office in no way connected with the Hindu religion or usages. There is nothing to prevent its being held by a

44. (1926) 97 I.C. 437=51 M.L.J. 258=1926 Mad. 1012.

45. *Parmananda v. Radhakrishna*, (1926) 97 I.C. 437=51 M.L.J. 258.

46. *Salimullah v. Abdul Khayer*, (1909) 3 I.C. 419 (425)=37 Cal. 263=11 C.L.J. 304; Followed in *Kassim Hassan v. Hazra Begum*, (1921) 60 I.C. 165=32 C.L.J. 151; also see *Ram Piari v. Nandlal*, (1917) 42 I.C. 77=39 All. 636=15 A.L.J. 740.

47. *Jagannath Das v. Birbadhra*, (1892) 19 Cal. 776 (779).

48. *Ibid.*

49. *Kidambi Raghava Chariar v. Tirumalai Asari*, (1902) 26 Mad. 113; Relied on 19 Cal. 776 and 6 M.H.C.R. 301.

50. 6 M.H.C.R. 301.

1. (1880) 2 Mad. 283.

Christian or a Muhammadan. In the case of a suit for a non-hereditary office, the starting point must be taken to be, by analogy to S. 124, "when the defendant takes possession of the office adversely to the plaintiff."²

1894. SUIT FOR PROPERTY, APPURTENANT TO OFFICE.—It has been held that a claim to office and to property appurtenant thereto may be barred by limitation. If the office is not hereditary, Art. 120 is applicable. If, on the other hand, the office is hereditary, Art. 124, governs the matter.³ Their Lordships of the **Privy Council** decided in the case of *Balwant Rao v. Purunmal*⁴ that the twelve years' rule is applicable when there is no question for recovering any property for the trusts of the institution, and when the plaintiff sues only for his personal

Adverse possession of personal right to manage property. right to manage or to control the management of the endowment.⁴ **The right to an office with its emoluments can be**

acquired by adverse possession as such a right is treated like the right of the manager of a temple, or an *uraina* right where there is no question of the malversation of the trust property.⁵ In *Gnana Sambandha v. Velu Pandaram*,⁶ the **Privy Council** observed that

"Their Lordships are of opinion that there is **no distinction between the office (that of trustee) and the property of the endowment.** The one is attached to the other".

Following this principle, that there is no distinction between the claim to the office and the claim for property in regard to the application of Art. 124 of the Schedule, and of S. 28, Limitation Act, it has been held by the **Madras High Court** that a suit to recover possession of a choultry building belonging to a charity by one claiming to be its trustee is governed by this article.⁷ In *Kidambi Ragavachariar v. Thirumalai Asari*,⁸ the same High Court held,

"that the right to land which was the endowment of a temple was only secondary to and dependent upon, the right to the office (of trustee) and that, **if the right to recover the office was barred, the right to recover the land attached to it was equally barred**".

2. *Palaniyandi Malavarayan v. Vadamalai Oodayan*, (1913) 18 I.C. 373 (Mad.).

3. *Salimullah v. Abdul Khayer*, (1909) 3 I.C. 419 (424)=37 Cal. 263; Cf. *Gobind Ramanuj Das v. Ram Charan*, (1935) 62 C.L.J. 153 (A suit by shebait for declaration of right to office, and for possession of properties from persons unlawfully holding as shebaits, held governed by Art. 144, not being one for possession of a hereditary office, within Art. 124).

4. 6 All. 1=10 I.A. 90 (P.C.); Followed in *Nilakandan v. Padmanabha*, (1890) 14 Mad. 153.

5. *Alagirisami Naicker v. Sundareswara Ayyar*, (1898) 21 Mad. 278 (287); Relied on 10 I.A. 90 (P.C.) and 14 Mad. 153.

6. 23 Mad. 271=27 I.A. 69=4 C.W.N. 329 (P.C.).

7. *Singaravelu v. Chokkalinga*, (1923) 46 Mad. 525=1923 Mad. 88 (2)=70 I.C. 994=43 M.L.J. 737.

8. 26 Mad. 113.

The same rule was laid down in *Tammirazu Ramazogi v. Pantina Narsiah*,⁹ that the right to the land was only secondary to and dependent on the right to an office. This proposition is further illus-

Claim to office and
appurtenant property.

trated by the decision in *Govindasami Pillai v. Dakshinamurthi*,¹⁰ where the plaintiffs sued (a) for possession of certain rights in certain temples, (b) the consecrated idols therein and (c) for certain properties attached to the temples. The suit was dismissed as barred by time, and plaintiffs appealed, specially limiting their relief in appeal to (c). It was held that if the right to recover the office of trustee is lost by the dismissal of the suit, the right to recover a portion of the endowments must fall to the ground along with the trusteeship. In *Alagirisami Naicker v. Sundareswara Ayyar*,¹¹ where under a family settlement between two branches of a family, the hereditary office was to be held in rotation and the land enjoyed in equal shares, a suit by younger branch to recover a moiety of a village was dismissed on the ground that the offices and emoluments were indivisible, and went by right to the older branch of the family. In a suit by the elder branch later to establish right to the entire offices and to recover possession of the other villages, it was held that it was open to the defendant to assert in this suit a title by adverse possession, and that the defendant had acquired a divisible right to a moiety by twelve years' adverse possession and that the suit should, to that extent, be dismissed. Where

Co-trustees forming
a collective trustee.

trust property is managed in rotation by co-trustees, the possession of the office by each during his turn is not exclusive of or adverse to the other co-trustees. Though each of the co-trustees may during his turn in rotation be regarded in a sense as the acting or executive trustee for the year (or period), yet he holds the office and discharges the duty thereof on behalf of all the co-trustees and not on behalf of himself alone.¹² However, when the members of the junior branch of a family, the trusteeship of which was hereditary, devolving by inheritance on the male descendants of the last sole trustee by his two wives, had discontinued possession of the immoveable properties belonging to the trust as also performances of the duties usually appertaining to the office of trustee, and the members of the senior branch had been, in turns, successively in possession of the properties and had performed the

9. 6 M.H.C.R. 301; Relied upon in *Govindasami Pillai v. Dakshinamurthi*, (1910) 35 Mad. 92=8 I.C. 760=9 M.L.T. 105.

10. (1910) 35 Mad. 92.

11. 21 Mad. 278.

12. *Ramanathan v. Murugappa*, (1903) 27 Mad. 192; Affirmed on appeal in 29 Mad. 283 (288)=16 M.L.J. 265=33 I.A. 139 (P.C.).

duties, to the exclusion of and adversely to the members of the junior branch, it was held that **the right of members of the junior branch, as co-trustees, had been extinguished, by the operation of S. 28 of the Limitation Act**, not in favour of the plaintiff individually but in favour of the members of the senior branch as a body.¹³ Where emoluments are attached and the office is hereditary, the emolument will be subject to partition, in the strict sense of the term, like any other family property; but **all the co-trustees form, as it were, one collective trustee**, and must execute the duties of their office in their joint capacity.¹⁴

1895. ADVERSE POSSESSION.—We have seen in S. 1894,

Adverse possession against office-holder. *ante*, that the claim to hereditary office, like the claim to property may be lost or acquired by adverse possession.¹⁵ The proposition may be qualified by the statement that a person cannot acquire right to office by adverse possession so long as there is no person entitled as of right to act in the office under the provisions of the trust.¹⁶ A suit intended to be covered by Art. 124, must be one filed by a plaintiff who claims the office from a person who at the time holds the office himself.¹⁷ Where a plaintiff sues the trustees of a *Devasthanam* for the recovery of emoluments attached to an office therein, and there is no allegation that the office was held adversely by any other person, Art. 124 has no application.¹⁸ In order that a trustee may prescribe for an hereditary trusteeship, it is necessary that he must have prescribed for that particular form of title. A person who has acquired title as a mere trustee cannot acquire the title of a hereditary trustee by merely asserting it in proceedings in Court.¹⁹

A trusteeship with power to appoint a successor is well-known to and recognised by the law, and may be prescribed for.²⁰ A suit to oust a trespasser from the office of a *Mutwalli* which is not hereditary becomes barred by time, under Art. 120, Limitation Act, if no such suit is brought to oust him within six years, and the trespasser would acquire a complete title for purposes of litigation or anything

13. *Ramanathan v. Murugappa*, (1903) 27 Mad. 192.

14. *Ibid.*

15. *Jagannath v. Birbadhra*, (1892) 19 Cal. 776; *Kidambi v. Tiru*, (1902) 26 Mad. 113; *Ramanathan v. Murugappa*, (1903) 27 Mad. 192; S.C. 33 I.A. 139 (P.C.); *Sital Das v. Protap Chandra*, (1909) 3 I.C. 408=11 C.L.J. 2; also see *Balwant Rao v. Purun Mall*, (1883) 10 I.A. 90=6 All. 1 (P.C.); and *Gossamee Girdharji v. Ramanlal*, (1889) 16 I.A. 13 (P.C.).

16. *Sah Dharam Narain v. Gur Saran*, 116 I.C. 278=1929 All. 404=1929 A.L.J. 189.

17. *Chinnaswamy Thathachariar v. Srirangam Nallan*, (1928) 109 I.C. 771=1928 Mad. 377.

18. *Ibid.*

19. *Pichai Pillai v. Lingam Iyer*, 108 I.C. 199=1928 Mad. 268.

20. *Kassim Hasan v. Hazra Begam*, (1921) 60 I.C. 165=32 C.L.J. 151; also see *Annasami Pillai v. Ramakrishna*, (1900) 24 Mad. 219.

connected with the endowment.²¹ A suit for a hereditary office is barred by adverse possession of 12 years, under S. 28, and Art. 124, Limitation Act, or Art. 144, Limitation Act. But in the case of a non-hereditary office, the period would be still shorter, *viz.*, six years, under Art. 120 of the Limitation Act.²²

1896. Where the predecessor has allowed his rights to the hereditary office, to get barred by limitation, those who are next in succession to him should also be deemed to have lost their rights.²³

Adverse possession against next in succession.

In *Thathachariar v. Veerasami Mudali*,²⁴ it was held that plaintiffs, hereditary *archakas* of the suit temple, who had been out of possession and enjoyment of that office for about 60 years, were barred under Art. 124, Limitation Act, when they brought the suit against the *archakas* in possession, and the trustees of the temple by whom these *archakas* for many years had been appointed. In *Pydigantam Jagannatha Row v. Rama Doss Patnaik*,²⁵ a claim for the recovery of an hereditary office by the reversioners of a Hindu widow was held barred under Art. 124 of the Limitation Act, where the widow had transferred the right of trusteeship together with certain temple properties to the first defendant, and the possession by the defendants during the lifetime of the widow was adverse to the plaintiffs, who derived their title "from and through" the widow notwithstanding the fact that they were not her heirs in the strict sense of the word.

Illustrations.

(1) A Full Bench of the Bombay High Court held in *Radhabai v. Anantrao*,²⁶ that in the absence of fraud and collusion, adverse possession for twelve years during the lifetime of one holder of service *watan* lands is a bar to succeeding holders. This decision has been commented upon in the Privy Council case of *Madhavrao v. Raghunath*^{26-a} and taken as holding that a stranger to the *watan* who had got possession of service *watan* lands

21. *Debendranath Mitra v. Sefatullah*, (1927) 99 I.C. 205 (211)=1927 Cal. 130=44 C.L.J. 339=31 C.W.N. 184.

22. *Ram Piyare v. Nandlal*, (1917) 42 I.C. 77=39 All. 636=15 A.L.J. 740.

23. *Muthukumaraswami v. Subbayya*, 1931 Mad. 505 (511)=1931 M.W. N. 8=133 I.C. 193; Relied on *Gnanasambandha v. Velu Pandaram*, (1900) 23 Mad. 271=27 I.A. 69=2 Bom. L. R. 597 (599) (P.C.); also see *Subramania Gurukkal v. Ammakannu*, (1921) 41 M.L.J. 450 and *Dhanushkotirayadu v. Venkayala Venkatarathnam*, (1919) 38 M.L.J. 320 (Each successive holder of an office cannot get a fresh right to recover the lands attached to the office—S. 28 gives a prescriptive title on adverse possession over twelve years); cf. *Muppidi Papayya v. Ramana*, (1883) 7 Mad. 85 and *Mahomed v. Ganapati*, 13 Mad. 277.

24. (1919) 49 I.C. 393 (Mad.).

25. (1904) 28 Mad. 197; also see and cf. *Narayan v. Lakshman*, (1915) 39 Mad. 456=28 M.L.J. 571=29 I.C. 1 (A suit by succeeding trustee to recover the estate from the alienee will be governed by Art. 124).

26. (1885) 9 Bom. 198 (F.B.); cf. 47 Bom. 798=1923 P.C. 205=74 I.C. 362 (P.C.).

26-a. 47 Bom. 798 (P.C.).

by an absolute assignment to him by a grantor, who was at the time of the grant the *watandar* could successfully defend a suit for possession of those lands by a subsequent *watandar* by proving that after the death of the grantor he had been in undisturbed possession of the lands for a period of twelve years.

(2) In *Chidambaram Chetti v. Minammal*,²⁷ where the holder of the office of trustee in a temple succeeded to the office in 1893, but his predecessor had remained in office for over twelve years, yet he had never sued for the recovery of certain lands, a suit brought after 1893 to recover the said lands on the ground that they provided the emoluments of the office of *meikaval* in the temple was held barred by limitation, the adverse possession held during the previous office-holder's time barring his successor.

(3) In *Swamirao v. Padapa*,²⁸ where property in question part of a *Desai watan* and as such held on service tenure was subject to the rule that alienation by way of mortgage of any portion of the *watan* property had no force beyond the life of the *watandar* who mortgages it, and the same had been mortgaged by one of the widows then recognised *watandar* in possession, but the plaintiff, her step-son was the true heir entitled from his birth, it was held by the Privy Council, reversing the judgment of the High Court, that the mortgage was void against the heir and had no force beyond the life of the *watandar* who had executed it.

(4) Where *Khazi inam* lands which are inalienable and impartible are held adversely to the office-holder for more than twelve years, the person in adverse possession acquires a prescriptive title to the lands as against the holder of the office and his successors.²⁹ In *Neelachalam v. Kamarazu*,³⁰ it was held that the Privy Council ruling in 23 Mad. 271 (P.C.), was applicable to lands alienated by the holder for the time being of the hereditary office of *karnam*, and that possession adverse to the holder of the *karnam's* office is adverse to his successors. Where an alienation of land appertaining to an hereditary office is good for the lifetime of the alienor, limitation commences to run against the successor not from the date of the alienation but from the date of the alienor's death. It is otherwise when possession is adverse from the start.³¹

1897. The statute of limitation will not run where there is no person competent to sue. This is the principle underlying S. 17 of the Limitation Act,³² viz., that cause of action could not be said to arise before there is any body in

27. (1898) 23 Mad. 439.

28. (1892) 18 Bom. 22; Reversed in 24 Bom. 556 (P.C.).

29. *Najavatti Alli v. Mujaffar Alli*, (1923) 77 I.C. 568=45 M.L.J. 791=18 L.W. 887.

30. 14 M.L.J. 438; Followed in *Idarapalli v. Venkayla*, 59 I.C. 65=38 M.L.J. 320=11 L.W. 453 (Art. 144 applied to a case of this sort).

31. *Per Hughes, J.*, in *Najavatti Alli v. Mujaffar Alli*, (1923) 77 I.C. 568=45 M.L.J. 791=18 L.W. 887.

32. *Palaniyandi Malavarayan v. Vadamalai Oodayan*, (1913) 18 I.C. 373 (Mad.).

whom it vests, which is followed in some leading cases.³³ Effect is given to this principle in suits for the recovery of an office by providing that time would run only when the possession of the defendant becomes adverse to the plaintiff.³⁴ There can be no adverse possession of trust property while the office of trustee is vacant, as there is then no person who is capable of taking proceedings to protect the trust property. And a trustee appointed to the office can maintain a suit for possession at any time within 12 years from the date of his appointment.³⁵ It seems

"undesirable that the omission on the part of the public or the Advocate-general to take steps to get a trustee appointed should make possible for a person in possession of the office without a title to acquire the office by virtue of his occupation in the absence of any one entitled to claim it from him. The same reasoning would apply to the omission of a person having the right to appoint to exercise that power."³⁶

Accordingly, where no trustee was appointed for suit temple by the committee of management for 24 years, *i.e.*, from 1883 to 1907, when the plaintiff was appointed to the office, and the defendants had been in possession of the office before 1907, the year of plaintiff's appointment: it was held that plaintiff's adverse possession commenced only from 1907, when a trustee was lawfully appointed.³⁷ Similarly, in another Madras case, where one *V*, held the office of Sri Pandaram of a temple till 1884, the facts were that on his relinquishment of office, his widow, *T*, was permitted by the trustees to perform the duties of the office by her proxy *A*, who continued in office till the dismissal of *T*, in 1889. Afterwards no one was appointed to the office till 1900 when the defendant was appointed. From 1889 to 1900 the trustee had the duties of the office performed by his servants. In an action by plaintiff for possession of the office and of the properties attached thereto in 1905, on the ground that he was the reversioner entitled to them after *T*, it was held that the suit was not barred under Art. 124, Limitation Act as the defendant's possession did not commence to be adverse to the plaintiff before the date of his appointment in 1900, and that he was not entitled to tack on the possession of *A* to his own.³⁸

33. See Darby and Bosanquet, 2nd Edn., pp. 49 and 50; also see *Chan Kit San v. Ho Fung Hung*, 1902 A.C. 257=71 L.J.P.C. 49; *Atkinson v. Bradford*, L.R. 25 Q.B. 377=59 L.J.Q.B. 360; *Jeevan Das v. Kubeerooddeen*, 2 M.I.A. 390 (406); 6 W.R. 3 (P.C.) and *Murray v. The East Indian Company*, 106 E.R. 1167; 24 R.R. 325; 5 B. & Ald. 294.

34. *Palaniyadi v. Vadamalai*, (1913) 18 I.C. 373 (Mad.); also see *Sah Dharam Narain v. Gur Saran*, 116 I.C. 278=1929 All. 404.

35. *Manikkam Pillai v. Thanikachalam*, (1916) 34 I.C. 945=2 M.W. N. 87.

36. *Palaniyadi v. Vadamalai*, (1913) 18 I.C. 373 (Mad.).

37. *Ibid.*; on appeal 28 I.C. 956=2 L.W. 723.

38. *Umaiiorubhagam Pillai v. Vaithinathaswami*, (1911) 10 I.C. 95=9 M.L.T. 485.

1898. The rule as to adverse possession among co-owners, *viz.*, that in order to treat possession of one co-owner as adverse, ouster must be proved, was applied by the Calcutta High Court in *Panchanan Banerjee v. Surendranath Mukerjee*,³⁹ where the right to religious office which devolved on three brothers was held by one of them and his heirs. Where several co-trustees or co-managers of trust property hold the office by rotation, and enjoy a share in the immoveable property, a division of the rights and duties of the office cannot be made, as all the co-trustees form, as it were one collective trustee; and the possession of the office, and its emoluments by one trustee in his turn is on behalf of all the co-trustees, and neither exclusive nor adverse to the other trustees.⁴⁰

1899. **VOID ALIENATION OF HEREDITARY OFFICE AND ENDOWED PROPERTY.**—**23 Mad. 271 (P.C.).**—Their Lordships of the Privy Council, have held in *Gnanasambandha v. Velu Pandaram*,⁴¹ that as the sale of the management and property of a religious endowment by the hereditary manager was beyond the vendor's legal powers, it was *void*, and adverse possession, under Art. 124 of Schedule to the Limitation Act, consequently ran *forthwith* in favour of the vendee, whose title after 12 years was unassailable. The vendor's title was extinguished under S. 28 of the Limitation Act, on expiry of 12 years during the vendor's lifetime, and this affected adversely the right of suit by his son (who claimed through the vendor as his heir) to recover possession of the management and property from the purchaser, notwithstanding that the suit was brought within 12 years of the vendor's death. As observed by the **Patna High Court**, in *Nathe Pujare v. Radha Binode Naik*,⁴² a trustee of a public religious endowment cannot alienate his office and duties or the possession of the trust property at his own will either by sale or gift, so as to create a valid title in the transferee. He cannot even create a life interest in favour of the donee in respect of the *shebaiti* right. He has no beneficial interest beyond what may be expressed in the trust and has no powers of alienation beyond what may be necessary or beneficial for the purposes of the trust. Where, a person has been performing the duties of a *shebait* of an idol, and claims the right to hold that office, S. 10 of the Limitation Act has no application, and he can acquire that right

39. 1930 Cal. 180=50 C.L.J. 382=126 I.C. 36; cf. *Ramanathan v. Murugappa*, (1903) 27 Mad. 192 (All the co-trustees held, in the eye of law, to be one collective trustee).

40. *Ramanathan v. Murugappa*, (1903) 27 Mad. 192; also see and cf. *Alagirisami v. Sundreswar*, 21 Mad. 278 (Divisible right of one branch of family as a whole body against another branch).

41. (1900) 23 Mad. 271=27 I.A. 69=2 Bom. L. R. 597 (599) (P.C.); Reversing 19 Mad. 243.

42. (1918) 47 I.C. 290=4 P.L.W. 283=3 P.L.J. 327.

as against the original *shebait* by adverse possession.⁴³ By Art. 124 of the Limitation Act, a suit for possession of an hereditary office is barred after twelve years from the time when the defendant takes possession adversely to the plaintiff. Arts. 134 and 144 do not apply to such cases.⁴⁴ In cases of this nature, the

mere fact that the alienor is a female makes no difference, and consequently her successor in office cannot, either by

Alienations by a female office-holder. analogy to Art. 141, or otherwise claim to sue within twelve years of her death.⁴⁵ Where a childless widow who succeeded to her husband as a trustee, transferred the right of trusteeship together with certain temple properties to the first defendant, and after her death the plaintiffs as the persons entitled to be trustees in succession to her brought the suit to establish their right as trustees and to have the transfer in favour of the first defendant declared invalid, it was held that the suit was barred under Art. 124 of the Limitation Act. The property transferred with the trusteeship was only recoverable by the plaintiff in their right as trustees, which right had ceased to exist through the operation of the law of limitation.⁴⁶

A *stani*, in Malabar, holds the position analogous to that of a Hindu widow so far as he holds the

Suit by a *stani* for possession. property for life. An alienation by a *stani* of the absolute right of management of trust properties vested in him is invalid; and a suit by a *stani* for possession of stanom properties against a person claiming title adversely thereto is governed by Art. 124.⁴⁷ For this purpose the *stani* is deemed to be the heir of his predecessor in office, and is bound by defendant's acts of adverse enjoyment against the previous holder. The plaintiff cannot claim exemption from limitation on the ground that the suit was brought within twelve years of his succession to the *stanom*.⁴⁸ Lands held on service-

43. *Nathe Pujare v. Radha Binode Naik*, (1918) 47 I.C. 290=3 P. L.J. 327; also see S. 1895, ante, "**Adverse possession against office-holder**"; *Ram Piari v. Nand Lal*, (1917) 42 I.C. 77=39 All. 636=15 A.L.J. 740; *Ramanathan v. Murugappa*, (1903) 27 Mad. 192; s.c. 33 I.A. 139 (P.C.).

44. *Nathe Pujare v. Radha Binore Naik*, 47 I.C. 290=4 Pat. L. W. 283=3 Pat. L. J. 327; Relied on *Balwant Rao v. Puran Mal*, 6 All. 1=10 I.A. 90=13 C.L.R. 39 (P.C.).

45. *Pydigantam Jagannadha v. Rama Doss Patnaik*, (1904) 28 Mad. 197; also see *Suppa Bhattar v. Suppa Sockaya*, (1915) 29 M.L.J. 558 (568) and *Lilabati Misra v. Bishun Chobey*, (1907) 6 C.L.J. 621.

46. *Ibid.*, 28 Mad. 197.

47. *Raja of Palghat v. Kannaupra Nair*, (1917) 42 I.C. 22=41 Mad. 4=33 M.L.J. 26.

48. *Ibid.*

tenures are inalienable beyond the lifetime of the office-holders.⁴⁹

Service-tenures.

Similarly, an alienation by a watandar or a ghatwal is good only during his lifetime.⁵⁰

A *ghatwal* does not claim through his father as his predecessor, and is not included in the word "plaintiff" (S. 2, Limitation Act).¹ A *matadhipathi* cannot make nor validate a transfer beyond his transfer beyond his tenure of life. Therefore he can contest an alienation and sue for possession within twelve years of his becoming such *matadhipathi*.² A permanent lease by such a Head will only enure for the grantor's lifetime, and possession of the lands forming the emoluments would become adverse only when the succession opens on the death of the alienor.³ The ruling in *Vidyavaruthi's* case is not opposed to the view taken in 23 Mad. 271 (P.C.).⁴ The view taken by Devadoss, J., in *Rama Reddy v. Ranga Dass*,⁵ does not seem to be correct, as observed by Mitra, on Limitation, p. 1492.

1900. The plea that S. 28 of the Limitation Act cannot apply

Tacking possession by adverse holders.

to the office of manager or *sarbarohkar*, as it is not "property", was repelled by their Lordships of the Privy Council in *Gnanasambandha v. Velu Pandaram's case*.⁶ In a suit for *dharma-kartaship* of a *pagoda*, by the plaintiff as the eldest surviving male member of the founder's family, it was found that a former *dharmakarta M*, was succeeded in the office by his brother *L*, who left it by will to his sister *A*, and her husband *R*, jointly, and that on *R's* death, *A* left the office by will to her sister's son, the defendant. It was held that the plaintiff was precluded from setting up a fresh right as accruing to him on the death of "*A*", as his right had been absolutely extinguished by S. 28, Limitation Act (S. 29, Act IX of 1871), long before the death of "*A*".⁷ The term "defendant" has been held to include the predecessors of the defendant in office where the successive persons in possession of the office claim under the same title. For instance, an *archaka* in possession of his office appointed by a temple trustee for less than twelve years can tack on the possession of his predecessor in

49. *Muppidi v. Ramana*, (1883) 7 Mad. 85; *Pakkiam v. Seetharama*, (1903) 14 M.L.J. 134; also see *Anjaneyalu v. Srivenugopala*, (1922) 45 Mad. 620=42 M.L.J. 477 (F.B.).

50. *Narasimha Krishnaji v. Vaman Vankatesh*, (1909) 34 Bom. 91=4 I.C. 249.

1. *Prosanna Kumar v. Srikantha Row*, (1912) 40 Cal. 173.

2. *Muthusamier v. Methanithi*, (1913) 19 I.C. 694 (Mad.).

3. *Vidyavaruthi v. Balusami Aiyar*, (1921) 44 Mad. 831 (P.C.).

4. *Parkashdas v. Janki*, (1926) 95 I.C. 27=1926 Oudh 444 and *Badri Narayan v. Kailash*, 93 I.C. 303=1926 Pat. 37.

5. 49 Mad. 543=50 M.L.J. 589.

6. 23 Mad. 271 (279) (P.C.); Reld. upon in *Ram Piari v. Nandlal*, (1917) 42 I.C. 77=39 All. 636=15 A.L.J. 740.

7. *Manally Chenna v. Mangadu*, 1 Mad. 343.

office similarly appointed.⁸ However, defendant's possession did not commence to be adverse to the plaintiff before the date of his appointment, where the office was previously held by a person *A*, on behalf of the widow, through whom the plaintiff claimed and the defendant was not allowed to tack on the period during which no one was appointed to the office.⁹ No doubt he might tack on to the period of his own possession the time during which any one else through whom he claims was in possession.¹⁰ In *Annasami Pillai v. Ramakrishna*,¹¹ the trusteeship of certain public temples was handed down from *M* to his son, and then to his grandson, after which the younger brother of grandson succeeded to the office. He, by will, appointed his sister, and her husband as trustees to succeed him with power to appoint and then the sister by will appointed his son-in-law, the defendant, as his successor. Defendant was a great-grandson of *M*, and a rightful trustee by appointment of one who had acquired a valid title to the trusteeship by prescription. It was held that plaintiff's suit was barred and a trusteeship with power to appoint a successor is an estate well known to and recognised by law and may be prescribed for.

1901. STARTING POINT OF LIMITATION.—Art. 124 prescribes a period of twelve years' limitation for a suit for possession of an hereditary office, and lays down that the time will begin to run from the date when the defendant takes possession of the office adversely to the plaintiff.¹²

"It seems to be the plain meaning of the article that the plaintiff's right to recover an hereditary office would not be barred unless the defendant is found to have been in possession of it adversely to the plaintiff for twelve years, and the fact that the plaintiff did not have possession of the office at any time within twelve years previous to the suit would not be sufficient in itself to bar his claim. **The Explanation** added to Art. 124 as to how an hereditary office is possessed makes the matter still clearer."¹³

The analogy of Art. 142 cannot be invoked in interpreting Art. 124, as the two articles substantially differ in their wording.¹⁴ The starting point of limitation, according to Art. 124, is the time "*when the defendant takes possession of the office adversely to the plaintiff*". Where the defendant's possession was admittedly as agent of a widow, and the duties of the office were performed till the second defendant's appointment by servants appointed by the

8. *Krishnaswami Thathachariar v. Veeraswami Mudali*, (1918) 36 M.L.J. 93.

9. *Umayurubhagam v. Madavar Vilagam*, (1911) 10 I.C. 95=9 M.L.T. 485.

10. *Ibid.*; see Mitra on Limitation.

11. (1900) 24 Mad. 219; also see *Kassim Hassan v. Hazra Begum*, (1921) 60 I.C. 165=32 C.L.J. 151.

12. *Raghunathachariar v. Tiruvengada*, 19 M.L.J. 257=6 M.L.T. 167=3 I.C. 123.

13. *Ibid.*

14. *Ibid.*

trustees, the plaintiff having an hereditary right to succeed to the office could not be barred by limitation, where the period during which no one was appointed to the office could not enure to defendant's benefit.¹⁵ The provision rests on the principle long recognised that cause of action does not arise until there is a person competent to sue. *See* (S. 1897, above).¹⁶ The explanation in col. 3, Art. 124, Limitation Act, only lays down a general rule for determining the question of possession in respect of offices and is applicable to cases governed by Art. 120 wherever the claim is in substance one to recover possession of an office; *e.g.*, where the defendant is in possession and management of a non-hereditary office and the properties, and set up a right in himself, and claimed them adversely to plaintiff's villagers.¹⁷

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
125.	Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her remarriage.	12 years.	The date of the alienation.

SYNOPSIS.

- 1902. Corresponding provisions.
- 1903-1905. **Scope and applicability.**
- 1903. Declaratory suits: during her life.
- 1904. Remedy of possession—Art. 141.
- 1905. Suit not restricted to male reversioners.
- 1906-1911. **Conditions of applicability.**
- 1906. (i) *during the life of female life tenant.*
- 1907. (ii) *Title to possession, on her death.*
- 1908. (1) Suit by a remote reversioner—Art. 120.
- 1909. (2) Recent Madras view—Art. 125.
- 1910. (3) Representative suit on common cause of action.
- 1911. (iii) *Alienation by a Hindu or Mahomedan female.*
- 1912-13. **Article explained.**
- 1912. "Alienation", meaning of.
- 1913. "Land", meaning of.
- 1914. Starting point of limitation.

15. *Umayyurubhagum v. Madavar*, 10 I.C. 95=9 M.L.T. 485.

16. *Palaniyandi v. Vadamalai*, (1913) 18 I.C. 373 (375) (Mad.).

17. *Rajagopala v. Ramasubramania*, 1935 Mad. 449=1935 M.W.N. 503.

NOTES.

1902. **CORRESPONDING PROVISIONS.**—Under Act XIV of 1859, cl. 12 of S. 1 governed such suits.

The corresponding Art. 124, in Act IX of 1871 was worded thus:—

“suit during the life of a Hindu widow by a Hindu entitled to the possession of land on her death to have an alienation made by the widow declared to be void except for her life”—“Twelve years—The date of alienation.”

Art. 125 of Act XV of 1877, Sch. II, made considerable alterations in the language of Art. 124 of Sch. II of Act IX of 1871, enlarging its scope. (1) The words “Hindu or Muhammadan female” were substituted in place of “Hindu widows”. (2) The words “entitled to the possession of land on her death,” were replaced by the words “who if the female died at the date of instituting the suit, would be entitled to the possession of land”,

indicating that under the Act of 1877, the operation of the article is not confined to the person who would be the actual reversioner on her death, but it applies to suits by persons who form the reversionary body at the date of the institution of the suit. (3) The words “or until re-marriage” were added after the words “for her life”. Art. 125 of the present Act IX of 1908, is the same as Art. 125 of Sch. II of Act XV of 1877.

1903. **SCOPE AND APPLICATION.**—(1) This article is confined to **declaratory suits** “during the life” of a Hindu or Muhammadan female, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage”. This covers cases contemplated by S. 42, illustration (e).

“The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.”

A **suit for declaration** that a gift by a Hindu widow is void as against the reversionary heirs of her husband is a typical case contemplated by the Specific Relief Act I of 1877 (S. 42) as is shown by the explanation lettered (e) to that section, and such suits fall for the purposes of limitation, under Art. 125 of Sch. I of the Limitation Act.¹⁸ (2) A Hindu reversioner has no right

During the life. or interest in *praesanti* in the property which a female owner holds for her life,

18. *Fateh Singh v. Jagannath*, (1925) 91 I.C. 280=1925 P.C. 55=47 All. 158=52 I.A. 100 (P.C.); *Saudagar Singh v. Pardip Narain Singh*, (1918) 43 I.C. 484=45 Cal. 510=1917 P.C. 196=45 I.A. 21 (P.C.) and *Lahori v. Radho*, 72 P.R. 1906.

until it vests in him on her death, should he survive her. His right becomes concrete only on her demise; until then it is a mere *spes successionis*.¹⁹ Art. 125 of the schedule to the Limitation Act refers only to suits brought during the lifetime of the widow whose alienation is impeached.²⁰ The suit for a declaration may be by the persons presumptively entitled to a declaration of their title as presumptive, or as sometimes called reversionary heirs, that a certain deed which was executed by the Hindu widow in possession, and purporting to confer the absolute estate in the property on one of the reversionary heirs, is not binding on the other reversionary heirs.²¹ A suit lies by the collaterals of an occupancy tenant for a declaration that an alienation by his widow is of no effect on their reversionary interest.²² But, a suit by a reversioner for a declaration that an adverse possession set up by the defendants (who were originally tenants) in respect of certain properties is not binding on the reversioner, and that he is entitled to succeed to the properties on the death of the widow, is not a suit falling under Art. 125, and will be governed by Art. 120 of the Limitation Act.²³

1904. Where a suitor cannot have the remedy of possession made over to him till the widow's death, he is not thereby debarred from suing for a declaratory decree.²⁴ This article does not in any way affect the provisions of Art. 141 of the Limitation Act, which on the death of a widow, or female life-tenant, gives a new cause of action to the reversioners entitled to claim possession of the property to sue to set aside her alienations.²⁵ A suit to set aside alienations of ancestral property made by a childless Hindu widow during her life-tenancy may be brought at any time within twelve years from the death of the widow²⁶ and the reversioner will be entitled to recover possession, provided that the deeds impugned are proved to be invalid.²⁷ A suit for declaration during the lifetime of the female life-tenant to set aside her alienation is not obligatory, and it does not interfere with the right of reversioners to recover possession of real property within twelve

19. *Amrit Narayan Singh v. Gaya Singh*, (1918) 44 I.C. 408=45 Cal. 590=45 I.A. 35=1917 P.C. 95 (P.C.).

20. *Bhagwanta v. Sukhi*, (1899) 22 All. 33=19 A.W.N. (1899) 159 (F.B.).

21. *Saudagar Singh v. Pardip Narain Singh*, (1918) 43 I.C. 484=1917 P.C. 196=45 I.A. 21=45 Cal. 510 (P.C.).

22. *Gami v. Mt. Khio*, 205 P.R. 1889.

23. *Ramaswami v. Thayyammal*, 26 Mad. 488 (490).

24. *Nur Buksh v. Mt. Fajjo*, 121 P.R. 1876.

25. *Pershad Singh v. Chedee Lall*, (1871) 15 W.R. 1; *Santokhee Thakoor v. Mt. Balasee*, (1868) 10 W.R. 276.

26. *Tiluck Roy v. Phoolman Roy*, (1867) 7 W.R. 450.

27. *Rash Beharee v. Burmeesur*, (1868) 10 W.R. 30.

years of her death.²⁸ The Judicial Committee have laid down that the reversioner may treat the alienation which purports to extend beyond the life of the limited owner as a nullity and he may sue for possession at any time within twelve years of the death of the limited owner without first seeking to set aside the transfer in favour of the defendant, where the inheritance is not transferred so as to bind the reversioners.²⁹ A reversionary heir cannot sue for possession during the lifetime of the widow, or female life-tenant, because during her life the estate of deceased is represented by her as the heir at law.³⁰ A party desirous, as a reversioner, to obtain a declaration of his rights affected by the sale or gift made by a Hindu widow, must bring his suit within twelve years of the *alienation*. After the death of the widow, the remedy open to him is of a different description.³¹

1905. Section 42, Specific Relief Act, or illustration (e), cannot restrict declaratory suits merely to male reversionary heirs or to persons entitled to succeed in absolute estate.³²

Declaratory suit not restricted to male reversioners.

A female reversioner would be competent to contest an alienation by a female if she proves two things, (a) that she is in fact to succeed on the death of the alienor; (b) that the alienor is holding as a female with only a limited estate resembling that of a widow.³³ This Art. 125 would apply to a right to sue for a declaration impugning the alienation accruing at the date of alienation.³⁴ Thus, a **widow entitled to collateral succession**,³⁵ or a **married daughter** where there are no male kindred at all,³⁶ as nearest living reversioners would be competent to sue for a declaration to set aside the alienation made by a life-tenant. A **daughter** can maintain a declaratory suit effected by her mother or step-mother.³⁷ But, a female reversioner cannot

28. See Art. 141, Limitation Act; also see *Kunjaru Venkataramanayya v. Dejappa Konde*, (1917) 42 I.C. 540=34 M.L.J. 319.

29. *Bijoy Gopal Mukerjee v. Krishna Mahishi*, 34 Cal. 329=34 I.A. 87 (P.C.); *Kondama Naicker v. Kandasami*, 47 Mad. 181 (189)=79 I.C. 961 (P.C.).

30. *Nobin Chander v. Issur Chander*, (1868) 9 W.R. 505.

31. *Bishonath Surmah v. Srcemathny Shushee Mookhee*, (1873) 20 W. R. 1.

32. *Lahori v. Radho*, 72 P.R. 1906.

33. *Maqoudul Nissa v. Kaniz Zohra*, 135 P.R. 1908=194 P.W.R. 1908.

34. *Bhagwanta v. Sukhi*, (1899) 22 All. 33=19 A.W.N. (1899) 159 (F.B.).

35. *Lahori v. Radho*, 72 P.R. 1906.

36. *Mt. Nur Khanum v. Mt. Bansi Begam*, 90 P.R. 1894.

37. *Mt. Bhagwanta v. Sukhi*, (1899) 22 All. 33=19 A.W.N. (1899) 159 (F.B.); *Mt. Bal Kaur v. Mt. Har Kaur*, (1928) 108 I.C. 184=1928 Lah. 242.

maintain an action to declare an alienation by a female life-estate holder inoperative where there is an absolute estate intervening in favour of another female.³⁸

1906. CONDITIONS OF APPLICABILITY OF

(i) During the life. **ART. 125.**—(1) We have noticed in para. 1903, *ante*, that the first essential of a declaratory suit such as contemplated by S. 42, illustration (e), which would be governed by Art. 125 of the Limitation Act is a suit “*during the life*” of the female life-tenant whose alienation is sought to be set aside by a male reversioner, or by a female reversioner, entitled to succeed the alienor on her death. The remedy lies under Art. 141, Limitation Act, for a possessory suit after the death of the alienor.³⁹

1907. The second point to be observed is that the plaintiff must be a person who, *if the female died on the date of instituting the suit would be entitled to the possession of the land.*

(ii) Title to possession on her death.

Thus in the case of *Narayana Aiyar v. Rama Aiyar*,⁴⁰ Art. 125 was not applied to a suit by an adopted son to set aside alienations effected by his maternal grandmother on two grounds, *viz.*, that the suit was not brought during the life of the alienating female, and again that the plaintiff was not entitled to the possession of the land at the date of instituting the suit, as his mother and his aunt were alive.

Article 125, therefore, contemplates suits for declaration of the invalidity of an alienation by a female life-tenant by the nearest reversioner at the date of institution of the suit; and it has no application to suits by a remote reversioner,⁴¹ though such suits are maintainable under S. 42, Specific Relief Act, under certain circumstances, *e.g.*, where the nearer reversioners have precluded themselves from suing,⁴² or when the immediate reversioner is also a female having only a limited interest.⁴³

38. *Thenirkulam Muthusami Iyer v. Kalyani Ammal*, (1917) 38 I.C. 223=40 Mad. 818; Relied on *Chidambara Reddiar v. Nallammal*, 5 I.C. 164=33 Mad. 410.

39. See para. 1904, above.

40. (1913) 20 I.C. 625=38 Mad. 396 (399) (Art. 120, applied).

41. *Abinash v. Harinath*, (1904) 32 Cal. 62; *Kunwar v. Bindrabun*, (1914) 37 All. 195; *Bhagwanta v. Sukhi*, (1899) 22 All. 33 (F.B.) and *Rani Anand Koer v. Court of Wards*, (1880) 8 I.A. 14 (P.C.).

42. *Bhikaji Apaji v. Jagannath Vithal*, 10 Bom.H.C.R. 351; also see and cf. *Koer Golak v. Rao Kurn*, (1871) 14 M.I.A. 176 (193) (A case of adoption).

43. *Abinash v. Harinath*, (1904) 32 Cal. 62; Relied on *Balgobind v. Ram Kumar*, (1884) 6 All. 431; also see *Bhagwanta v. Sukhi*, (1899) 22 All. 33 (F.B.).

1908. (1) There is a considerable conflict of view on the question whether Art. 125 covers a suit by a remote reversioner, when he is allowed under the circumstances to bring

a suit for declaration, such as may admittedly be instituted by the nearest reversioner, who is entitled to possession if the female life-tenant were to die on the date of the institution of the suit.

In *Rani Anund Koer v. Court of Wards*,⁴⁴ their Lordships of the **Privy Council** held that a contingent remote reversionary heir who had neither alleged nor proved that there were no nearer reversionary heirs in existence, or that they had precluded themselves from suing, cannot be allowed to maintain a suit for setting aside the adoption by the widow, and a decree declaratory thereof alleged to have been obtained by the defendant. A right to bring such a suit under Art. 125 is limited to the presumptive reversionary heir. But, where the nearest reversioner at the time when the alienation takes place is charged as concurring in them, the next presumable reversioner would be entitled to question them.⁴⁵ A daughter can maintain a declaratory suit effected by her mother, or step-mother, and such a suit would be governed by Art. 125 of the Limitation Act⁴⁶; but the **Lahore High Court** has held in *Mt. Bal Kuar v. Mt. Har Kuar*,⁴⁷ that daughter's sons are under Hindu Law not entitled to succeed in the lifetime of their mother, and, therefore, are not the immediate reversioners of their grand-mother. Their suit for a declaration that an alienation by their grand-mother is not binding on them is governed by Art. 120 of the Limitation Act. The Punjab view is that Art. 125 of Sch. I of the Limitation Act, applies to an action brought by an immediate reversioner for a declaration in respect of a widow's alienation, and a similar suit by a remote reversioner is governed by Art. 120 of the same Act.⁴⁸ The **Madras High Court** took a similar view, in *Venkata Row v. Tuljaram Row*,⁴⁹ where it was observed that "in terms Art. 125 applies only

44. (1883) 6 Cal. 764=8 C.L.R. 381=8 I.A. 14 (P.C.) (Approved *Brikaji v. Jagannath*, 10 Bom.H.C.R. 351).

45. *Kanwar Golab Singh v. Rao Kuran Singh*, 14 M.I.A. 187=10 B.L.R. 1 (P.C.); also see *Fatch Singh v. Jagannath Buksh Singh*, (1925) 91 I.C. 280=1925 P.C. 55=47 All. 158=52 I.A. 100 (P.C.) (Held, that a suit for a declaration, contesting a gift by a Hindu widow is competent only to nearest prospective reversioners, and a distant reversioner can only maintain his suit by showing that the nearer reversioner has precluded himself by his own act or conduct from suing).

46. *Mt. Balkaur v. Mt. Har Kaur*, (1928) 108 I.C. 184=1928 Lah. 242; also see *Mt. Amir Begum v. Hussain Bibi*, 58 I.C. 333=2 Lah. 5 and *Bhagwanta v. Sukhi*, (1899) 22 All. 33=19 A.W.N. (1899) 159 (F.B.).

47. (1928) 108 I.C. 184=1928 Lah. 242.

48. *Mt. Thakri v. Mt. Ganeshi*, (1916) 33 I.C. 161=15 P.R. 1916.

49. (1917) 38 I.C. 270=1917 M.W.N. 30=5 L.W. 482; Relied on 6 Cal. 764=8 C.L.R. 381=8 I.A. 14 (P.C.).

to plaintiffs, who, 'if the female died at the date of instituting the suit', would be entitled to the possession of the property in dispute. A remote reversioner cannot come under this category". It was observed that "remote reversioners have no cause of action to sue so long as there are nearer reversioners who have neither colluded with the widow, nor have precluded themselves from suing". The residuary Art. 120 was, therefore, applied to the case.⁵⁰ A Full Bench of the Allahabad High Court, in *Kunwar Bahadur v. Bindra-ban*,¹ on a review of case-law reached the conclusion that the Schedule in the Limitation Act makes no express provision for the rare cases in which a suit is permitted to be brought by a more remote reversioner by reason of collusion or wilful default on the part of the nearest reversioner or reversioners; and, the result, no doubt was that such suits must necessarily be referred to the residuary Art. 120 of the Schedule. The Oudh Judicial Commissioner's Court takes the same view in *Anandi Din v. Ramsahai*,² that in a case of collusion or connivance between a donee from a Hindu widow and the next reversioner, a remote reversioner is entitled to maintain a suit to challenge the gift. Such a suit, however, is governed not by Art. 125, but by Art. 120, inasmuch as, the plaintiff not being the immediate reversioner is not entitled, if the donor were to die at the date of the institution of the suit, to possession of the property.

1909. (2) The Madras High Court took the view in *Govinda*

Pillai v. Thayammal,³ that the right given
Recent Madras view.

by S. 42 of the Specific Relief Act to bring a declaratory suit is not limited by illustration (c) of that section, or by Art. 125 of the Limitation Act to suits by a person presumptively entitled to possession: and this was followed by *Chiruvolu Punnamma v. Chiruvolu Perrazu*,⁴ where the true character of the right of a reversioner under Hindu Law to impeach an alienation by a qualified female owner, or an adoption by a Hindu widow, was examined, and it was observed

"that no doubt the language of Col. 1 of Art. 125, is not literally applicable to a suit by a remote reversioner who is allowed in the discretion of the Court to sue owing to the collusion, neglect, etc., of the presumptive reversioner, but the apparent difficulty by such language may be obviated by construing the word 'Hindu.....who if the female died', etc., in the article as comprehending for the purposes of the article, a remote reversioner allowed

50. *Venkata Row v. Tulja Ram*, 38 I.C. 270, *supra*; Relied on *Ramanna v. Annamma*, 18 I.C. 710=24 M.L.J. 183; *Kalvathal v. Thirupathi*, 10 M.L.J. 229 and *Narayana Aiyar v. Rama Aiyar*, 20 I.C. 625=38 Mad. 396=25 M.L.J. 219.

1. (1915) 26 I.C. 737 (739)=37 All. 195=13 A.L.J. 196; Relied on 6 Cal. 764 (P.C.); 32 Cal. 62; 22 All. 33 (F.B.).

2. 83 I.C. 1055=1924 Oudh 381=11 O.L.J. 236.

3. 28 Mad. 57=14 M.L.J. 209.

4. 29 Mad. 390=1 M.L.T. 183=16 M.L.J. 307 (F.B.).

by law to sue in his stead. Having regard to the heading of Col. (1) 'description of suit' we think it permissible to hold that the language of Art. 125 is intended rather to describe the character of suit than to strictly limit the person who may bring such suits".⁵

The Judicial Committee of the Privy Council have held in *Venkatanarayana Pillai v. Subbammal*,⁶ and in the case of *Janaki Ammal v. Narayanaswami*,⁷ that the law gives to the nearest reversioner a right to institute a suit, during the lifetime of the female owner, for a declaration that an alienation effected by her is not binding on the reversion, such a right to sue being based upon the danger to the inheritance **common to all the reversioners**. The next reversioner has such an interest as will justify a suit when that interest is in danger.⁸

1910. (3) The **Madras Full Bench** in *Chiruvolu v. Chiruvolu*,⁹ in holding that a suit by a reversioner questioning an adoption was binding on another reversioner, expressed an opinion as to the representative character of the reversioner's suit which has since been confirmed by the Privy Council. The cause of action of all reversioners is the same and arises on the date of the alienation. Following the above, in view of the support given by the pronouncements of the Judicial Committee as to the representative character of a suit by a reversioner on a common cause of action, another Full Bench of the Madras High Court, in the case of *Varanma v. Gopaladasayya*,¹⁰ has reached the conclusion

"that when a Hindu widow makes an alienation voidable against the ultimate reversionary heir at her death or re-marriage the next presumptive reversioners avail of this single cause of action by bringing a representative suit on behalf of the whole body of successive reversioners till the opening of the reversion, and, in case the next presumptive reversioner by collusion or other act precludes himself from availing himself of that single cause of action, it is to be availed of by the next reversioner in order of succession and so on, the suit, whenever brought, being based on the single cause of action".

The Madras Full Bench has interpreted the observations of the **Privy Council** in the case of *Venkatanarayana Pillai v. Subbammal*¹¹ to mean that the right to relief existing in the reversioners in the order of succession is in respect of their claim to possession,

5. *Chiruvolu Punnamma v. Chiruvolu Perrazu*, 29 Mad. 390=1 M.L.T. 183 (F.B.), *supra*.

6. (1915) 38 Mad. 406 (411, 412) (P.C.).

7. (1916) 39 Mad. 634 (638) (P.C.).

8. *Issi Dut Kocr v. Hansbutti*, (1883) 10 Cal. 324 (332)=10 I.A. 150 (P.C.).

9. 29 Mad. 390=1 M.L.T. 183=16 M.L.J. 307 (F.B.).

10. 41 Mad. 659=24 M.L.T. 115=8 L.W. 62=46 I.C. 202=(1918) M.W.N. 461=35 M.L.J. 57 (F.B.).

11. 38 Mad. 406 (411) (P.C.).

but that the right to a declaratory relief arises simultaneously and jointly in favour of all the reversioners at the time of the alienation. On this view,

"Art. 125 is the only article applicable to a suit based on such single cause of action. Several causes of action do not arise at different times to several reversioners when each preceding reversioner has lost his right to bring and conduct such a suit through collusion or other similar acts; or by laches and consequent bar by limitation. When a new reversioner comes into being for the first time by natural birth or adoption, with a preferential presumptive reversionership, or title to sue by reason of collusion between the nearer reversioner and the alienee, a fresh cause of action does not arise in the new reversioner so coming into being as above, entitling him to bring a suit for a declaration of the invalidity of the alienation".¹²

Accordingly, the Madras view is now settled, as opposed to the view taken by the **Allahabad Full Bench** in *Bhagwanta v. Sukhi*,¹³ and all the earlier cases in **Madras High Court** which proceed upon the Allahabad Full Bench view, e.g., *Govinda Pillai v. Thayammal*,¹⁴ *Veeramma v. Ganamma*,¹⁵ *Narayana v. Rama*¹⁶ and *Venkata Rao v. Tuljaram*,¹⁷ to which may be added the **Calcutta** case of *Abinash v. Harinath*.¹⁸ The Madras latest view differs from the Punjab, Oudh, Allahabad, view that Art. 120 of the Limitation Act is applicable to suits by remote reversioners.¹⁹ The difficulty presented by the language of Art. 125 is got over by the construction that Art. 125, though applicable in terms only to presumptive reversioners, must be deemed to cover equally a declaratory suit by remote reversioners in their representative

12. *Varamma v. Gopaladasayya*, 41 Mad. 659=46 I.C. 202=35 M.L.J. 57 (F.B.); Followed in *Gadiraju Somaraju v. Dandu Venkiah*, (1919) 53 I.C. 171=26 M.L.T. 180 (*Held*, that there is only one cause of action for a declaratory suit for all reversioners).

13. 22 All. 33=(1899) A.W.N. 159 (F.B.) (*Held*, that one reversioner does not claim through another, and each has his own separate, individual cause of action, in succession). Cf. *Kesho Prasad Singh v. Sheopargash Ojha*, (1921) 64 I.C. 248=1922 All. 301=44 All. 19 (F.B.); s.c. 82 I.C. 962=46 All. 831 (P.C.) (A suit by a reversioner for setting aside an alienation made by a Hindu widow in possession is a representative suit).

14. 28 Mad. 57=14 M.L.J. 209 (*Held*, that a minor reversioner on date of alienation, or born subsequently during widow's lifetime would be entitled to benefit of S. 7, Limitation Act).

15. (1912) 36 Mad. 570=16 I.C. 839=23 M.L.J. 269 (Suit by a person who was remote reversioner at time of alienation, but immediate reversioner on date of suit).

16. (1913) 38 Mad. 396=20 I.C. 625=25 M.L.J. 219.

17. 1917 M.W.N. 30=38 I.C. 270=5 L.W. 483.

18. 32 Cal. 62=9 C.W.N. 25 (*Held*, that a presumptive reversioner's suit if barred will not bind next reversioners).

19. See S. 1908, ante: *Mt. Thakri v. Mt. Ganeshi*, (1916) 33 I.C. 161=15 P.R. 1916; *Mt. Bal Kaur v. Mt. Har Kaur*, (1928) 108 I.C. 184=1928 Lah. 242; *Mt. Amir Begam v. Hussain Bibi*, 58 I.C. 333=2 Lah. 5; *Bhagwanta v. Sukhi*, (1899) 22 All. 33=19 A.W.N. (1899) 159 (F.B.) and *Ananadin v. Ram Sahai*, 83 I.C. 1055=1924 Oudh 381=11 O.L.J. 236 and *Venkata Row v. Tulja Row*, (1917) 38 I.C. 270=1917 M.W.N. 30=5 L.W. 482.

character for the benefit of all persons, near or remote, born or unborn, entitled to recover the property when the succession opens. In Bombay, the representative character of the reversioner's suit has all along been recognised,²⁰ and this view agrees with that taken by the Madras Full Bench,²¹ which has been applied in *Neelakantamier v. Chinnamal*, where it was held that a minor presumptive reversioner on date of alienation could not claim the benefit of S. 6 of the Limitation Act when his brothers, the other presumptive reversioners, were barred under Art. 125, Limitation Act. The same view has been adopted by the **Lahore High Court** in *Chiragh Din v. Abdulla*²²; but the Calcutta High Court has dissented from it in *Das Ram v. Thirthanath*.²³

1911. The third essential condition for the applicability of

(iii) Alienation by a Hindu or Muhammadan female.

Art. 125 is the existence of an *alienation*, which must be by a Hindu or Muhammadan female, which is questioned by a Hindu or Muhammadan reversioner²⁴

who seeks to challenge the alienation made by a Hindu, or Muhammadan female, or other limited owner. Where an **alienation** was

Alienation by a transferee of Hindu female.

made by a transferee from a Hindu female in possession with a limited estate, or by a stranger in possession holding under her, a suit for declaration was held to be maintainable under S. 42, Specific Relief Act, being in respect of a "*right*" of reversion under Hindu Law to the property of the last male owner, but such a suit to obtain a declaration of invalidity in respect of (a) an adoption and consequent entries in the revenue papers, (b) a mortgage executed by one of the defendants, and (c) mutation of names after the death of the last female holder must be brought within the period prescribed by **Art. 120**, Limitation Act.²⁵

20. *Bhikaji Apaji v. Jagannath Vithal*, 10 B.H.C.R. 351; also see *Chhaguram v. Bai Motigori*, (1890) 14 Bom. 512.

21. *Varamma v. Gopaladasayya*, 41 Mad. 659=46 I.C. 202 (F.B.).

22. (1925) 6 Lah. 405 (Benefit of S. 6, Limitation Act not allowed to a reversioner born subsequent to alienation).

23. (1923) 51 Cal. 101 (Art. 120 read with Ss. 6 and 8, applied to a suit for declaration by a minor reversioner born after date of alienation); also see *Jagabandhu v. Harischandra*, (1922) 76 I.C. 915=36 C.L.J. 92.

24. An adopted son is not in the position of a *reversioner* seeking to set aside an alienation by a widow, his adoptive mother; because the adoption under Hindu Law, puts an end to widow's intervening life estate, and the possession of her transferee would be adverse to the adopted son, from the date of the transfer (See Arts. 141 and 144, *post.*); and *Hanamgowda v. Irgowda*, (1924) 48 Bom. 654 (660).

25. *Balbhadar Prasad v. Prag Datt*, (1919) 50 I.C. 938 (943)=17 A.L.J. 765=41 All. 492.

Again, this article does not apply where the alienation was not made by the Hindu or Muhammadan female herself, but was made during her minority by a guardian appointed under the Bengal Minors Act, effected after the coming into force of the Guardian and Wards Act. Such an alienation, if sought to be avoided by reversioners, not entitled to immediate possession, can only be by a suit for declaration governed by Art. 120 of the Limitation Act.²⁶ In such a case, it could not be held that the right to sue had accrued under any circumstances before the plaintiff was born.²⁷ However, Art. 135 was applied by the Madras High Court in *Adeyya v. Govinda*,²⁸ where two mortgages of the same property were made, the first having been effected during the widow-owner's minority by her mother, as *de facto* guardian, and the second in renewal was by the widow herself after she came of age. The alienation being only voidable at the option of the minor,²⁹ the reversioners had a cause of action for a declaratory suit with regard to the former alienation. An alienation by the widow's guardian not repudiated by her on attaining the age of majority may be treated as an alienation by the widow herself.³⁰

Art. 135 applies to every case where the alienation is made by a Hindu or Muhammadan female, and the immediate reversioners bringing a declaratory suit also profess the same faith: but it is not necessary that the female making the alienation should be actually governed by Hindu or Muhammadan Law.³¹ In *Varamma v. Gopaladasayya*,³² it was observed by Sadasiva Aiyar, J., that "the first column of the article might also be made clear by confining its operation to Mahomedans governed by Hindu Law through custom".

1912. ARTICLE EXPLAINED.—An alienation under this article includes all transfers by sale, gift, mortgage, lease, etc.^{32-a} However, for the

26. *Das Ram Chowdhry v. Tirthanath Das*, (1924) 51 Cal. 101=1924 Cal. 481=81 I.C. 522.

27. *Ibid.*, 51 Cal. 101; Dissented: *Varamma v. Gopala Dasayya*, 46 I.C. 202=41 Mad. 659=35 M.L.J. 57 (F.B.).

28. 1931 Mad. 274=131 I.C. 609=58 M.L.J. 417.

29. *Ibid.*, 1931 Mad. 274; Relied on *Papassi Ram v. Raja Ram*, 1930 Lah. 116=115 I.C. 417.

30. *Sriramulu v. Kristamma*, (1902) 26 Mad. 143 (146).

31. *Mt. Nandan v. Wazira*, 1927 Lah. 198=8 Lah. 215=100 I.C. 84=28 P.L.R. 341 (Under Muhammadan Law, a female never succeeds to a life estate); cf. *Mahomed Reasat v. Hasin*, (1893) 21 Cal. 157 (P.C.) (Local customs empowering Muhammadan females to take for life or during their widowhood).

32. 41 Mad. 659 (677)=46 I.C. 202 (212) (F.B.); per *Sadasiva Aiyar, J.*

32-a. *Jaggi v. Prithupal*, (1894) A.W.N. 134; *Tuka Bai v. Lalasao*,

purposes of this article, a Hindu reversioner impeaching an alienation by a widow need not prove an actual transfer by the widow.³³ It is enough if he proves that the widow had done **an act which resulted in the transfer of property.**³⁴ For example, where the widow intended by **collusive proceedings**, by confessing judgment in a suit not instituted *bona fide* against her,³⁵ or by allowing a decree to be passed on a fictitious award against her,³⁶ to have property sold in execution of a decree. In *Govind Krishna Narain v. Khunni Lal*,³⁷ it was held that a **compromise** made by a person holding a Hindu widow's estate in the property of her deceased husband is not binding on the reversioners even though it has been followed by a decree of Court, and that the reversioners can only be bound by a decree made after full contest in a *bona fide* litigation. A Court sale if brought about by widow's **collusive arrangement** to use the Court as a medium of transfer, can be regarded as a private sale, and Art. 125 would apply to a reversioner's suit to set it aside.³⁸ A suit by a reversioner on the allegation that the widow executed a **sham mortgage**, and got the property sold in a collusive suit is governed by Art. 125.³⁹ A **surrender of property** held as a mortgage to a person not entitled to redeem it, by way of redemption is an alienation within the meaning of Art. 125, Limitation Act.⁴⁰ The **creation of occupancy rights** by a widow, which is invalid as against the reversionary rights, is an alienation, and a suit by the reversioners for a declaration to that effect will be governed by Art. 125, and not by Art. 120 of the Limitation Act.⁴¹

But, a mere admission of adverse possession against the limited owner, in a *bona fide* litigation, is not an "alienation" by a female which implies some action on the part of the alienor.⁴² Where a suit was brought to set aside an alienation made by the stranger person allowed by the widow to be in possession or enjoyment of some portion of the property, it was held to be governed by Art. 120,

(1920) 63 I.C. 417 (Nag.); *Amir Begum v. Hussain Bibi*, (1920) 58 I.C. 333 (Lah.).

33. *Ranga Row v. Ranganayaki Ammal*, (1918) 47 I.C. 578 (579)=35 M.L.J. 364.

34. *Ibid.*, 47 I.C. 578 (580)=35 M.L.J. 364.

35. *Shao Singh v. Jeoni*, 19 All. 524=A.W.N. (1897) 141.

36. *Ram Sarup v. Ram Dei*, 29 All. 239=A.W.N. (1907) 33=4 A.L.J. 160=3 M.L.T. 59.

37. 29 All. 487; Relied in *Mt. Sohanbibi v. Mt. Hiranbibi*, (1909) 1 I.C. 180 (All.).

38. *Ranga Row v. Ranganayaki*, 47 I.C. 578=35 M.L.J. 364=1918 M.W.N. 739.

39. *Poochammal v. Soundrammal*, (1924) 80 I.C. 554=1924 Mad. 617=19 L.W. 564=1924 M.W.N. 322.

40. *Kashi Ram v. Chet Kuar*, (1928) 111 I.C. 203=10 Lah. 237=1928 Lah. 932.

41. *Hira v. Mt. Ghathu*, (1915) 29 I.C. 789=1915 P.L.R. 115.

42. *Ramasami Naik v. Thayammal*, 26 Mad. 488 (490).

Limitation Act.⁴³ Where a creditor of a deceased male-holder brought a suit against the widow for recovery of the debt, and in execution of the decree in that suit brought certain properties to sale, it was held that this did not amount to an *alienation* by the widow.⁴⁴ Similarly, the compromise of a litigation entered into by a female owner with rights over property, her title to which is disputed by the opposite party, the compromise recognising the disputant's title to the property, does not amount to an alienation of the property in the disputant's favour by her and the disputant does not hold the property thereafter under any new title derived from or created by her.⁴⁵ The test to be applied in order to determine whether a widow's action in submitting to a decree amounted to an alienation is to see whether she materially contributed by her action to the transfer.⁴⁶

1913. The word "land" as used in this article has not been defined. It is doubtful if it has been used "Land", meaning of. in the same sense as "immoveable property," *viz.*, including land, and benefits to arise out of land. The Nagpur Judicial Commissioner's Court has held in *Mt. Tukabai v. Lalsao*,⁴⁷ that,

"for the purposes of Art. 125 'land' must be taken to include an interest in land. The Legislature cannot have intended to allow the suit referred to in Art. 125 to be brought only in respect of out and out dispositions of property, such as sales or gifts, and not mortgages."

In *Deo Raj v. Shiv Ram*,⁴⁸ the Punjab Chief Court, did not apply Art. 125 to suit for declaration that mortgage of a house should not affect plaintiff's reversionary rights. It was held that Art. 125 covers only suits for land, and comes in only when the suit is by the first reversioner. Both these essentials were found wanting in that suit. In *Ralya Ram v. Sher Singh*,⁴⁹ Art. 125 was applied where a widow had alienated house property *including the site*, though it was considered "open to argument," whether it could apply to a house apart from *its site*. The word "land" in Art. 125, no doubt includes a house and its site⁵⁰ and Art. 125 of

43. *Ramasami Naick v. Thayammal*, 26 Mad. 488 (490).

44. *Chhagganram v. Bai Motigavri*, 14 Bom. 512 (514) and *Issuridutt Singh v. Ibrahim*, (1881) 8 Cal. 653.

45. *Gadiraju Samaraju v. Dandu Venkiah*, (1919) 53 I.C. 171=26 M.L.T. 180.

46. *Poochammal v. Soundrammal*, (1924) 80 I.C. 554=1924 Mad. 617=19 L.W. 564=1924 M.W.N. 322.

47. (1921) 63 I.C. 417=1922 Nag. 197=18 N.L.R. 42.

48. (1914) 25 I.C. 463=70 P.R. 1914.

49. (1910) 15 P.W.R. 1910=5 I.C. 842.

50. *Soman Singh v. Uttam Chand*, 1 Lah. 69; also see *Mt. Amir Begam v. Mt. Husain Bibi*, (1920) 58 I.C. 333=2 Lah. 5; Reld. on *Ralya Ram v. Sher Singh*, C. A. No. 2878 of 1886 (unreported).

the Limitation Act would apply to the suit so far as it relates to the house also, where in the deed of gift the house and the site together were gifted.¹ The word "land" does not cover the equity of redemption in immoveable property. A sale of equity of redemption is not an alienation of land within the meaning of Art. 125. Consequently, a suit for a declaration of invalidity of a sale of equity of redemption by a Hindu female is governed by Art. 120, Limitation Act.²

1914. STARTING POINT OF LIMITATION.—Art. 125, in its third column, specifies the "*date of alienation*" as the starting point of a suit for declaration of the description mentioned in column 1. Thus, it differs in this respect from Arts. 90, 91, 92, 94, 95, 96, 118, 126, 127, etc., where specific suits of analogous description mention the date of the knowledge of the plaintiff of his right to sue as the commencing date for period of limitation prescribed therefor in the schedule. Art. 125 provides a special rule of computation, which seems, if anything, to be an exception to a general principle, that

"where the act was of a kind which could be done without the knowledge of the person aggrieved by it, then time would not run against such person until he became conscious of his right to sue".³

Thus,

"a suit, brought merely to obtain a declaration mentioned in this article, might become time-barred without the reversioner having heard of the alienation. This result of the article has been perceived and Art. 141 of the said schedule was specially modelled to meet the injustice which this result might have caused".⁴

The language of this article has not been construed to permit a suit on the basis of a later alienation, which has resulted from an earlier alienation which has not been questioned within the period prescribed in this article. A suit for a declaration that a mortgage and a decree for sale obtained thereon are void as against the plaintiff must be brought within the period of limitation prescribed under Art. 125 of the Act, and time commences to run from the date of the mortgage and not from the date of the decree for while a mortgage is an "alienation", within the meaning of that article, a decree for sale is not.⁵ Similarly, it has been held that a suit by a Hindu reversioner for a declaration that a mortgage by a widow of the last owner, and a Court-sale in execution of the decree

1. *Mt. Amir Begam v. Mt. Husain Bibi*, (1920) 58 I.C. 333=2 Lah. 5.

2. *Mt. Ralli v. Sundar Singh*, (1912) 17 I.C. 864=108 P.R. 1912.

3. *Lukhmichand v. Ganpat*, (1909) 1 I.C. 906 (907)=5 N.L.R. 28.

4. *Ibid.*, 1 I.C. 906 (908).

5. *Mt. Tukabai v. Lalasao*, (1921) 63 I.C. 417=3 N.L.J. 335=1922 Nag. 197.

passed thereon are void, and not operative after the death of the widow is governed by Art. 125, and limitation commences to run from the date of the mortgage and not from the date of the sale in execution of the decree.⁶ A mortgage of land by sonless proprietor did not merge in the subsequent sale of land by the widow.⁷ A reversioner is not competent to challenge mortgage beyond the period of limitation merely because they are included in a sale in respect of which he has a subsisting right of challenge.⁸ Where three daughters inherited the property of the last male-owners, and two of them sold the property to their other sister professing to convey absolute rights of the vendors, and the vendee subsequently sold the property to a stranger, the plaintiff-reversioner's suit for declaration under Art. 125, which was found barred in respect of the first sale, was held not within limitation from the date of the second alienation.⁹ Where a mortgage was executed by the widow's *de facto* guardian during her minority, and the widow renewed the previous mortgage after attaining majority, it was held that a suit for a declaration by the reversioners was barred by time starting from the time of the original mortgage, and no fresh cause of action accrued from the date of the mortgage executed by the widow herself later.¹⁰ Where the daughters of a Hindu brought a suit to set aside an alienation by her mother, and the suit was compromised, and subsequently, the reversioners brought a suit impeaching the same alienation: it was held that the period of limitation for such a suit was that prescribed by Art. 125, and that no fresh cause of action accrued to the reversioners from the compromise, which did not amount to a fresh alienation.¹¹

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
126.	By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	12 years.	When the alienee takes possession of the property.

6. *Kamakshi Ammal v. Poochammal*, (1925) 88 I.C. 578=21 L.W. 277=1925 Mad. 567; Reld. on *Jaggi v. Prithipal*, A.W.N. (1894) 134 and *Rajindra Singh v. Abdul Ghani*, 25 P.R. 1917=40 I.C. 63; Overruled *Poochammal v. Soundarammal*, (1924) 80 I.C. 554.

7. *Khiali Ram v. Gulab Khan*, 33 P.R. 1911=33 I.C. 392.

8. *Bur Singh v. Hazara Singh*, 63 I.C. 760=3 Lah. 99=1922 Lah. 275.

9. *Venkatasubbayya v. Subramaniam*, (1924) 86 I.C. 1016 (2) (Mad.).

10. *Adeyya v. Govinda*, 1931 Mad. 274 (275)=58 M.L.J. 417.

11. *Gadiraju Somaraju v. Dandu Venkiah*, (1919) 53 I.C. 171=26 M.L.T. 180.

SYNOPSIS.

1915. Corresponding provisions.
 1916-1920. **Scope and application.**
 1916. Mitakshara doctrine.
 1917-1920. **Article explained.**
 (i) Alienation, of ancestral property—includes mortgage or gift.
 1918. (ii) Setting aside, involves consequential relief.
 1919. (iii) Father's alienation.
 1920. **Starting point:** (i) Date of possession.
 1921. (ii) Minor plaintiff—Benefit of Ss. 6 and 8.
 1922-1924. **Suit by after-born son:**
 1922. (i) No right to share where whole property sold.
 1923. (ii) No fresh cause of action to after-born son.
 1924. (iii) No benefit of Ss. 6 and 7.

NOTES.

1915. CORRESPONDING PROVISIONS.—Under Act XIV of 1859. XIV of 1859, S. 1, Cl. (12), gave a period of 12 years from the date of the vendee's taking possession of the property.¹² In *Beer Kishore v. Hur Bullub*,¹³ the **Mitakshara Law doctrine** was explained, under which a son has an equal right with his father in ancestral property from the moment of his birth, which enables the son to control the alienations made by the father without justifiable legal necessity, or consent of the son.

"The date of the alienation, or at all events, of the possession under it, must be considered as the starting point from which the statute commenced to run against the plaintiff."¹⁴

A **Full Bench**, of **Calcutta High Court**, in the case of *Raja Ram v. Luchmun Pershad*,¹⁵ held that the cause of action to the son accrues when possession is taken by the purchaser. A new cause of action does not accrue, upon the subsequent birth of a younger brother, either to the elder brother alone, or to him and his brother jointly. When twelve years had elapsed during plaintiff's minority, the suit may be brought within three years (not 12) from the time of his attaining majority.¹⁶ In a suit under Mitakshara Law for possession of land by annulment of illegal sales by his father, the plaintiff's only cause of action is the taking possession by the defendant of what was the son's joint share of the family-property, and his suit ought to be brought within twelve years of such adverse possession.¹⁷

12. *Raja Ram v. Luchmun Pershad*, (1867) 8 W.R. 15 (F.B.); cf. *Zuhoorul Huq v. Mt. Bagoo*, (1869) 11 W.R. 532; also see *Nuthoo Lal v. Chedes Sabee*, (1869) 12 W.R. 446 and *Mt. Poonheet Koor v. Kishen Kishore*, (1875) 23 W.R. 419.

13. (1867) 7 W.R. 502.

14. *Ibid.*, (1867) 7 W.R. 502 (507).

15. (1867) 8 W.R. 15 (F.B.).

16. *Zuhoorul Huq v. Mt. Bagoo*, (1869) 11 W.R. 532.

17. (1875) 23 W.R. 419.

Under Act IX of 1871, the corresponding provision was made in its **Art. 125**, for suits by a son governed by Mitakshara Law; while **Art. 126** made provision for like suits by a Hindu governed by the **Dayabhaga Law**. The starting point of limitation, under Act IX of 1871, was to run from the date of the alienation.

The provision in **Art. 126** of Sch. II, Act IX of 1871, as to suits governed by the **Dayabhaga Law** was omitted.¹⁸ and the starting point of limitation for suits under Mitakshara Law, was to run from the date when the alienee takes possession of the property. The present article is the same as **Art. 126**, Sch. II of Act XV of 1877.

1916. SCOPE, AND APPLICATION.—According to the Mitakshara Law of inheritance, a son acquires a right in ancestral property during the life of his father, in a case of unobstructed heritage. A son by birth alone acquires this right which enables him during his father's lifetime to compel a partition of such property, and to control the alienations by the father, who cannot, without the consent of the son, alienate such property except for sufficient cause. It has been held that the son has not merely the right to prohibit the father from doing so, but that he may sue to set aside the alienation if made.¹⁹ A member of a joint Hindu family, governed by the Mitakshara Law, has no authority to mortgage his undivided share in a portion of the joint-family property, in order to raise money on his own account, and not for the benefit of the family.²⁰ He cannot mortgage or sell his share in the joint-family property without the consent, express or implied, of his co-parceners.²¹

1917. ARTICLE EXPLAINED.—(1) This article provides a limitation period of 12 years for a suit by a Hindu governed by the **Mitakshara Law**.²² It has no application to a *jaina* governed by a tribal custom.²³ It governs suits "*to set aside his father's alienation of ancestral property*". The expression "ancestral" in **Art. 126**, as opposed to "acquired", has been used in this article in the ordinary sense of Hindu Law, and cannot be given a wider interpretation for

18. *Punhit v. Kishen Kishore*, 23 W.R. 419 (The rights of sons under the Bengal School accrue on the death of the father, and so they come in under **Art. 144**, Limitation Act).

19. *Raja Ram Tewary v. Luchmun Pershad*, (1867) 8 W.R. 15 (F.B.).

20. *Sudaburt Pershad v. Foolbash Koer*, (1869) 12 W.R. 1 (F.B.).

21. *Ramanand Singh v. Gobind Singh*, (1883) 5 All. 384=3 A.W.N. (1883), 61.

22. See S. 1916, above.

23. *Milap Chand v. Mohini*, (1928) 110 I.C. 180=1928 Oudh 348 (351). =5 O.W.N. 515.

purposes of the Limitation Act.²⁴ Thus, the property in the hands of a son, being a gift of part of the property in dispute made to him by father is not necessarily ancestral.²⁵ The restrictions on the power of a Hindu father to alienate immoveable property are equally applicable to transfers of moveables, and **moveable property** also would be governed by this article.²⁶

(2) The word "alienation" would cover a sale, mortgage, or gift, but not an involuntary transfer in execution of a Court's decree. A suit to set **aside a mortgage of ancestral property,** and to ask for possession not in accordance with, but contrary to its terms is to be **distinguished from a suit for redemption of mortgage,**

"in which the plaintiff, accepting the position of mortgagor, or of a person interested in the equity of redemption, asks for possession in accordance with the terms of a mortgage on payment of the amount due under it".²⁷

A redemption suit by transferee from surviving member of joint Hindu family is not one to set aside an alienation, within Art. 126, its object indeed being to obtain relief under the alienation and not in spite of it.²⁸ If the dispute is only as to the length of the period provided for redemption in a mortgage created by a father, it cannot be said that the suit is to set aside the mortgage, but the suit falls under Art. 126. Even if the plaintiff admits that one item of the consideration was borrowed for legal necessity, there is no offer to re-pay the amount in accordance with the terms of the mortgage, but it is done "in accordance with the principle, which applies equally to sales and mortgages, that a co-parcener seeking to recover joint-family property illegally alienated must re-pay any portion of the consideration by which he has benefitted."²⁹ It was held by Sadasiva Aiyar, J., in the Madras case of *Murajalli v. Ramasami Chetti*,³⁰ that

24. *Gobind Ram v. Gopi Chand*, 1934 Lah. 397=150 I.C. 963.

25. *Amarnath v. Guranditta*, 1918 Lah. 394=43 I.C. 117=14 P.R. 1918.

26. *Kishenlal v. Shib Narain*, (1909) 3 I.C. 505=6 A.L.J. 614; *Nand Ram v. Mangal Sain*, (1919) 31 All. 359; *Bankey Lal v. Nathu Ram*, (1927) 1929 All. 199 (201)=107 I.C. 576 and *Ramasami v. Govinda*, 1929 Mad. 313=56 M.L.J. 332.

27. *Chokey Singh v. Hardeo Singh*, (1921) 64 I.C. 757 (759)=24 O.C. 330=8 O.L.J. 667=1921 Oudh 196.

28. *Suraj Baksh Singh v. Kedar Nath*, (1932) 135 I.C. 379=1932 Oudh 66=7 Luck. 505=8 O.W.N. 1090; also see *Jafri Begam v. Syed Ali Raza*, 23 All. 383=28 I.A. 111=11 M.L.J. 149 (P.C.); Followed in *Mt. Kaniz Fizza Bibi v. Data Din*, (1925) 90 I.C. 184=1925 Oudh 678=2 O.W.N. 650.

29. *Chokhey Singh v. Hardeo Singh*, (1921) 64 I.C. 757=24 O.C. 330=8 O.L.J. 667=1921 Oudh 196; cf. *Mt. Kaniz Fizza v. Data Din*, (1925) 90 I.C. 184=1925 Oudh 678=2 O.W.N. 650.

30. 41 Mad. 650=45 I.C. 867=34 M.L.J. 528.

"the Legislature has provided for a special Art. 126 for the perfection of the title of an alienee from the father, when a Hindu son who wants to take advantage of the antiquated Mitakshara Law seeks to set aside such an alienation" "It is significant that the alienation under Art. 126

Alienation includes gifts. need not be for consideration.³¹ It is also significant that Art. 126 applies to an alienee with and to an alienee without notice. The Legislature has clearly fixed an overt and patent fact, namely, the taking of possession of the property by the alienee, as the event from which the period has to be calculated so as to avoid as far as possible difficult questions as to notice."

An involuntary sale in execution is not included within the expression "alienation".³²

1918. The words "*set aside*", as used in Art. 126, and in five other articles, namely, Arts. 13, 14, 15, 44 and 91, are to be taken in their strict meaning. It was observed in *Dev Raj v. Shiv Ram*,³³

(ii) Setting aside involves consequential relief.

"that to ask for a thing to be '*set aside*' implies a prayer for immediate relief, and not for a mere declaration that on the happening of a future contingency, of which the plaintiff may not be able to take advantage, certain results will follow".³⁴

Art. 126, which speaks of a suit "*to set aside*" the father's alienation of ancestral property, includes a suit in which possession is claimed and does not only contemplate a declaratory suit.³⁵ A suit for mere declaration without consequential relief would be treated as one falling under Art. 120, Limitation Act.³⁶ But, where the plaintiff sues for the annulment of the sale, Art. 126 applies, and the period of Limitation is 12 years.³⁷ It may be noticed that the expression "suit to set aside a transfer of property" in the analogous Art. 44, has been held to include a suit in which there is a prayer

31. *Ram Kishore Kedarnath v. Jainarayan Ramrachpal*, 40 Cal. 966 (P.C.) (Where the father disposed of property by way of partition and gave a share to an utter stranger to the family without consideration, it was held that Art. 126 applied).

32. *Issuridut v. Ibrahim*, (1881) 8 Cal. 653 (Art. 127 applied); also see *Bhavrao v. Rukhmini*, 23 Bom. 137 (F.B.) (Held, that the limitation prescribed by Art. 126 applies whether the alienee did or did not know that the property which he was obtaining formed part of an undivided estate).

33. (1914) 25 I.C. 463=70 P.R. 1914 (Art. 120 applied to a mere declaratory suit); also see 3 M.L.J. 338 (341) (Jour.).

34. *Deva Ram v. Shiv Ram*, (1914) 25 I.C. 463=70 P.R. 1914 (Art. 120 applied).

35. *Muraj Ali v. Ramasami*, 45 I.C. 867 (870)=41 Mad. 650.

36. *Chokhey Singh v. Hardeo Singh*, (1921) 64 I.C. 757=1921 Oudh 196; Reld. on *Lachmandas v. Sunderdas*, 59 I.C. 678=1 Lah. 558.

37. *Gokharam v. Shamlal*, (1923) 77 I.C. 174=3 Lah. 426=1923 Lah. 268.

for consequential relief for possession. Even when in the suit the plaintiff claims possession of the property,

Suit for declaration and possession. Article 126 will govern.³⁸ But, Article 126 is not applicable to a suit by a

Hindu to set aside his father's alienation of ancestral property where the alienee never gets possession of the property under the alienation. In such a case the right of the son amounts merely to obtaining a declaration that the deed is invalid, and the suit will be governed by Art. 120.³⁹ The view is held by Allahabad, Bombay and Madras High Courts, that this article was based upon the principle that the son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession.⁴⁰ In applying Art. 126, it has to be noticed that the starting point begins to run from the date when the alienee takes possession of the property⁴¹ and this indicates that the article would cover a suit for some consequential relief arising out of possession of the property given to an alienee.

1919. (3) In the case of suits governed by Art. 126 the plaintiff's cause of action is the taking possession by the defendant of what was the son's joint share of property alienated by the father in a joint Hindu family governed by Mitakshara.⁴² The fact that a Hindu father executes a sale-deed as guardian of his son will not take the case out of Art. 126 of the Limitation Act and bring it under Art. 44, which applies to cases where property belonging to a minor is transferred by his guardian.⁴³ Article 126 applies also to a suit where the alienation was made by the father in conjunction with an uncle,

"since the mere fact that an uncle combined with the father in making the alienation in question is not a sufficient ground for taking it out of the scope of Art. 126".⁴⁴

38. *Ranodip v. Parmeshwar Pershad*, 52 I.A. 69=47 All. 165=86 I.C. 249=1925 P.C. 33 (P.C.); also see *Chintaman v. Bhagwan*, 1928 Bom. 383=113 I.C. 378=30 Bom.L.R. 1095 (Suit to set aside alienation as well as to recover possession falls under Art. 126); also see *Lachmi Narayan v. Kishan Kishore*, (1915) 38 All. 126 and *Ganesa Aiyar v. Amirthasami*, (1917) 44 I.C. 605=23 M.L.T. 245.

39. *Angud Singh v. Bahadur Singh*, (1929) 119 I.C. 90=1929 All. 750; also see *Bindeshri Upadhyay v. Sital Upadhyay*, (1927) 106 I.C. 377=1927 All. 702=50 All. 163=25 A.L.J. 734; Reld. on 45 I.C. 867=41 Mad. 650.

40. *Chintaman v. Bhagwan*, (1928) 113 I.C. 378=1928 Bom. 383=30 Bom. L. R. 1095; also see *Bindeshri v. Sital*, (1927) 106 I.C. 377=1927 All. 702=50 All. 163; *Angud Singh v. Bahadur Singh*, (1929) 119 I.C. 90=1929 All. 750; Reld. upon 45 I.C. 867=41 Mad. 650=34 M.L.J. 528.

41. *Ramaswamy v. Vanamali Aiyar*, (1915) 26 I.C. 873 (876).

42. *Soundararajan v. Saravana Pillai*, (1916) 34 I.C. 794 (798)=30 M.L.J. 592 (Art. 126 applies if claim tenable).

43. *Ganesa Aiyar v. Amritasami*, (1918) 44 I.C. 605.

44. *Deonandan Singh v. Musafir Singh*, 1927 All. 54=97 I.C. 591.

Similarly, this article was applied in a case where property had been conveyed by the **father and grandfather**, and the suit was dismissed on the ground that the alienation was more than twelve years before suit.⁴⁵ However, according to the language of this article, it will not apply to a suit to set aside a grandfather, or a great grandfather's alienation, unless the term "father" is taken as used in a generic sense, meaning and including grandfather or great grandfather.⁴⁶ Where the manager of the family happens to be some person other than the father, this article will not apply to a suit to set aside the alienation by the manager.⁴⁷ In such a case Art. 144 of the Limitation Act would apply.

1920. STARTING POINT OF LIMITATION.—

(1) Art. 126 provides the alienee's taking possession of the property as the starting point, presumably on the theory that this affords a son the necessary knowledge of the father's unauthorised alienation⁴⁸; and, it has been noticed in above, that this article would not apply where the alienee has not taken possession of the property to the prejudice of the rights of a son in a Mitakshara joint Hindu family.⁴⁹ Under Art. 126 of the Limitation Act, the fact which starts limitation running is the ouster of the Hindu father and son from the actual enjoyment of the property transferred. Therefore, in the case of a simple mortgage by the father, there is no necessity for the son to take any action. He can wait till the mortgagee seeks to enforce the mortgage and then plead his own right in answer to it.⁵⁰ The cause of action in suits falling under Art. 126, may be the alienation by the father of ancestral property, but the starting point begins to run from the date when the alienee takes possession of the property, and not before.¹

1921. (2) If the plaintiff was a minor at the time when the alienee takes possession of the property, he will get the benefit of Ss. 6 and 8 of the Limitation Act. In the case of *Jawahir*

Minor plaintiff—
Benefit of Ss. 6 and 8.

45. *Lachmi Narayan v. Kishan Kishore*, 33 I.C. 913=38 All. 126=14 A.L.J. 125.

46. *Masitullah v. Damodar Pershad*, (1926) 48 All. 518=53 I.A. 204=51 M.L.J. 792 (P.C.).

47. *Bunwarilal v. Daya Sunker*, (1909) 13 C.W.N. 815; also see *Muktalal v. Haran Singh*, (1910) 6 I.C. 641=7 A.L.J. 783 and *Asaram v. Ratan Singh*, 32 I.C. 242.

48. *Munia Goundan v. Ramasami Chetti*, 45 I.C. 867=41 Mad. 650=34 M.L.J. 528; also see *Bindeshri v. Sital*, (1927) 106 I.C. 377=1927 All. 702=50 All. 163; *Angud Singh v. Bahadur Singh*, (1929) 119 I.C. 90=1929 All. 570.

49. *Chintaman v. Bhagvan*, (1928) 113 I.C. 378=1928 Bom. 383; also see *Oudh Behari Lal v. Dal Singh*, (1922) 79 I.C. 666 (Oudh).

50. *Oudh Behari Lal v. Dal Singh*, (1922) 79 I.C. 666 (Oudh).

1. *Chintaman Balwant v. Bhagvan Ganapati*, (1928) 113 I.C. 378=1928 Bom. 383=30 Bom. L. R. 1095; *Bindeshri v. Sital*, (1922) 106 I.C. 377=1927 All. 502=50 All. 163.

Singh v. Udai Prakash,² where a Hindu father had sold certain properties and a suit was brought by his younger son within three years of his attaining majority, though the elder son had attained majority more than three years earlier and had allowed his claim to set aside the alienations to become barred, their Lordships of the Privy Council held that the suit brought by the younger son within three years of attaining majority was not barred by limitation. In dealing with the question of limitation, their Lordships expressed approval of the **Allahabad** view where it had differed from the opinion of the **Madras High Court** in the case of *Vigneswara v. Bapayya*,³ and in *Doraiswami v. Nandisami*.⁴ The **Allahabad High Court** held in *Lachmi Narayan v. Kishan Kishore*,⁵ that after the bar of the son's right to dispute the alienation the property alienated ceases to be joint family property and passes to the purchaser. In this case some ancestral property belonging to *B*, the father, and *L*, the son, members of a joint Hindu family, was sold by *B*, in 1881, and at the date of sale *L* was a minor, and having attained majority in 1895, he could have brought a suit to set aside the alienation and to recover the property till 1898; but he brought no such suit, and his right became extinct; therefore, the property was held to have ceased to be the property of the joint family, and passed absolutely to the purchasers in that year, and the minor sons of *L*, born in 1904, 1906, and 1909 respectively acquired no interest in the property, as it had, before the date of their birth, ceased to be joint ancestral property in which they might have acquired a right by birth.

Section 28 applied.

Suit by son born after date of sale. family property belonging to himself and his son, he becomes a divided member, and a son born subsequently acquires no right to a share in the property, and cannot sue to set aside the alienation and recover his share, as there is no property held jointly.⁶ It is true that according to the authorities on Hindu Law, an alienation made by a father can be set aside not only at the instance of sons living but also at the instance of the son born after the disputed alienation, which had been made without legal necessity or without the consent of the sons then living.⁷ But, the rule is

1922. (1) Where a Hindu father alienates the whole of the family property belonging to himself and his son, he becomes a divided member, and a son born subsequently acquires no right to a share in the property, and cannot sue to set aside the alienation and recover his share, as there is no property held jointly.⁶ It is true that according to the authorities on Hindu Law, an alienation made by a father can be set aside not only at the instance of sons living but also at the instance of the son born after the disputed alienation, which had been made without legal necessity or without the consent of the sons then living.⁷ But, the rule is

2. 1926 P.C. 16=48 All. 152=53 I.A. 36 (P.C.); Approved *Ganga Dayal v. Mani Ram*, (1909) 31 All. 156=1 I.C. 824=6 A.L.J. 62; also see and cf. *Ranodip Singh v. Parmeshwar Pershad*, 1925 P.C. 33=47 All. 165 (P.C.).

3. (1893) 16 Mad. 436=3 M.L.J. 216.

4. (1915) 38 Mad. 118=21 I.C. 410=25 M.L.J. 405.

5. (1916) 33 I.C. 913=38 All. 126 (130).

6. *Soundara Rajan v. Saravana Pillai*, (1916) 34 I.C. 794=30 M.L.J. 592 (Art. 126 applies, if claim is tenable).

7. See Mayne, 9th Edn., para. 342; also see *Tulsi Ram v. Babu*, (1911) 33 All. 654 and *Lachmi Narain v. Kishan Kishore*, (1915) 38 All. 126.

understood as applying where the father and the sons were members of a joint Hindu family owning and possessed of properties other than those alienated by their father.⁸ In *Ganesh Row v. Tulja Ram Row*,⁹ it was no doubt held that after-born sons are entitled to a share with the sons born before the alienation, but in that case also it did not appear that the father and the prior born sons were not possessed of other family properties which remained as joint family properties, owned by the father and the prior born sons when a son was born subsequent to the alienation in dispute. But, when the father and elder son held no property in common after the father had alienated the whole of his interest in the joint property, they would be taken as divided members.¹⁰

1923. (2) In the case of an alienation by a Hindu father, a new cause of action does not accrue to his son upon a subsequent birth of another son, either to him alone, or to him and his younger brother jointly.¹¹ The Privy Council have taken the same view in *Ranodip Singh v. Parmeshwar Pershad*,¹² where it was held that the birth of a son subsequent to the alienation does not create a *fresh* cause of action in his favour so as to afford a new starting point from that date. Of course, where the son then existing succeeds in his attempt to set aside the alienation, the younger sons, born after the alienation in dispute, would also be entitled to share in the relief obtained by him.¹³ The Allahabad High Court has held in *Sita Ram v. Cheddi Singh*,¹⁴ that it cannot be that successive causes of action would arise as new members are born year after year. In *Sankat Narain v. Ram Bharos*,¹⁵ Mukerji, J., held that the after-born son does not get a fresh start on his birth, where the alienation to be contested took place, before he was born. The starting point under Art. 126, is the date when the alienee takes possession of the property and the Oudh Judicial Commissioner's Court has held to like effect in *Chokhey Singh v. Hardeo Singh*,¹⁶ that there is no fresh cause of action for a son born after the alienation.

8. *Ramkishore Kedarnath v. Jainarayan Ramrachpal*, 20 I.C. 958=40 Cal. 966=25 M.L.J. 512=40 I.A. 213 (P.C.).

9. 24 I.C. 696=26 M.L.J. 460.

10. *Per Sadasiva Aiyar, J., in Soundararajan v. Saravana Pillai*, (1916) 34 I.C. 794=30 M.L.J. 592.

11. *Raja Ram v. Luchman*, 8 W.R. 15 (F.B.).

12. (1924) 47 All. 165=52 I.A. 69=48 M.L.J. 29 (P.C.).

13. *Ram Kishore v. Jainarayan*, (1913) 40 Cal. 966 (979) (P.C.).

14. (1924) 46 All. 882=1924 All. 798=22 A.L.J. 809.

15. (1924) 79 I.C. 1010=1924 All. 677 (678).

16. (1921) 64 I.C. 757=24 O.C. 330=8 O.L.J. 667; also see *Ram Kishen v. Baldeo*, 86 I.C. 704=1925 All. 247.

1924. (3) The legal position is that minor plaintiff in existence at the date of the transfer has undoubtedly a right to claim the benefit of Ss. 6 and 7, but these provisions could not apply in the case of an after-born son who is not a person entitled to institute a suit at the time when the period of limitation began to run. A right to challenge an alienation of family property is not co-parcenary property in which a son acquires an interest by birth.¹⁷ Limitation under Art. 126 runs from the date when the alienee takes possession of the property, which may be the date of the sale.¹⁸ If the plaintiff is a minor on that date when the limitation commences, this period will be extended in virtue of S. 6 of the Limitation Act, but S. 6 cannot be pleaded by a plaintiff who was not in existence when the alienee took possession.¹⁹ Every co-parcener who challenges an alienation does so in virtue of his own independent right as a person who has acquired interest in the family estate by birth.²⁰ Accordingly, plaintiffs claiming the benefit of Ss. 6 and 7 have to show that they had a cause of action to sue when the alienee took possession, and there was a joint right in their favour.²¹

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
127.	By a person excluded from joint family property to enforce a right to share therein.	12 years.	When the exclusion becomes known to the plaintiff.

SYNOPSIS.

Title I: Historical.

1925. Corresponding provisions.

1926. Legislative changes.

Title II: Scope and application.

1927-1936. Essentials of the article.

1927. (i) Suit by a member of joint family.

1928. (ii) Suit regarding joint family property.

1929. (iii) Suits between Mahomedan co-heirs.

1930-1932. (iv) **Suit to enforce a right to share.**

1930. (1) Joint family property.

1931. (2) Non-participation in profits not sufficient.

17. *Dhanraj Rai v. Ramnaresh Rai*, (1924) 79 I.C. 1019=1924 All. 912 (914); Reld. on *Lachman Das v. Sundar Das*, 59 I.C. 678=1 Lah. 558.

18. *Ibid.*, (1924) 79 I.C. 1019 (1021)=1924 All. 912 (914).

19. *Ibid.*, (1924) 79 I.C. 1019 (1021); Reld. on *Lachman Das v. Sundar Das*, 1 Lah. 558=59 I.C. 678; also see *Chokhey Singh v. Hardeo Singh*, 64 I.C. 757=24 O.C. 330.

20. *Ibid.*, (1924) 79 I.C. 1019 (1021); Reld. on *Padarath Singh v. Raja Ram*, 4 All. 235=2 A.W.N. (1882) 29.

21. *Dhanraj Rai v. Ramnaresh Rai*, (1924) 79 I.C. 1019=1924 All. 912 (914).

- 1932. (3) *Onus probandi*.
- 1933. (v) **Exclusion from participation.**
- 1933. Intention to exclude.
- 1934. Knowledge of exclusion.
- 1935. Illustrative cases.
- 1936. Exclusion from whole of joint property.
- 1937. Starting point of limitation.
- 1938. Minority of plaintiff.

NOTES.

1925. CORRESPONDING PROVISIONS.—Under Act XIV of 1859, “*suits to enforce the right to share in any property moveable or immoveable on the ground that it is joint family property*”, were provided for in S. 1, cl. 13 of that Act. The period of twelve years prescribed was to start running

“from the death of the person from whom the property alleged to be joint was said to have descended, or from the date of the last payment to the plaintiff or any person through whom he claimed, by the person who was in possession or management of such property on account of such alleged share”.²²

This clause applied to Mahomedan as well as Hindu families²³ and it was intended to apply to the case of a son claiming partition of joint family property after the death of his father.²⁴

Under Act IX of 1871, provision was made by its Art. 127 for a suit “*by a Hindu excluded from joint family property to enforce a right to share therein*,” and the period would begin to run from the time “when the plaintiff claimed, and was refused his share”: not from the time of his exclusion. Thus, if he had never claimed or been refused his share, according to the language of the Art. 127, in Act IX of 1871, he might bring his suit at any time.²⁵ In the Act of 1871 the Legislature not only confined the words to an article expressly dealing with Hindus alone but coupled the word “*joint*” to “*family*” by the use of a hyphen.

In the Limitation Act of 1877, the expression “joint family property” again appears in the same connection, but the Art. 127 is no longer confined to Hindus, but applies to any ‘person’. The words “joint-

22. *Gossain v. Sero Koomarie*, (1873) 19 W.R. 192; also see, *Govindan Pillai*, (1866) 3 M.H.C.R. 99.

23. *Mt. Khyroonissa v. Salehoonissa*, (1866) 5 W.R. 238; *Achima Bebee v. Ajeerjoonissa*, 11 W.R. 45; *Chundermonee Debia v. Mehrajan Bibi*, 22 W.R. 185; also see *Pandurang v. Balkrishna*, 6 B.H.C.R. 125; *Sakhonarayan v. Narayan Bhikaji*, 6 B.H.C.R. 238; *Shidhojirav v. Nairkojirav*, 10 B.H.C.R. 228.

24. *Hansi Chhiba v. Valabh Chhiba*, (1883) 7 Bom. 297.

25. *Kali Kishore v. Dhananjoy*, (1877) 3 Cal. 228; also see *Hansji v. Valab*, (1883) 7 Bom. 297.

family" were again coupled in the Act, as officially published, with a hyphen; and the time from which the period was to start running was changed to "*when the exclusion becomes known to the plaintiff*". The present article is the same as Art. 127 of Sch. II of Act XV of 1877.

1926. **LEGISLATIVE CHANGES.**—(1) We have noticed above that the corresponding provision in "By a person." S. 1, cl. 13, applied equally to Hindu as well as Mahomedan families. This was so held in certain **Calcutta** and **Bombay** rulings, namely, *Mt. Khyroonissa v. Saleh-oonissa*,²⁶ *Achina Bibee v. Ajeejoonissa Bibee*²⁷ and *Chunder Monce Debia v. Mehrajin Bibee*²⁸ in Bengal and *Bai Jamnubi v. Mitha Bai*²⁹ in Bombay, wherein effect was given to the expression in the Act of 1859 as embracing undivided property of members of Muhammadan families not shown to be joint families in the Hindu sense.

(2) In the Act XV of 1871, the language was expressly changed to confine Art. 127 to Hindus: "Joint family property." but in the Act XV of 1877, the expression "person" was restored and substituted for the word "Hindu" in column 1 of the article. The question has arisen, therefore, whether the Legislature intended this article to apply to persons other than Hindus also; and if so whether the expression "*joint family property*", which is a technical expression peculiar to Hindu Law, was to be taken in its loose non-technical sense of broadly including any undivided family property of a Hindu or Mahomedan, in which a person is claiming a share by inheritance as distinguished from survivorship. See paras. 1928 and 1929, for the discussion of its meaning.

TITLE II: SCOPE AND APPLICATION.

1927-1936. ESSENTIALS OF THE ARTICLE.

1927. This article applies to "*a person*" being a member of a joint family, who is "*excluded from*" participation in the enjoyment of some "*joint family property*", and who sues "to enforce a right to share therein". This article contemplates a suit by a member of the joint family against other members thereof to have restoration to joint enjoyment on the allegation of having been unlawfully excluded from joint enjoyment.³⁰

26. 5 W.R. 238.

27. 11 W.R. 45.

28. 22 W.R. 185.

29. 1881 P.J. 150.

30. *Bisheshar Tewari v. Bisheshar Dayal*, 15 O.C. 111=15 I.C. 394; Reld. in *Gajraj Singh v. Sadho Singh*, (1912) 16 I.C. 882=15 O.C. 397; also see *Jagat Singh v. Achhaibar*, 26 O.C. 191=1922 Oudh 15.

The language of the article shows that **five things are required for its application, viz. :—**

- (1) There must be a joint family;
- (2) There must be a joint family property;
- (3) Plaintiff must be a member of the joint family;
- (4) Plaintiff must have been excluded from the enjoyment of the joint family property; and
- (5) Plaintiff's suit must be for restoration to joint enjoyment.³¹

This article is meant to apply to **suits for partition** between members of a joint family³²; but, suits for money belonging to joint family, realised by one member of the family, brought *after partition*, is not governed by Art. 127, because it is no longer joint family property.³³ Co-parcenary as recognised by Hindu Law can only subsist between the members of a joint Hindu family.³⁴ In order that Art. 127 may be applicable the property in dispute in a suit must have been the property of an existing joint family on the date when the cause of action accrued.³⁵ Thus, this article would not apply where there has already been a division of status but no division of immoveable properties by metes and bounds.³⁶ This article does not apply to a person who claims to inherit property as a daughter's son and is not a member of the joint-family³⁷; nor does it apply to a suit by a daughter who after her father's death was living in her husband's house, and never had resided with the members of the father's family in her paternal house.³⁸ This article is, again, not applicable to a suit where the alleged joint-family property has passed by sale to a stranger.³⁹ Nor does it apply to a suit where the plaintiff is a stranger who has purchased a share in joint-family property from one of the members thereof,⁴⁰ who is alleged

31. *Bisheshar Tewari v. Bisheshar Dayal*, 15 O.C. 111=15 I.C. 394.

32. *Ravji v. Bala*, 15 Bom. 135.

33. *Jagat Singh v. Achhaibar*, 26 O.C. 191=1922 Oudh 15; *Gajraj Singh v. Sadho*, 15 O.C. 397=16 I.C. 882 (883).

34. *Muthusami v. Ramakrishna*, (1889) 12 Mad. 292 (293); Reld. on *Ramlakhi v. Durgacharan*, 11 Cal. 680.

35. *Thakur Prasad v. Partab*, (1884) 6 All. 442=4 A.W.N. (1884) 154.

36. *Mukhram Rai v. Chandra Deep*, (1935) 159 I.C. 453.

37. *Mothuranath v. Borkant Nath*, (1882) 11 C.L.R. 312; also see *Radanath v. Gisborne*, 14 M.I.A. 1 (P.C.).

38. *Kartik v. Saroda*, 18 Cal. 642 (645) (Person construed to mean a "person claiming as a member of the family").

39. *Bhavrao v. Rakhmin*, 23 Bom. 137 (F.B.); Followed in *Fakirappa Babappa v. Rudrappa Rachappa*, 1932 Bom. 255=137 I.C. 367.

40. *Horendra Chundra v. Annordi Mundul*, (1887) 14 Cal. 544; Reld. on 11 Cal. 680; also see *Venkayya v. Ramakrishna*, (1911) 9 M.L.T. 397=

to be out of possession at the time of sale.⁴¹ Thus, where after separation of a joint Hindu family two of its members had certain bonds jointly, it was held that a suit by one of them for his share of money recovered by the other on one of such bonds was governed, not by Art. 127, but by Art. 62 of the Schedule to the Limitation Act.⁴² The same principle was recognised in *Banoo Tewary v. Doona Tewary*,⁴³ and in *Amnte Raham v. Zia Ahmad*.⁴⁴

1928. Before a plaintiff can bring his case within Art. 127, it is incumbent on him to show that the
 (ii) Joint family property. property in which he seeks to recover a share is "joint-property".⁴⁵ Article 127, pre-supposes the existence of *joint-family property*, and that there has been an exclusion from participation in the enjoyment of such property.⁴⁶ This article proceeds upon the hypothesis that there is a joint-family, and it provides for the remedy of a member who is excluded, and has no application to cases where there was disruption of the status of jointness.⁴⁷ Under this article, a person excluded from joint-family property has 12 years from the date or time when the exclusion becomes known to him, to bring a suit to enforce his right to share therein.⁴⁸

Article 127 applies equally to moveable and immoveable properties belonging to a joint-family.⁴⁹ The
 Moveable properties. personal property of a Zemindar left at his death is joint-family property divisible amongst his sons.⁵⁰ But, where a joint-family property is actually divided, and one of the co-sharers subsequently deposits money which he has received for his share with another co-sharer, that

9 I.C. 495=(1911) 2 M.W.N. 175; and *Muthusami v. Ramakrishna*, 12 Mad. 292.

41. *Venkayya v. Ramakrishna*, (1911) 9 M.L.T. 397=9 I.C. 495=(1911) 2 M.W.N. 175.

42. *Thakur Prasad v. Partab*, (1884) 6 All. 442=4 A.W.N. (1884) 154.

43. 24 Cal. 309.

44. 13 All. 282=A.W.N. (1891) 88.

45. *Obhoy Churn Ghose v. Gobind Chunder*, (1882) 9 Cal. 237.

46. *Soondury Dossee v. Doyamoyce Dossee*, (1880) 5 Cal. 938; also see *Kartik v. Saroda*, 18 Cal. 642 (645).

47. *Banno v. Doona*, (1897) 24 Cal. 309.

48. *Ishridutt Singh v. Ibrahim*, (1882) 8 Cal. 653; Folld. in *Lal Gauri Kant v. Shankar Baksh*, 2 O.C. 348 (Claim for a share in joint family property).

49. *Ajodhya Pershad v. Mahadeo Pershad*, (1909) 3 I.C. 9=14 C.W.N. 221.

50. *Maharajulingaru v. Raja Row*, 5 M.H.C.R. 31.

money is no longer joint-family property, and a suit to recover it does not fall under this article.¹

A family may remain joint in regard to some properties after a separation in regard to the others.² There-

Partial partition. fore, the mere fact that there had been a partial partition of the family property does not affect the rights of the parties to sue for partition in regard to other properties which remained undivided³; and twelve years' limitation applies to a suit for partition in regard to the properties which remained joint, under Art. 127, Limitation Act.⁴ However, where a partial partition is proved, or admitted to have taken place between members of a Hindu family, the presumption is that there has been an entire partition, both with reference to rights and properties. The parties may be considered as divided in status, where there is no joint management of properties left undivided on a separation between the family members.⁵ A **Full Bench of the**

Madras High Court has held, that where **Division of status.** in a Hindu family, some of the properties have been actually divided by metes and bounds, and the rest are in the possession of various members who have become *divided in status*, though all the properties have not been divided and apportioned among them, a suit by one member asking for his share of the undivided moveables and rents and profits of the immoveables after the taking of the accounts is governed not by Art. 127, but by Art. 120.⁶ Article 127 is inapplicable to cases where at the date of the suit the property has ceased to be joint-family property and is held by sharers as tenants-in-common.⁷ The view is in accordance with the **Full Bench** decision of **Allahabad High Court**, that the word "joint" in Art. 127 has a settled and well-defined meaning and could not be used as descriptive of property held in common. It was held that "joint-family property" means the property of a joint-family, and not property in which the contending proprietors have

1. *Ahmed Ali v. Hussain Ali*, 10 All. 109.

2. *Ajodhya Pershad v. Mahadeo Pershad*, (1909) 3 I.C. 9=14 C.W.N. 221; also see *Muthusami v. Nalla Kulantha*, 18 Mad. 418 (419) and *Ramachandar v. Narayana*, 11 Bom. 216.

3. *Ibid.*

4. *Ibid.*; (1909) 3 I.C. 9=14 C.W.N. 221 and 18 Mad. 418 (419).

5. *Vaidyanatha Aiyar v. Aiyasamy Aiyar*, (1908) 32 Mad. 191=5 M.L.T. 49=1 I.C. 408=19 M.L.J. 94.

6. *Yerukola v. Yerukola*, (1922) 45 Mad. 648=1922 Mad. 150 (F.B.).

7. *Ibid.*, (1922) 45 Mad. 648 (F.B.) and *Venkatappayya v. Venkata Ranga Row*, (1919) 43 Mad. 288=59 I.C. 978=38 M.L.J. 149; also see *Kumarappa v. Saminatha*, 42 Mad. 431 (439) (Art. 127 cannot apply to a case of exclusion of a tenant in common from a property, because plaintiff is not a person excluded from "joint family property").

interest as tenants-in-common.⁸ It was observed by Edge, C.J., that

"if the Legislature meant the article to apply to the joint property of a family that is not joint, there is no reason apparent why it should not have provided for joint property generally whether the person jointly interested belongs to the same property or not".

Similarly, the **Calcutta High Court** has held in *Banoo Tewary v. Doona Tewary*,⁹ that Art. 127 has no application to cases where there was disruption of the status of jointness. The **Full Bench of the Bombay High Court**, in *Bhaorao v. Rakhim*,¹⁰ takes a similar view, holding that Art. 127 does not apply except in cases between *members of a joint-family*, and the ordinary rule of limitation under Art. 144, applies in the case of a stranger to the family holding property which originally belonged to the family. In the case of *Isap Ahmed v. Abhramji Ahmadji*,¹¹ it was held by the majority of the Judges constituting the Full Bench that the expression "*joint-family property*" must be read as property appertaining to a joint-family. This view was adopted in *Krishnaji Annajee v. Annajee Dhundajee*,¹² that Art. 127 does not apply where the property in suit is not joint-family property. In *Govindrao v. Rajabai*,¹³ their Lordships of the **Privy Council** observed that even where the property was joint-family property held by G. and S., who were at one time joint in estate, the effect of their separation before S's death was "that any immoveable joint-property which continued undivided was no longer joint-family property so as to come under Art. 144". Thus, in order to bring a case under Art. 127, it must appear that plaintiff is a member of a joint-family, and not a person having a divided status with other family members in respect of the property in suit.¹⁴

1929. (1) In para. 1926, *ante*, we have noticed that the word *person* in S. 1, Cl. (13), was changed to "*Hindu*", in Art. 127 of Act IX of 1871, and, again, the word '*person*' was restored in Art. XV of 1877. This gave rise to a question as to whether the expression "*joint-family property*" as used in Act XV of 1877, was used in a loose non-technical sense of meaning property belonging to an undivided family, whether Hindu or Mahomedan, or whether it was used in the well-known

8. *Amme Raham v. Zia Ahmad*, (1891) 13 All. 282 (F.B.); also see *Sultan Begam v. Debi Prasad*, (1908) 30 All. 324.

9. (1897) 24 Cal. 309.

10. (1898) 23 Bom. 137 (F.B.).

11. (1917) 41 Bom. 588=41 I.C. 761=19 Bom. L. R. 579 (F.B.).

12. 1930 Bom. 61 (62)=54 Bom. 4=124 I.C. 773.

13. 1931 P.C. 48=130 I.C. 673=60 M.L.J. 386 (P.C.).

14. *Jagat Singh v. Achhaibar*, 1922 Oudh 5=26 O.C. 191; Followed *Gajraj v. Sadhu*, 15 O.C. 397=16 I.C. 882.

technical sense of the Hindu Law, meaning the property of a joint-family, which passes not by the rule of inheritance, but by survivorship. A **Full Bench** of the **Allahabad High Court**, took the view in the leading case of *Amme Raham v. Zia Ahmad*,¹⁵ that the words "joint-family property" in Art. 127, mean the property of a joint-family in the accepted and well-understood meaning of the term. The **Calcutta High Court**, held in *Mahomed Akram v. Anarbi Chowdhrani*,¹⁶ that Art. 127 does not apply to a suit by Mahomedans for possession by right of inheritance of shares in the property of their deceased ancestor. The **Madras High Court** took the same view, in *Pathba v. Mohidin*,¹⁷ that the words "joint-family property" in Art. 127, are intended to refer to joint-family property in the Hindu sense of the term; and similarly in *Mohideen Bee v. Meer Saheb*,¹⁸ that under the Mahomedan Law there is no such thing as joint-family property: and accordingly, Art. 127 is inapplicable to Muhammadans.¹⁹ The **Punjab Chief Court** has, likewise, not applied Art. 127 to a case where the parties were Muhammadans. As observed in *Daud Khan v. Govinda*,²⁰ by the **Nagpur Judicial Commissioner's Court**, Art. 127 is inapplicable to the case of Muhammadans who have not alleged that they have by custom adopted the Hindu system of joint-family property. In *Maung Aung Tun v. Maung San Nyun*,²¹ it was doubted if Art. 127 could apply to Burmese Budhists, where property could not be called joint-family property.

(2) In *Sayad Gulam Hussein v. Bibi Anwarnissa*,²² Sir

Bombay cases.

Charles Sargent, C.J., understood the words "joint family property" in the

Act XV of 1877, in the same sense as they were taken in cases under Act XIV of 1859, *viz.*, that

"joint family property includes property left by a deceased Mahomedan and divisible among the heirs until it is divided".

A long series of Bombay cases was based on this view, in which Art. 127 was considered applicable to the case of Mahomedan co-heirs,²³ and it was observed that in the Presidency of Bombay, a

15. (1891) 13 All. 282=11 A.W.N. (1891) 88 (F.B.); Diss. from *Bavasha v. Masumsha*, 14 Bom. 70.

16. 22 Cal. 954.

17. (1891) 15 Mad. 57=1 M.L.J. 757 (Note).

18. (1916) 38 Mad. 1099=32 I.C. 1002.

19. *Cheriya Imbichi v. Syed Ali*, (1912) 13 I.C. 791 (Mad.).

20. 5 N.L.R. 41=2 I.C. 15; Folld. 22 Cal. 954; 13 All. 282; 15 Mad. 57.

21. (1927) 105 I.C. 598=1928 Rang. 13=5 Rang. 576.

22. B.P.J. (1885) 170 (171).

23. *Abdul Rahim v. Kirpa Ram*, (1891) 16 Bom. 186; *Abdul Kadir v. Bapubhai*, (1898) 23 Bom. 188; *Boo Fatima v. Boo Ghisanboo*, (1898) 23 Bom. 188 (Art. 127 applied to a suit by daughter for a share).

suit for partition of an inheritance is hardly distinguishable from a partition suit by Hindus.²⁴ It was pointed out, however, by Beaman, J., in *Jan Mahomed v. Datu Jaffar*,²⁵ that the opinion hitherto prevailing in Bombay had not been accepted by the other High Courts,²⁶ and it was untenable upon any view of the Mahomedan Law. He observed that

"It could not even be argued that the heirs, sharers, and residuaries took over each other by survivorship, which is the crucial test of joint family property. On the death of a Mahomedan intestate, his estate could not in any conceivable circumstances, unless it is by a special custom supposed to be governed by the Hindu Law, be 'joint family property'. It is what it always was, an undistributed estate, to be taken in severalty by the heirs, sharers and residuaries."²⁷

The conclusion reached by him on an elaborate critical analysis of early Bombay cases was that

"The criterion of its (Art. 127) applicability is the character of the property. That property must be '**joint family property**', and no such property is known to the law outside the special Hindu Law of the joint family."

He added,

"Some who are not Hindus may hold property under that special branch of the Hindu Law, but before Art. 127 can be applied it must be shown that they do."²⁸

(3) A **Full Bench** of five Judges in *Isaf Ahmed v. Abramji*,²⁹ 41 Bom. 588 (F.B.), has overruled the earlier decisions, in spite of the rule of *stare decisis*, holding that the *Sayad Gulam Hussain's case*,³⁰ was wrongly decided, and this clearly erroneous construction of the Limitation Act was not to be followed. The majority of the **Full Bench** (Shah, J., Diss.), have explained that

"the word 'joint' may be construed in a **technical sense**, or in a loose popular sense. In India '**joint**' in the article if used in a technical legal sense would attract '**joint family property**'. to itself the word '**family**' and form a **compound adjective** connoting appertaining to a joint family living as an undivided Mitakshara or an undivided Dayabhaga

24. *Abdul Kadir v. Bapubhai*, (1898) 23 Bom. 98.

25. (1914) 38 Bom. 449=22 I.C. 195 (224).

26. *Amme Rahim v. Zia Ahmad*, 13 All. 282; *Mahomed Akram v. Anarbi*, 22 Cal. 954; *Puicha v. Mohidin*, 15 Mad. 57, etc.

27. Per Beaman, J., in *Jan Mahomed v. Datu Jaffar*, (1914) 38 Bom. 449=22 I.C. 195 (224).

28. *Ibid.*, (1914) 38 Bom. 449=22 I.C. 195 (225); Relied on Baty, J.'s view in *Abdul Kadir v. Mahomed*, 5 Bom. L. R. 355 (*Held*, that if the word "joint" qualifies the word "property" and not the word "family," this article would extend to property in which the most remote and separated kinsmen whether Hindus or Mahomedans held a common interest).

29. (1917) 41 Bom. 588=19 Bom. L. R. 579=41 I.C. 761 (F.B.).

30. 1885 B.P.J. 170; Overruled in 41 Bom. 588 (F.B.).

family lives. In a loose popular sense 'joint family property' might mean undivided property of a family."³¹

The majority of the Full Bench held that "*joint family*" in Art. 127 of the Act must be read as a compound adjective, and the expression 'joint family property' must be read as property appertaining to a joint family. Beaman and Heaton, JJ., added, pointing out that

"the joint Hindu family, as a definite legal entity is as well-known and recognised under the Dayabhaga as under the Mitakshara School, and so generally under the Hindu, as contradistinguished from all other great systems of law . . . that the 'joint family' as a legal entity involving definite legal notions, incidents and consequences is unknown to any other great system of law prevailing in the Empire. So that where property is spoken of as belonging to a joint family, it must primarily be referred to a Hindu joint family, and only secondarily to such groups of non-Hindus as can prove that they have by custom adopted the Hindu Law of the joint family."³²

1930-1932. SUITS FOR PARTITION.—This article

(iv) Suit to enforce a right to share. applies only when a right to share is sought to be enforced. It has no application where there has already been a partition and the suit is only for the recovery by plaintiff of his share allotted to him on family partition.³³ This article cannot apply to a suit to re-open a partition on ground of mistake, or misapprehension of true facts, and to re-adjust the shares of the parties; because only upon the footing, that the original partition was void, can it be said that the property remained joint family property.³⁴ Art. 127 relates to a suit by a person excluded from joint family property, to enforce a right to share therein.³⁵ A claim for partition is one of the modes of enforcing a right to share in joint family property within the meaning of this article.³⁶ The phrase "*to enforce a right*" is different from the phrase "*to establish a right*" and indicates a claim for actual possession, *i.e.*, suits for partition, whether the whole property has remained joint or whether on a partition one portion has been left undivided.³⁷ A suit for declaration of rights and for injunction would be governed by Art. 120

31. *Isaf Ahmed v. Abramji*, 41 Bom. 588 (F.B.).

32. *Ibid.*

33. *Ahmadali v. Hussain*, (1887) 10 All. 109 and *Thakur Pershad v. Partap*, (1884) 6 All. 442; also *Saroda Soondary v. Doyamoyee*, 5 Cal. 938 and *Obboy Churn v. Gobinda*, (1882) 9 Cal. 237; also see *Mansaram v. Champalal*, 1935 Nag. 137=156 I.C. 672=31 N.L.R. 304.

34. *Ramakotayya v. Sundararamayya*, 1931 Mad. 707=34 M.L.W. 262=61 M.L.J. 430=54 Mad. 883=135 I.C. 9.

35. *Krishnaji v. Annajee*, 1930 Bom. 61=54 Bom. 4=124 I.C. 773=31 Bom.L.R. 1240.

36. *Rudra Pratap v. Nirman Prasad*, (1923) 74 I.C. 225 (Oudh).

37. *Ravji v. Bala*, 15 Bom. 135 (143).

and not Art. 127.³⁸ The word *exclusion* implies *previous inclusion*, and the words "*excluded from the joint family property*" apply to the exclusion of a person who is a member of a joint family³⁹ but they were not intended to apply to a person, who is not such a member, but has a divided status at the time of suit in respect of the property sought to be partitioned.⁴⁰ It is to be noted that this right can only be enforced, under this article, in respect of property which is "joint family property" in the sense of appertaining to a joint family, and not property in which the contending parties have interest as tenants-in-common (*See S. 1928*), *ante*. Again, **Art. 127 does not apply where a stranger has acquired the property.** Such an alienee who has been in possession for more than 12 years is not to be deemed a person who has excluded his co-parceners from joint family property.⁴¹ Article 127 will, however, apply even if the plaintiff cannot claim a definite share.⁴² A claim to share in joint property as he was accustomed to do before his exclusion is governed by this article.⁴³

1931. (2) Mere non-participation of some of the co-sharers in the enjoyment of the property is not exclusion, within the meaning of this article.⁴⁴ A mere exclusion from commensality, without partition of the family property, is not sufficient to prove exclusion from joint family property.⁴⁵ In the case of a joint family, where no partition was proved, the mere fact that two of the brothers went to live in a neighbouring village would not make the possession of the third brother necessarily adverse, and exclusive.⁴⁶ A possession as that of a tenant-in-common is not inconsistent with the title of another co-sharer: and as between tenants-in-common mere non-participation of the profits by one tenant, and exclusive occupation by the other is not sufficient to entitle the former to a decree for joint possession

38. *Moti Ram v. Devidas*, 1935 Pesh. 65.

39. *Soondury Dossee v. Dayamoyee Dossee*, (1880) 5 Cal. 938.

40. *See para. 1927, ante*; see also *Harendra v. Annoardi*, (1877) 14 Cal. 544; *Ramlakhi v. Durga Charan*, (1885) 11 Cal. 680.

41. *Fakirappa Babappa v. Rudrappa Rachappa*, 1932 Bom. 255=137 I.C. 367=34 Bom.L.R. 354.

42. *Muttake v. Thimmappa*, (1891) 15 Mad. 186.

43. *Ajodhya Pershad v. Mahadeo Pershad*, (1909) 14 C.W.N. 221=3 I.C. 9.

44. *Srimantha v. Devasikamany*, (1910) 20 M.L.J. 364=7 M.L.T. 174=5 I.C. 924 (2); *Relied on Sellam v. Chinnammal*, 24 Mad. 441 and *Dhoorjetti Subbayya v. Dhoorjetti Venkayya*, 30 Mad. 201=2 M.L.T. 184.

45. *Jeolal Mahton v. Loke Narayan*, (1912) 15 I.C. 184=16 C.W.N. 466 (P.C.).

46. *Jagjivandas v. Bai Amba*, (1900) 25 Bom. 362 (365).

or consequently to make a case of adverse possession.⁴⁷ Thus, it has been held that a neglect by plaintiff to take possession of his share notwithstanding request that he would do so, did not indicate that the defendant was in possession of the property as his own property to the exclusion of the plaintiff: and, the mere circumstance that subsequent to the date of the letter, the plaintiff had not participated in the profits would not in the absence of supportive evidence, justify the inference that the plaintiff was then excluded.⁴⁸ The rule laid down by the authorities is that so long as a co-owner who actually enjoys the profits of jointly owned property does not by some unequivocal act communicate to his co-owner, either directly or indirectly, that he no longer recognises any right of the latter in the property, and assert that he holds the property as his own to the exclusion of the other, the possession of one continues to be the possession of both, and the one in possession can acquire no right against the other by adverse possession.⁴⁹

1932. In a suit for partition of joint family property, where the plaintiff proved that the family property was joint, and that he had a share in it, the onus lay on the defendant to prove plaintiff's exclusion from the joint estate for more than 12 years and an exclusion known to the plaintiff.⁵⁰ Mere proof of refusal on the part of the plaintiff, a widow, to live with her co-widow, or of non-participation by her in the family property, did not establish ouster or exclusion by the defendant, in the absence of other evidence to show that she had abandoned her interest to their knowledge.¹ Where the plaintiff was found to have continued even after the invalidation of his adoption to live with the adoptive father's widow, and perform the shraddh ceremony of her husband, there was nothing to indicate that he had abandoned his claim to enjoy his family property or that the defendants to his knowledge excluded him from enjoyment.²

However, possession is evidence of title, and is primarily exclusive. The burden lies on the plaintiff to prove the property in which he seeks to recover a share is joint family property,³

47. *Ittappan v. Manavikrama*, (1897) 21 Mad. 153 (159); Relied on *Watson & Co. v. Ramchand Dutt*, 18 Cal. 10; also see *Lachmeshwar Singh v. Manowar Hossein*, 19 Cal. 253 (P.C.) (Enjoyment of joint estate by a co-owner not necessarily an adverse possession).

48. *Dinkar Sadashiv v. Bhikaji*, (1887) 11 Bom. 365; Followed in *Jivanbhat v. Anibhat*, (1896) 22 Bom. 259.

49. *Ma Le v. Ma Huryin*, (1909) 5 L.B.R. 112=4 I.C. 298.

50. *Jivanbhat v. Anibhat*, (1896) 22 Bom. 259; Relied on 18 Bom. 197 (202); also see *Hari v. Maruti*, 6 Bom. 741 and *Umesh v. Jagadish Chandra*, 1 C.W.N. 543; *Hansji v. Vallabh*, 7 Bom. 297.

1. *Sellam v. Chinnamal*, (1901) 24 Mad. 441.

2. *Subayya v. Venkayya*, (1906) 30 Mad. 201.

3. *Annamallai v. Subramanian*, 1929 P.C. 1=56 M.L.J. 435; *Obhoy*

or that the division of status took place within 12 years preceding the institution of suit for partition.⁴ It is for him who impugns this exclusive title, to show that the possession arose in some way which has preserved his own right. In every case the person who has been out of possession for more than twelve years must make out some *prima facie* title, and some agreement or acknowledgment of that title to deprive the defendant's possession of its ordinary effect.⁵

1933. (v) EXCLUSION FROM PARTICIPATION.—

Question of exclusion one of fact.

Their Lordships of the Privy Council have observed in the case of *Radhoba v. Aburao*,⁶ that there is no definition of the word "exclusion" in the Limitation Act, and the question whether a person has been excluded from joint family must depend upon the facts of the particular case. As observed

(i) Intention to exclude.

by the **Oudh Judicial Commissioners** in *Rudra Pratap Narain v. Nirman Prasad Singh*,⁷

"in 'exclusion' just as in 'possession' there is a mental as well as a physical element. We must look not only to the physical act but also to the intention accompanying that act. **Legal possession** is not defeated by the person in such possession putting another person in physical possession (*i.e.*, in detention) as his servant or tenant, because such **physical possession** in one person is consistent with legal possession in another. In the same way, **legal or judicial exclusion** from an estate by one co-owner of his co-owners is consistent with their physical admission to it".

An intention to exclude is an essential element of exclusion. It is necessary, therefore, for the Court to be satisfied that there was an intention on the part of those in control and possession of joint family property to exclude the person and **that exclusion was to his knowledge.**⁸

v. Gobin, 9 Cal. 237 (241); *Gajraj v. Sadho*, 15 O.C. 397=16 I.C. 882 (883).

4. *Sarjoo Prosad v. Deodat*, 4 O.W.N. 958=1927 Oudh 499=105 I. C. 410.

5. *Ramchandra Narayan v. Narayan Mahadev*, 11 Bom. 216; also see *Nilo Ram Chandra v. Govind Ballal*, 10 Bom. 24 (An agreement of partition between two brothers acknowledging the title to a share of an absentee brother); also see *Lingan Gouda v. Sangan Gouda*, 145 I.C. 780=1933 Bom. 386=35 Bom.L.R. 779 (Long and exclusive possession by one co-parcener).

6. 1929 P.C. 231=118 I.C. 1=53 Bom. 699=56 I.A. 316=31 Bom. L.R. 103 (P.C.).

7. 74 I. C. 225=1923 Oudh 61=9 O. L. J. 552 ("What will amount to exclusion in a given case, will have to be determined in the light of its particular facts"); also see *Rajoo Singh v. Gunesh Monee*, 15 W.R. 400 (The question of fact, whether there has been exclusive possession and enjoyment, must be decided upon the evidence in each case).

8. *Radhoba v. Aburao*, 1929 P.C. 231=118 I.C. 1=56 I.A. 316=53 Bom. 699=57 M.L.J. 287 (P.C.).

(ii) Knowledge of exclusion.

1934. The legal position may be stated in the words of Abdul Rahim, J., in *Narasimha Deo v. Krishenchandra*.⁹

"The mere fact that a co-parcener has not enjoyed any portion of the family property for twelve years or more, cannot deprive him of his rights. Possession of one co-parcener is deemed in law to be possession on behalf of all co-parceners, although other co-parceners may take no part in the management, and may not even enjoy any of the income of the property. In order that lapse of time may deprive a co-parcener of his rights in the joint family property, it has to be established that he has been **excluded from the enjoyment of the property** to his own knowledge. If exclusion for 12 years to the knowledge of the excluded co-parcener is established, his right will be barred, but not otherwise".¹⁰

1935. ILLUSTRATIVE CASES.—

(1) "What will amount to exclusion in a given case will have to be determined in the light of its peculiar facts."¹¹ In

Receipt of maintenance.

some cases, receipt of maintenance by a junior member of a Zemindar's family may be good evidence to negative the allegation of enjoyment of the Zemindari or its properties as in *Raghunath Bali v. Maharaj Bali*.¹² In some cases, on the other hand, receipt of maintenance may be evidence of recognition of a person's claim as a co-parcener in a joint Hindu family.¹³

In *Udayarpalayam Zemindary* case, it was pointed out "that although

Physical possession as servant, etc.

one member of the family was in sole possession of the estate the receipt of maintenance by the other member and his **enjoyment of portions of property allotted for his maintenance** would be regarded as participation in family income. However, if a person is allowed maintenance and permitted to live in the family house, not as a co-parcener, but as a mere dependant, while his claim as a co-parcener is distinctly denied, the enjoyment of such residence or maintenance is not sufficient to prevent time running against his claim.¹⁴

(2) Where *N*, a member of a joint Hindu family after the death of his father and mother went to live with his

Intention to exclude.

maternal uncle voluntarily, and he was helped in an humble way by his maternal uncle, and was not educated in the same way as other members of the family, but he was not dissatisfied with the conditions under which he was living, and the other

9. (1919) 52 I.C. 725=37 M.L.J. 256.

10. *Ishridutt Singh v. Ibrahim*, (1852) 8 Cal. 653; Followed in *Lal Gauri Kant v. Shanker Bakshi*, 2 O.C. 348—Claim for a share in joint family property) and *Krishnabai v. Kanguda*, 18 Bom. 197 (Limitation begins to run only after he came to know of the exclusion) and see S. 1937: "starting point of limitation".

11. *Narasimha v. Krishna Chendra*, (1919) 52 I.C. 725 (P.C.).

12. 11 Cal. 777=12 I.A. 112 (P.C.).

13. *Narasimha v. Krishna Chendra*, (1919) 52 I.C. 725, *supra*; cf. *Maharaju Langaru v. Rajah Row*, 5 M.H.C.R. 31 (Where the Court of Wards did not profess to decide as to which of the claimants was entitled to the Zemindari, and no exclusion was consequently established).

14. *Narasimha Deo v. Krishna Chendra*, (1919) 52 I.C. 725=1919 M. W.N. 440=10 L.W. 156=37 M.L.J. 256.

members though willing to allow the uncle to maintain him did not subscribe towards his maintenance and marriage expenses, it was held that they had given no indication of excluding him from his share in the joint family property.¹⁵ In *Nilo Ramchandra v. Govind Ballal*,¹⁶ where plaintiff's father had been absent from the village for 35 years, but a deed of partition between his two brothers, dividing the property half and half, contained a provision that they would return the share of absentee on receiving a certain sum for expenses incurred in the management, it was held that the possession and enjoyment of the share in question by the other members of the family, for over 35 years, had not been as their own property to the exclusion of the plaintiff and their father, which was necessary in order to constitute a statutory bar by limitation under S. 1, Cl. (13) of Act XIV of 1859.¹⁷

(3) Where the plaintiff's branch had long ago severed their connection with the defendant's branch, and they had for many years lived apart on the property acquired by their paternal ancestors, and there was no reliable evidence to show that they had, within living memory, had any community of property with the defendant's branch, it was held that there was evidence of separation or exclusion or both.¹⁸

What is exclusion. "Where a co-parcener is not in possession of any joint property, and does not receive any of the proceeds of the property, he may be said to be excluded from joint property, but not if he has maintained his connection as joint owner, by living on the property, or by being supported in the family by the proceeds of the family property."¹⁹

(4) Where a member of a joint Hindu family became a convert to Islam, this was held *ipso facto* amounting to his separation from the family, and in the absence of any evidence that after his conversion the plaintiff continued to be treated as a member of a joint Hindu family, within 12 years of the date of the institution of his suit, his claim as to acquired property was held not within time under Art. 127, Limitation Act: but as regards ancestral property, the plaintiff being a co-sharer, the presumption was that his title continued until it was extinguished by some overt act of adverse possession, and plaintiff was accordingly allowed a decree only for his share in the ancestral property.²⁰

(5) Orders in mutation proceedings, upon the application of a person to put him upon the registry as sole occupier, are not to be regarded as judicial determination expelling *proprio vigore* any individual from any proprietary right or interest he claims in immovable property. These orders may show sole legal possession but not a possession as sole legal owner in a proprietary sense.²¹

15. *Radhoba v. Aburao*, (1929) 56 I.A. 316=1929 P.C. 231=118 I.C. 1=53 Bom. 699 (P.C.); also see *Doorjetti Subbayya v. Doorjetti Venkayya*, 30 Mad. 201 (A member of an undivided family living with an adoptive mother after adoption declared invalid: not debarred from partition of his share in natural family).

16. (1885) 10 Bom. 24.

17. *Nilo Ramchandra v. Govind Ballal*, (1885) 10 Bom. 24; also see *Faki v. Nurudin*, 18 Bom. 19.

18. *Muttake v. Thimmappa*, (1891) 15 Mad. 186.

19. *Jagannatha v. Ramabhadra*, 11 Mad. 380, s.c. on appeal, 14 Mad. 237 (P.C.)—Per Kernan, J.

20. *Ganga Singh v. Mt. Hardevi*, (1916) 57 P.R. 1916=35 I.C. 549=4 P.L.R. 1917.

21. *Nirman Singh v. Lal Rudra Partab*, 1926 P.C. 100=48 All. 529=29 O.C. 316=1 Luck. 389 (P.C.); O. R. *Rudra Partab v. Nirman*

1936. The exclusion spoken of in this article is probably a total exclusion from the joint family property, though there is some conflict of opinion on the subject. The **Bombay High Court** has held that what would bar the operation of Art. 127, would be a reserve of a part of the joint estate from partition, and a possession of that portion conceded to, and taken by one of the sharers as the common property of himself and the other sharers.²² But, this article applies equally to a portion of joint family property left undivided as to the whole estate, and a twelve years' exclusion known to the excluded sharer binds him in the one case as in the other. Accordingly, the fact that the house in question had admittedly remained undivided on the occasion of a general partition which had taken place about 35 years before the suit, did not prevent the operation of Art. 127, where the defendant had since been in sole possession and enjoyment of the house in dispute.²³ In *Vishnu v. Ganesh*,^{23-a} the fact that the plaintiffs were not excluded from their share in one part of the joint property did not prevent Art. 127 from operating in respect of another part from which they had been excluded to their knowledge, but this **Bombay** view has been dissented from in a **Madras** case, where it has been held that **to bar a plaintiff's right under Art. 127 of Sch. I, to the Limitation Act, there must be exclusion from the whole of the joint family property:** and that where individual members of a joint family are in possession of specific items of joint property, such possession does not constitute an exclusion of the others from the family properties.²⁴ The same view appears to have been taken in *Lakshman Dad v. Ram Chunder*,²⁵ that the exclusion spoken of in Art. 127, is exclusion from the whole of the joint family property. That was a case in which the co-parcener wanted to establish his rights to his own share as well as to a moiety of his father's interest to which he became entitled on the death of his father. In applying the corresponding S. 1, Cl. (13) of Act XIV of 1859, their Lordships of the Judicial Committee said:

Singh, 1923 Oudh 61=74 I.C. 225=9 O.L.J. 552; also see *Muttake v. Thimappa*, (1891) 15 Mad. 186 (To entitle a person or a branch of an *aliyasantana* family to participate in the property of the family, the exercise of the right to share ought to be kept up by joining in the *sacra*, by inter-marriage, etc.).

22. *Ram Chandra Narayan v. Narayan Mahadev*, (1886) 11 Bom. 216.

23. *Ibid.*, 11 Bom. 216; also see *Vithoba v. Narayana*, B.P.J. (1883), 262=11 Bom. 216, note and *Vishnu v. Ganesh*, 21 Bom. 325 (328).

23-a. 21 Bom. 325 (328).

24. Cf. *Kumarappa Chettiar v. Saminatha Chettiar*, (1919) 52 I.C. 470=36 M.L.J. 612=42 Mad. 431=1919 M.W.N. 328 and *Mutusami v. Nilakulantha*, 18 Mad. 418; also see *Jagannath v. Rambhadra*, 11 Mad. 392, on appeal 14 Mad. 237 (Exclusion to operate as a bar must be an entire exclusion).

25. (1880) 5 Bom. 48.

"Now, so far as the immoveable property of the family is concerned, there seems to be no ground for the application of the statute. Not only has the respondent all along been in the enjoyment of part of that property, *viz.*, the house at Shahpur, but . . . is also entitled to exclude from the computation the period of limitation during which he had prosecuted the suit."

This decision is taken in *Kumarappa v. Saminatha*,²⁶ as "authority for the proposition that possession of part of the property would save limitation, as regards the rest of the property." In (*Sri Raja*) *Lakshmi Devi v. Surya Narayana*,²⁷ which related to the Belgaum Zemindari one member of the family, believing the estate to be impartible, was in sole possession of the major portion of the Zemindari. The others were given a few villages for maintenance. After the death of the last Zemindar the question was whether the other members, who were enjoying the villages for maintenance, were not barred by limitation. On behalf of the widow the plea of limitation was raised on the ground that the other members notwithstanding their possession of portions of property were excluded from the Zemindari. Both the High Court and the Judicial Committee overruled this contention. They held that so long as there was no total exclusion of the claimants there can be no adverse possession in favour of persons holding portions of the property.²⁸

1937. STARTING POINT OF LIMITATION.—See notes in para. 1934, *ante*. Time cannot run against a claim to partition joint family estate unless there has been definite exclusion to the knowledge of plaintiff;²⁹ but the claim may be shown to be stale. The decided cases have held that the exclusion must have come to the knowledge of the other co-sharers, and the onus is on the defendant to show when such exclusion took place beyond 12 years of the institution of the suit to bar the plaintiff's claim.³⁰ Where plaintiffs had separated themselves from the defendants, and had for more than 12 years been to their own knowledge excluded from the joint family property it was held that their suit to enforce a right to share therein was barred.³¹ If exclusion for twelve years to the knowledge of the excluded co-parcener is established,

26. (1919) 52 I.C. 470=36 M.L.J. 612=42 Mad. 431=1919 M.W.N. 328.

27. 20 Mad. 256=24 I.A. 118 (P.C.).

28. *Lakshmi Devi v. Suryanarayana*, 20 Mad. 256=24 I.A. 118 (P.C.); Followed in *Kumarappa v. Saminatha*, (1919) 52 I.C. 470=42 Mad. 431=36 M.L.J. 612.

29. *Annamalai Chetty v. Subramanian Chetty*, 1929 P.C. 1=56 M.L.J. 435=113 I.C. 897 (P.C.).

30. *Faki Abas v. Faki Mohidin*, (1891) 16 Bom. 191; also see *Nilo Ram Chandra v. Govind Ballal*, 10 Bom. 24; also see *Ishri Dutt Singh v. Ibrahim*, (1882) 8 Cal. 653; *Ram Lakhi v. Durga Charan*, (1885) 11 Cal. 680 (682) and *Hari v. Maruti*, (1882) 6 Bom. 741.

31. *Muttake v. Thimmappa*, (1891) 15 Mad. 186.

his right will be barred but not otherwise.³² The mere fact that a co-parcener has not enjoyed any portion of the family property for 12 years or more cannot deprive him of his rights.³³ Mere paper assertions not brought home to the knowledge of the person affected would not make time run against him under Art. 127.³⁴

1938. Article 127 of Sch. I to the Limitation Act applies equally to minors as to adults.³⁵ However, **Minority of plaintiff.** under the Scheme of the Act, in the case of persons under disability, a certain extension of time is allowed to them to enable them to file suits after the disability has ceased: *vide* Ss. 6, 7 and 8. The effect is that time runs against a minor just as against a person *sui juris*, but in the case of a minor, he will have 3 years more after attaining his majority, if the period of time allowed for the suit or application expired before he attained majority. In cases where the time would not, as provided in the article, expire before a minor attains majority, then he will have that time within which to institute the suit, that is, in no case he shall have less than the time allowed by the articles, but in certain cases, he will have three years more after the cessation of disability.³⁶ Knowledge of plaintiff-minor, during his minority, as to his exclusion, or the knowledge of his guardian will start limitation running, as there is no legal principle that knowledge to a minor is not imputable.³⁷

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
128.	By a Hindu for arrears of maintenance.	12 years.	When the arrears are payable.
129.	By a Hindu for a declaration of his right to maintenance.	12 years.	When the right is denied.

SYNOPSIS.

1939. Corresponding provisions.

1940. Scope and application.

32. *Narasimha Deo v. Krishna Chandra*, (1919) 52 I.C. 725=37 M.L.J. 256 (262).

33. *Narasimha Deo v. Krishna Chandra*, (1919) 52 I.C. 725=37 M.L.J. 256 (262).

34. *Anandrao Ganpatrao v. Vasantrao Madhavrao*, (1907) 17 M.L.J. 184=11 C.W.N. 478 (P.C.).

35. *Narasimha v. Krishna Chandra*, (1919) 52 I.C. 725=37 M.L.J. 256.

36. *Ibid.*, 52 I.C. 725 (731).

37. *Kalyandappa v. Chanbasappa*, (1924) 48 Bom. 41=51 I.A. 220=46 M.L.J. 598 (P.C.); also see and cf. *Radhoba v. Abu Rao*, (1929) 53 Bom. 699=57 M.L.J. 287=56 I.A. 316 (P.C.) (Evidence of plaintiff's exclusion during the period of his minority considered).

NOTES.

1939. **CORRESPONDING PROVISIONS.**—Under Act XIV of 1859, suits of this nature, *viz.*, for recovery of maintenance charged upon the inheritance of any estate were governed by S. 1, cl. 13, with a period of twelve years, beginning to run from

“the death of the person on whose estate the maintenance was alleged to be a charge, or from the date of the last payment to the plaintiff, or any person through whom he claimed, by the person in possession or management of such estate on account of such maintenance”.

But, where the maintenance was not charged on any estate, this clause did not apply,³⁸ and the suit was governed by S. 1, cl. 16 of that Act, time commencing to run from date of demand and refusal.³⁹

The corresponding provision was made in Act IX of 1871, by Art. 128, which was worded as follows:—
 Act IX of 1871. “By a Hindu for maintenance—Twelve years—When the maintenance sued for was claimed and refused.”
 A view was taken by the **Bombay**⁴⁰ and **Madras**⁴¹ High Courts, which latter was noticed with approval by their Lordships of the **Privy Council**,⁴² that a Hindu widow could claim arrears of maintenance for *any* period *prior* to date of demand and refusal, and she had a prospective claim only for twelve years’ arrears of maintenance from the date of such demand and refusal. The **Allahabad High Court** held in *Janki v. Nand Ram*,⁴³ that the head of a Hindu family is bound *morally*, if not *legally*, to provide for the maintenance of all the members of the family according to the various rules applicable to the claims of each class of members. A son inheriting the self-acquired property of his father takes that property subject to such *moral* obligations as are conducive to the spiritual benefit of his father, and that such *moral* obligations become *legal* obligations as against the son who holds his father’s property by inheritance.

38. *Binode Lal v. Luckhee Monce*, (1865) 4 W.R. 84; *Timmappa Bhat v. Parmeshariamma*, 5 Bom. H. C. R. A. C. J. 30; *Narayan Rao v. Ramabai*, 6 C.L.R. (1879) 162 (P.C.).

39. *Kalo Nil Kanto v. Lakshmi Bai*, 2 Bom. 637.

40. *Jivi v. Ramji*, (1879) 3 Bom. 207; *Reld. on Sukarbai v. Bhavanji*, 1 Bom. H. C. R. 194.

41. *Venkopadhyaya v. Kajari Hengusce*, 2 Mad. H. C. R. 36; Approved in *Raja Pirthee Singh v. Rani Raj Kocr*, 12 B.L.R. 238 (P.C.); also see *Narayan v. Ramabai*, (1879) 3 Bom. 415 (P.C.) (*Held*, that “by the Hindu common law the right of a widow to maintenance is one accruing from time to time according to her want and exigencies”).

42. *Ibid.*

43. *Janki v. Nand Ram*, (1888) 11 All. 194=9 A.W.N. (1889) 30 (*Per* Mahmood, J.).

The present articles are the same as
 Act XV of 1877. Arts. 128 and 129 of Sch. II to Act XV
 of 1877.

1940. SCOPE AND APPLICATION.—This article is applicable to a suit for arrears of maintenance “by a Hindu,” which expression signifies, “by a person claiming under Hindu Law”.⁴⁴ Where a suit was based on an *ekrar* executed by the priest of an idol for the recovery of maintenance, it was held that Arts. 128 and 129 did not cover the case based entirely upon a *contract* merely because the persons claiming under the contract were Hindus.

“The applicability of these two articles depends not upon the nationality of the plaintiff but upon the nature of his right.”⁴⁵

A person not having a claim to arrears of maintenance as a member of the original owner of the family estate, or in any way related to him under the Hindu Law could not plead the limitation allowed by Art. 128 of the Limitation Act: and, where the plaintiff's claim was based on a contract evidenced by a compromise decree, her case was held governed by Art. 115, Limitation Act.⁴⁶ A claim for arrears of maintenance by a widow suing her husband's brother on basis of an agreement, was maintainable only for past three years.⁴⁷ In a joint Hindu family, a claim for arrears of maintenance lies for twelve years, and Courts will not disallow the claim, unless abandonment or waiver is expressed or can be implied from the circumstances of the case.⁴⁸ Where maintenance is a charge upon the property, twelve years is the term applicable to the suit, but the suit would be governed by Art. 132 of the Limitation Act.⁴⁹ In *Baburia Saraswati Kuer v. Baburia Sheoratan Kuer*,⁵⁰ where a Hindu wife living apart from her husband sued after his death to recover maintenance on the basis of a *tamliknama* and under the general Hindu Law, it was held that the claim was not one for maintenance but was a mere money claim and that the suit was not governed by Art. 128. Art. 129 is intended to apply to cases where

44. *Girijanand Datta v. Silajanand*, (1896) 23 Cal. 645.

45. *Ibid.*, 23 Cal. 645; Reld. on in (*Babu*) *Ramjidas v. Mahamaya Prasad*, (1936) 161 I.C. 478=1936 Pat. 158 (The word ‘Hindu’ in Arts. 128 and 129 does not refer to the religious persuasion of the plaintiff).

46. *Narendra Chandra Lahiri v. Nalini Sundari Debi*, (1915) 26 I.C. 939 (Cal.); Reld. on 23 Cal. 645, *supra*; also see *Ramjidas v. Mahamaya Prasad Singh*, 161 I.C. 478=1936 Pat. 158 (A suit for maintenance by even a Hindu under contract is governed by Art. 115).

47. *Bhonajee v. Mt. Saraswati*, (1923) 75 I.C. 833 (Nag.).

48. *Krishnamachariar v. Chellammal*, (1928) 107 I.C. 641=1928 Mad. 561.

49. *Ahmad Hossein Khan v. Nihaluddin*, (1883) 9 Cal. 945=13 C.L. R. 330=10 I.A. 45 (P.C.).

50. 12 Pat. 869.

the status of a person on the basis of which maintenance is claimed is denied, and the person *inter alia* wants to establish that status; but where such status is not denied, Art. 128 applies.¹

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
130.	For the resumption or assessment of rent-free land.	12 years.	When the right to resume or assess the land first accrues.

SYNOPSIS.

- 1941. Corresponding provisions (Previous History).
- 1942-1945. **Scope and application.**
- 1942. *Rent-free land*—Relationship as landlord and tenant.
- 1943. Resumption or assessment of rent-free land.
- 1944. Mere non-payment of rent, effect of.
- 1945. Extinguishment under S. 28.
- 1946. **Starting point of limitation.**

NOTES.

1941. **CORRESPONDING PROVISIONS.**—(1) The Regulation XIX of 1793. Bengal Revenue-free lands—Non-Badshahi grants (Regulation XIX of 1793) made provision by its S. 10, that no length of possession shall be hereafter considered to give validity to any grants, for holding land exempt from payment of revenue, that had been made since the 1st December, 1790, by any other authority than that of Governor-General in Council, either with regard to the property in the soil or the rent of it. A suit for assessment or resumption of such lands was thus exempted from limitation, if the alleged rent-free tenure was shown to have been created after the last December, 1790.

(2) However, Regulation II of 1805, by its S. 3, cl. 3, laid down a *proviso* that

"nothing in . . . any part of the existing regulation shall be held to authorize the cognizance of any suit whatever in any Court of Justice, if the cause of action shall have existed sixty years before the institution of such suit".

This clause took away from the Courts all the authority to take cognizance of any suit whatever if the cause of action shall have arisen sixty years before the institution of the suit; it precluded all enquiry into any original defects in the title under which the possession commenced, and made it unavailing to show that the possession commenced under a grant made null and void by Regulation XIX of 1793. Thus, a suit for rent was barred under cl. 3,

1. *Mt. Shibbi v. Jodh Singh*, 1933 Lah. 747.

S. 3, Regulation II of 1805, against a person who had been, by himself, or by those under whom he claimed, in peaceable possession without payment of rent for sixty years before the commencement of the suit.²

(3) By S. 28 of Act X of 1859, the jurisdiction of the Collector was distinctly extended to the cases of suits for the resumption and assessment of land held on invalid lakheraj title, whether under S. 30, Regulation II of 1819, or S. 10, Regulation XIX of 1793, which, previously used to be brought indiscriminately, either in the Civil Court or before the Collector.³ The provision of S. 28, Act X of 1859, had introduced the Law of Limitation as barring the hearing of suits under S. 10, Regulation XIX of 1793, unless instituted within twelve years from the date that the plaintiff's right of action accrued. But that law, which remained unrepealed, declared that no length of possession should give validity to such grants. If, then, there were a concurrent jurisdiction in the Civil Courts and the Collector, limitation would not apply in suits brought in the Civil Courts, while the suit before the Collector was subject to a law of limitation. Rules were laid down by a Full Bench for the future guidance of the lower Courts in disposing of suits for the resumption of lakheraj instituted before the date on which Act XIV of 1859 came into operation. In suits instituted after that date, the effect of cl. 14, S. 1 of that Act, was to be taken into consideration.⁴ All such suits were barred unless commenced within twelve years from the time when the plaintiff's title accrued.⁵ In *Gunga Gobind Mundul v. The Collector*,⁶ their Lordships of the Privy Council observed that

"it is of the utmost consequence in India that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands—contiguous owners are apt to charge one another with encroachments. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety; but if the party out of possession could set up a sixty years' law of limitation merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is, **the legal right of the Government is to its rent; the lands are owned by others; as between private owners contesting *inter se* the title to the lands, the law has established a limitation for twelve years; after that time, it declares, not simply that the remedy is barred, but that the title is extinct in favour of the possessor.** The Government has no title to intervene in such contests, as its title to its rent in the

2. *Chundrabullee Debia v. Luckee Debia*, 5 W.R. (P.C.) 1.

3. *Khelat Chunder Ghose v. Poornochunder Roy*, (1865) 2 W.R. 258 (259).

4. *Ibid.*, (1865) 2 W.R. 258 (260).

5. *Dhunput Singh v. Bhoojab Sakor*, (1865) 4 W.R. 53.

6. 7 W.R. 21 (23) (P.C.).

nature of *jumma* is unaffected by transfer simply of proprietary rights in the lands. The liability of lands to *jumma* is not affected by a transfer of proprietary right, whether such transfer is affected simply by transfer of title, or less directly by adverse occupation and the Law of Limitation."⁷

This was followed in *Bissonath Komilla v. Brijmohun*,⁸ where it was held, that possession of land without payment of rent for twelve years is sufficient to establish lakheraj title.

(4) Under Act XIV of 1859, provision was made by its
Act XIV of 1859. S. 1, cl. 14, which contained the proviso as to land held rent-free from the time of the permanent settlement. The period of twelve years prescribed was to run from the time

"when the title of the person claiming the right to resume and assess such lands, or of some person under whom the claim first accrued".

(5) The corresponding provision in
Act IX of 1871. Art. 130 of Act IX of 1871, contained the proviso

"that no such suit shall be maintained where the land forms part of a permanently-settled estate, and has been held rent-free from the time of the permanent settlement".

(6) The proviso in Art. 130, Act IX of 1871 was dropped
Act XV of 1877. from Art. 130 of Act XV of 1877: and the present Art. 130 is the same as Art. 130, Sch. II of Act XV of 1877. Since Act XV of 1877, therefore, all such suits must be brought within twelve years from the time "*when the right to resume or assess the land first accrues*".

(7) The statutory limitation on rent charges was provided
English Law. by the Real Property Limitation Act, 1833 (3 & 4 Will. IV, c. 27), giving a period of twenty years, which has been reduced to twelve years, by the Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57), S. 1, amending S. 2 of the Real Property Limitation Act, 1833. This amended provision does not apply to rent services as distinguished from rent-charges. The title to rent charges becomes extinguished, after the lapse of the statutory period of twelve years, by non-payment, and it cannot be revived by re-entry, or by a payment made after it had been extinguished.⁹

1942-1945. SCOPE AND APPLICATION.—(1) The
Rent-free land. effect of a decree passed in favour of a Zemindar, under S. 30 of Regulation

7. *Gunga Gobind Mundul v. The Collector*, (1867) 7 W.R. 21 (23) (P.C.).

8. (1868) 10 W.R. 61.

9. Dr. Pal's Limitation, p. 850: citing *Brassington v. Llewellyn*, (1858) 27 L. J. Ex. 297; *Bryan v. Cowdal*, (1873) 21 W.R. 693; *Hanks v. Palling*, (1856) 6 E. & B. 659.

II of 1819, declaring the land in possession of the defendant to be part of the permanently settled estate, which had been separated by an invalid grant, was to make the land liable to assessment.¹⁰ The defendant was only dispossessed in respect of the alleged proprietary right under the grant, and the relation of landlord and

Relationship as landlord and tenant. tenant was established between the Zemindar, and the holder of alleged *lakheraj* lands.¹¹

This would entitle a suit by the Zemindar in the Revenue Court, for *kabooleut*, under Act X of 1859, and rent would be fixed in respect of lands which a competent Court had found to be *mal* lands of the plaintiff, which the defendant had no right to hold *lakheraj*.¹² Where the plaintiff in 1862 obtained a decree for resumption, not under S. 30 of Regulation II of 1819, but under S. 6, Regulation XIX of 1793, it was held that in a case of that description, the Zemindar must proceed by a regular suit to assess the land according to the provisions of S. 8 of Regulation XIX of 1793, and to a suit of that description Art. 130 would apply.¹³ This was relied upon in *Bir Chunder Manikya v. Raj Mohun Goswami*,¹⁴ where the plaintiff brought a suit in 1861 against C for resumption of land, and for declaration of his right to assess rent upon C's land within his zemindary which C held as *lakheraj*. There was nothing to show if the grant was one subsequent or anterior to 1790. A decree declaring the land to be *shukur*, i.e., liable to assessment, was passed *ex parte* in 1863, and a suit was brought in 1886 against the representatives of C, for recovery of rent mentioned in the notice. *Held*, that the decree of 1863 had not the effect of creating the relationship of landlord and tenant between the parties, and that Art. 130 of Limitation Act applied to the suit.

1943. (2) A suit for the resumption or assessment of rent-free land is governed by Art. 130: but a

Resumption or assessment of rent-free land.

suit to establish a right to assessment of rent, in cases where the defendant wrongfully asserts that he is not liable to pay

rent, would fall, more appropriately under Art. 131, Limitation Act. The legal position is thus stated in *Devendra Narain Majumdar v. Jhumur Pramanik*.¹⁵

"If the land is found as not included in the admitted tenancy, it must be a case of encroachment or trespass by the defendant. In such a case it is

10. *Protap Chunder v. Shukhec*, (1878) 2 C.L.R. 569.

11. *Ibid.*; also see *Madhub Chunder v. Mohim Chunder*, (1869) 12 W.R. 442.

12. *Madhub Chunder v. Mohim Chunder*, (1869) 12 W.R. 442; also see *Ranee Shama Soonduree v. Seatul Khan*, (1871) 15 W.R. 474 and *Sowdaminee Debee v. Suroop Chunder Roy*, (1872) 17 W.R. 363.

13. *Nilkummul Chuckerbutty v. Bir Chunder*, (1886) 16 Cal. 450-n.

14. (1889) 16 Cal. 449.

15. (1926) 95 I.C. 622 (624)=1926 Cal. 883=43 C.L.J. 387.

well-settled that if the tenant is in adverse possession of the absolute interest for over twelve years, then the landlord's right should be held to be completely extinguished. If the tenant is in adverse possession for such a period in respect only of a limited interest as tenant, then whatever may be the effect of it on the question of the landlord's right to *khas* possession a claim for assessment of rent will not be barred unless as provided for in Art. 130, or Art. 131 of the schedule to the Limitation Act. A suit to establish a right to assessment of rent is governed by Art. 131."

Cases where the tenant sets up a rent-free title to the encroached land, are to be distinguished from cases where the tenant asserts that the land encroached upon by him is a part of an admitted tenancy.

"The difference is that in one case the assertion means that rent is being already paid for the land, and so more rent is not payable, and in the other that no rent is payable because the landlord is not entitled to realise any rent for the land."¹⁶

It was held in *Birendra Kisore v. Lakshmi*,¹⁷ that a suit for declaration of title to land, and for assessment and recovery of rent thereof, is in its essence a suit for recovery of a limited interest in land. In *Kali Mohan Tripura v. Birendra Kisore*,¹⁸ where a land was given rent-free by an ancestor of the plaintiff to the grandfather of the defendant in order that a tank might be excavated thereon, and the tank was excavated at the expense of the grantee, who with his descendants was in occupation for over sixty years without paying any rent, it was held that the legitimate inference was that the defendants held the land under a rent-free grant. Further, that assuming that the defendant did not hold the land under a rent-free grant, the claim for rent was barred by limitation, inasmuch as that the tenant had for over twelve years asserted to the knowledge of the landlord that he is under no obligation to pay rent. Suits for assessment of rent-free lands are governed by Art. 130 of the Limitation Act, and have to be instituted within twelve years from the time when the right to assess the land first arises, and this right may arise upon a distinct notice of the tenant's claim to hold it rent-free.¹⁹

1944. (3) Art. 130, Limitation Act, does not apply unless and until the land is found to be rent-free; the mere non-payment of rent for a period does not bar the landlord's right to

Mere non-payment not sufficient.

16. *Devendra Narain Majumdar v. Jhumur Pramanik*, (1926) 95 I.C. 622 (624)=1926 Cal. 883=43 C.L.J. 387; also see *Taran Chandra v. Ganendra*, 11 I.C. 30=16 C.W.N. 235.

17. (1915) 30 I.C. 896=22 C.L.J. 129.

18. 31 I.C. 391=22 C.L.J. 309.

19. *Devendra Narayan v. Jhumur Pramanik*, 95 I.C. 622 (624); also see *Gobinda Chunder Shaha v. Kishan Chunder Shaha*, (1866) 6 W.R. 110 (Suit to eject an alleged *lakhirajdar*—Onus on plaintiff to prove that his cause of action accrued within the time allowed); and *Shaikh Ghogoodle v. Shaikh Mazhur*, (1875) 24 W.R. 389 (As to onus on the issue of limitation in such cases).

have the rent assessed and to recover rent from his tenant.²⁰ In *Dhananjoy Manjhi v. Upendranath Deb*,²¹ the suit was not for the resumption or assessment of rent-free land, but for the assessment of *mal* land presumably liable to be assessed. It was held, under the circumstances that the non-payment of rent for more than twelve years before suit was not *per se* sufficient to support a decree for dismissal. **Mere non-payment of rent, or discontinuance of payment of rent, does not of itself constitute adverse possession.**²² A suit by a *saranjamdar* to levy assessment upon rent-free lands falls within Art. 130, Limitation Act, and must be filed within twelve years from the date when the right to assess first accrues, which in the case of a defendant, who claims under a grant from a previous *saranjamdar* is the date of the death of the grantor.²³

1945. (4) The right to levy assessment upon rent-free lands is governed by Art. 130 and is consequently extinguished under S. 28, if no suit to enforce the right is instituted within the time allowed.²⁴ Where a tenant claimed land as rent-free to the knowledge of plaintiff, and no suit for resumption or assessment was brought till after the expiry of twelve years, the suit was barred by limitation under Art. 130, Limitation Act.²⁵ In *Birendra Kishore v. Dilawar Ali*,²⁶ where a suit for possession or assessment of rent by a landlord was made more than twelve years after the entry in record-of-rights about the claim of the tenant to hold the land as rent-free, which was denied by the plaintiff's agent, it was held that a title completely hostile to the plaintiff was set up by the defendant, and the record-of-right, where an entry was made to the effect that no *jama* had been fixed, did not negative the claim made by the tenant; consequently, the clear assertion of adverse title submitted to for more than twelve years defeated the

20. *Akbar Sarcar v. Ramesh Chandra*, (1923) 72 I.C. 329 (331)=1923 Cal. 392=38 C.L.J. 207; Reld. on *Kamini Sundari v. Abdul Halim*, 47 I.C. 420=28 C.L.J. 254.

21. (1918) 46 I.C. 428=22 C.W.N. 685 (687).

22. *Prosonna Kumar Mukherjee v. Srikanth Raut*, (1912) 16 I.C. 365 (Cal.); Affd. in *Jagdeo Narain Singh v. Baldeo Singh*, 71 I.C. 984=1922 P.C. 272=3 P.L.T. 605 (P.C.).

23. *Sakharam Gopal Page v. Trimbak Rao Ramchandra Mantri*, (1921) 61 I.C. 40=45 Bom. 694=23 Bom. L. R. 314.

24. *Abhoy Churn Pal v. Kally Pershad*, 5 Cal. 949 (952)=6 C.L.R. 260; also see *Koylash v. Gokul*, (1881) 8 Cal. 230; *Madhavrao v. Anusuya Bai*, 36 I.C. 505=40 Bom. 606=18 Bom. L. R. 768; Reld. in *Akbar Sarkar v. Ramesh Chandra*, (1923) 72 I.C. 329 (332)=1923 Cal. 392=38 C.L.J. 207.

25. *Birendra Kishore v. Roshan Khan*, 13 I.C. 518=39 Cal. 453=15 C.L.J. 203=16 C.W.N. 931 note; *Birendra Kishore v. Akram Ali*, 13 I.C. 513=39 Cal. 439=16 C.W.N. 304=15 C.L.J. 194.

26. 13 I.C. 517.

claim. In *Keval Kuber v. Taluqdari Officer*,²⁷ where the plaintiffs, and those through whom they claimed had undisturbed possession for some forty years, and this possession was regarded as adverse to the taluqdar. Consequently, his right to resume or to assess the land was held barred by S. 29, Act IX of 1871 (now S. 28) and Art. 130. A right to assess the land which is extinguished by virtue of the statutory provisions in S. 28 and Art. 130 of the Limitation Act cannot be pleaded as a defence to the plaintiff's suit to hold it free of assessment.²⁸ Where a Zemindar did not exercise his right to resume within twelve years from the date of his engagement with Government, and therefore lost his right, it was held that he could not, by creating a putnee, confer such a right.²⁹ Where the right to resume has run out in the lifetime of a father, the right is lost to the son as well.³⁰

1946. STARTING POINT OF LIMITATION.—The starting point of limitation under Art. 130 is the time when the right to resume or assess the rent land first accrues. In the case of a Jagir, the grant must be taken *prima facie* to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary.³¹ The terms may further show that the right of inheritance should be general or should be confined to a particular class of heirs.³² Ordinarily, a suit for resumption of a life *jagir* must, under Art. 130 of Sch. I, be brought within twelve years of the death of the grantee.³³ Where defendants in a suit to assess the *niskar* (rent-free) tanks, pleaded old ancestral rent-free title, and also title by adverse possession, it was held that mere non-payment of rent for over twelve years was not sufficient, but a complete hostile title was claimed to the knowledge of plaintiff's agent when settlement entry was made, and the suit brought more than twelve years from the date of defendant's assertion of adverse title before the settlement officer barred the claim.³⁴

27. 1 Bom. 586 (590); Reld. in *Sakharam v. Trimbakrao*, (1921) 61 I.C. 40 (44)=45 Bom. 694=23 Bom. L. R. 314.

28. *Sakharam v. Trimbakrao*, 61 I.C. 40 (44)=45 Bom. 694.

29. *Nirunjun v. Kurallee*, (1864) 1 W.R. 197; *Shib Pershad v. Busseeroodin*, 1864 W.R. 170; *Krishto Mohun v. Joy Kishan*, (1865) 3 W.R. 33; *Gunga Ram v. Harinath*, (1871) 15 W.R. 436.

30. *Amatoola v. Nubbee Baksh*, 1864 W.R. Act X, 132.

31. *Gulabdas Jagjivandas v. Collector of Surat*, 3 Bom. 186=6 I.A. 54 (P.C.) and *Ram Narayan Singh v. Ram Saran Lal*, 50 I.C. 1=46 Cal. 683=46 I.A. 88 (P.C.).

32. *Guru Mahadeo Asram v. Jagatraj Kuer*, (1923) 71 I.C. 929 (Pat.).

33. *Guru Mahadeo Asram v. Jagatraj Kuer*, (1923) 71 I.C. 929=1924 Pat. 298.

34. *Birendra Kishore v. Roshan Khan*, 13 I.C. 518=39 Cal. 453.

Time begins to run when the right to assess the rent accrues, *viz.*, from the time when there is a clear and unequivocal assertion of adverse possession by the tenant, or when the tank becomes silted up and is no longer used for the purpose for which the land was granted.³⁵ If the right to assess the land is created by a decree declaring the land to be liable to assessment, a suit to recover assessment of the land must be brought within twelve years of the date of the decree.³⁶

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
131.	To establish a periodically recurring right.	12 years.	When the plaintiff is first refused the enjoyment of the right.

SYNOPSIS.

- 1947. Corresponding provision.
- 1948. **Scope and Application.**
- 1949. **Illustrative cases.**
 - (1) Pala or turn of worship.
 - (2) *Malikana*.
 - (3) Maintenance, etc., allowances.
 - (4) Suit to recover money under periodical right.
 - (5) Right to recover burial fees, etc.
 - (6) Suits for rent.
- 1950. Perpetual right.
- 1951. **Article explained**—"Suit to establish".
 - (i) Madras view.
 - (ii) The opposite view—Allahabad, Patna, Lahore.
 - (iii) The Bombay view.
- 1952-1955. **Starting point of limitation.**
- 1952. Refusal of the enjoyment of right.
- 1953. *Illustrative cases.*
- 1954. Non-payment within twelve years.
- 1954-A. *Illustrations.*
- 1955. Extinguishment of right.

NOTES.

1947. CORRESPONDING PROVISIONS.—This article is same as Art. 131 of Act XV of 1877: and of Art. 132, Sch. II, Act IX of 1871. There was no provision corresponding to the present article under Act XIV of 1859. In *Gour Mohun v. Mud-dun Mohun*,³⁷ where a claim was brought to exercise a right to a turn of worship of an idol, it was held that there was no recurring cause of action, and a suit to enforce such a right was governed by the limitation prescribed in cl. 16, S. 1, Act XIV of 1859.

35. *Birendra Kishore v. Akram*, 13 I.C. 513=39 Cal. 439.

36. *Birendra Kishore v. Raj Mohan*, 16 Cal. 449 (456).

37. (1871) 15 W.R. 129; cf. *Eshan Chander v. Monmohini*, 4 Cal. 683 and *Gopee Kishen v. Thakoor Das*, (1882) 8 Cal. 807.

1948. **SCOPE AND APPLICATION.**—A special provision for cases of this kind was first made in Act IX of 1871, and annuities, dividends, interest, malikana, or maintenance, or rent would fall within Art. 131, where the claim is not of the nature of an *interest in land*, in which case Art. 132, would apply,³⁸ or where the plaintiff is not claiming specific sums of money claimable by reason of some periodically recurring right in which case Art. 62 may come into operation.³⁹ The article refers to a *periodical right*, and not to a similar liability.⁴⁰

1949. **ILLUSTRATIVE CASES.**—(1) A suit for *pala* or turn of worship of an idol, for a portion of every year, is a claim governed by Art. 131, not being a suit in the nature of an interest in immoveable property.⁴¹ A suit to establish a right to the performance of the duties of an office, or the enjoyment of a *watan* in rotation, by different co-sharers comes under this article.⁴²

(2) Annual recurring charges like *malikana* have been held, in some cases, to fall under this article, and suit may be brought within twelve years from the time when money sued for becomes due.⁴³ Under the Act of 1859, it seemed imperative upon the Courts to deal with *malikana* as an interest in land, and to treat a claim for it as barred if not made within twelve years after the last receipt by the proprietor.⁴⁴ A suit to recover *malikana*, or for arrears of *malikana*, sought to be recovered as an interest in land would be governed by Art. 132,⁴⁵ and a suit for arrears of *malikana*, would come under Art. 115, when it arises out of a *quasi-contract* created by law.⁴⁶

38. *Harnand Shro v. Mt. Ozeem*, 9 W.R. 102; *Gobind Chandra v. Ram Chandra*, 19 W.R. 95; *Bhuli Singh v. Nehmu*, 3 B.L.R. App. 102; also see *Eshan Chander v. Monmohini*, (1878) 4 Cal. 683 and *Padhulal v. Tribeni Singh*, 1934 Pat. 44.

39. *Sakharam Hari v. Laxmipriya*, (1910) 34 Bom. 349=12 Bom. L. R. 157; *Raoji v. Bala*, (1890) 15 Bom. 135; *Janardhan v. Dinkar*, 131 I.C. 465=55 Bom. 193=1931 Bom. 189.

40. *Khande Rao v. Ramji*, (1899) 1 Bom. L. R. 373.

41. *Eshan Chander v. Monmohini*, (1878) 4 Cal. 683; *Gopeckishen v. Thakoordas*, 8 Cal. 807.

42. *Sinde v. Sinde*, (1867) 4 Bom. H. C. (A.C.) 51.

43. *Hurmuzi v. Hirdaynarayana*, (1880) 5 Cal. 921=6 C.L.R. 133; also see *Gopinath v. Bhugwat*, (1884) 10 Cal. 697 (708) and *Maheshri Prosad v. Baij Nath*, (1913) 21 I.C. 779=19 C.W.N. 410.

44. *Harnand Shro v. Mt. Ozeem*, 9 W.R. 102; *Gobind Chunder v. Ram Chandra*, 19 W.R. 95 and *Bhuli Singh v. Mt. Nehma*, 3 B.L.R. App. 102=12 W.R. 498: s.c. 4 B.L.R. (A.C.) 29.

45. *Padhulal v. Tribeni Singh*, 1934 Pat. 44.

46. *Maheshri Prosad v. Baij Nath*, (1913) 19 C.W.N. 410=21 I.C. 779; also see and cf. *Shaida Ali v. Phullo*, (1913) 35 All. 185=11 A.L.J. 206; Folld. in 17 A.L.J. 177.

(3) Suits to establish rights to receive payments periodically, such as maintenance allowances, would fall within Art. 131, Limitation Act.⁴⁷ A suit for declaration of right to maintenance, under Hindu Law, would be governed by Art. 129, but a claim to maintenance by illegitimate progeny of a Hindu, will fall under Art. 131, Limitation Act.⁴⁸ A suit by the junior members of a family governed by customary rule of primogeniture, not being based on Hindu Law is not governed by Art. 129, and where the plaintiff's suit is for possession, Art. 131 also will be inapplicable. Such a suit would be governed either by Art. 120 or Art. 144, depending upon the question whether the suit is treated as one for declaration, or possession.⁴⁹

(4) A right to recover certain sums of money as *dasturat* at specified annual rates,⁵⁰ or a suit to recover *dhara* or assessment or customary rent,¹ will be governed by this article. The Madras High Court took the view in *Ramnad Zamindar v. Dorasami*,² that a suit to establish the right of the plaintiff to a **monthly allowance** from Zamindar, which was not personal to a person, but descendible to his heirs, was governed by Art. 131. But, the **Allahabad High Court** would apply Art. 116, or Art. 120 to such suits to recover a specific amount.³ In *Raoji v. Balu*⁴ and *Chamanlal v. Bapubhai*,⁵ the Bombay High Court has held that a suit by a co-sharer to establish his title to a share in an **annual allowance** received by the defendant from Government is one falling under Art. 131, and not under Art. 144, Limitation Act, but it was observed that a **claim for arrears of the allowance** fell under Art. 62 of the Limitation Act. This view has been preferred by the **Bombay High Court** in a recent case⁶ to the opposite view held by the **Allahabad**,⁷ **Patna**,⁸

47. *Venkopadhyaya v. Kaivari*, (1864) 2 M.H.C.R. 36.

48. *Charanjit Singh v. Amir Ali Khan*, (1921) 2 Lah. 243.

49. *Ramnad Zamindar v. Dorasami*, (1884) 7 Mad. 341 (343) (Suit for declaratory decree, and not for any consequential relief).

50. *Hem Chandra v. Atul Chandra*, (1913) 21 I.C. 179=19 C.L.J. 118.

1. *Ganesh Vinayak v. Sita Bai*, (1916) 41 Bom. 159.

2. (1884) 7 Mad. 341 (343).

3. *Luchmi v. Parabulnissa*, (1912) 14 I.C. 505=34 All. 246 (248); also see and cf. *Dost Mohammad v. Sohan*, 83 P.R. 1916 (Suit to recover arrears of Jagir income).

4. (1890) 15 Bom. 135.

5. (1897) 22 Bom. 669.

6. *Janardhan Trimbak v. Dinkar Hari*, (1931) 131 I.C. 465=55 Bom. 193=1931 Bom. 189; Reld. on 15 Bom. 135 and 22 Bom. 669.

7. *Luchmi v. Turabulnissa*, 34 All. 246.

8. *Baidyanath v. Hardutt*, 5 Pat. 249=94 I.C. 826=1926 Pat. 205; also see *Saiyiduddin v. Avadh Behari*, 40 I.C. 468 and *Ramji Das v.*

or **Lahore High Courts.**⁹ In *Sakharam Hari v. Laxmipriya*,¹⁰ it was held that a **cash allowance** (*tastik*) to one temple from the proprietor of another temple, is according to Hindu Law, *nibandha* or immoveable property. Where it is annually payable, the right to payment gives the person entitled a periodically recurring right as against the person liable to pay.

(5) A suit to establish right to recover burial fees comes under this article.¹¹ A right to receive *lawajama* **Right to recover allowance,**¹² and a **right to share in a** burial fees, etc. **pension,**¹³ or to share in an allowance attached to a *deshpande vatan*,¹⁴ or to share in the offerings of a temple,¹⁵ have also been held to fall under this article.

(6) A suit by a landlord under an irredeemable *anubhavam* tenure for **arrears of rent** is **governed by Art. 116**, and not by Art. 131, and the award of arrears of rent can be limited to a period of six years.¹⁶

(7) A suit for rent is an instance of a periodically recurring **Suits for rent.** right¹⁷; and a suit to establish such a right is governed by Art. 131 of the Limitation Act, and not by Art. 120.¹⁸ It will be open to defendants to show that the plaintiff was refused the enjoyment of the right claimed by the defendant's predecessor-in-title at some time prior to twelve years preceding the date of the suit.¹⁹ A claim for rent being a recurring cause of action, a tenant is entitled to set up against it, for any particular year, any **right** which he had **to a deduction or abatement**, notwithstanding that he has paid full rent for several previous years.²⁰ Where land was recorded as rent-free, a suit for

Mahamaya, 1936 Pat. 158 (Claim for money under recurring right is not governed by Art. 131).

9. *Dost Muhammad v. Sokan Singh*, 83 P.R. 1906 and *Parshotam Singh v. Bhawant Singh*, 1929 Lah. 872.

10. (1910) 34 Bom. 349=12 Bom.L.R. 157=5 I.C. 568; Relied on *Harimukh v. Hari Sukh*, 7 Bom. 191.

11. *Bahar Shah v. Pero Shah*, (1875) 24 W.R. 385.

12. *Nazar Ali v. Akaji*, 109 I.C. 85=1928 Notes 6.

13. *Sahibunnissa v. Hafiza*, 9 All. 213.

14. *Keshab v. Narayan*, 14 Bom. 236.

15. *Jagdeo v. Mathura Prosad*, 22 O.C. 346.

16. *Rayiran v. Narayana Ayyar*, (1935) 158 I.C. 228=1935 Mad. 682=42 M.L.W. 596=1935 M.W.N. 866.

17. *Jagannath v. Pillai*, (1904) 14 M.L.J. 477; *Alubi v. Kunhi*, (1886) 10 Mad. 115.

18. *Mohammad Hussain v. Mohammadi Bibi*, (1915) 28 I.C. 600=13 A.L.J. 333; cf. *Syed Mohamed Mehdi Hasan v. Phul Kuar*, 5 I.C. 115 (Cal.).

19. *Mohammad Hussain v. Mohammadi Bibi*, (1915) 28 I.C. 600=13 A.L.J. 333.

20. *Ebrahim Azeem v. Agent, Bank of Bengal*, (1871) 16 W.R. 203; see *Gosta Behari v. Hem Chandra*, 1925 Cal. 356=51 Cal. 1022 (Abatement

declaration to contest the entry, would be within time if brought within six years of the decree by revenue officer that land is liable to pay rent (Art. 120).²¹ However, the right to have rent assessed is a periodically recurring right which may be exercised whenever necessary, subject to the period of limitation prescribed by Art. 131, Limitation Act.²² A suit to assess and recover rent of the plaintiff's *mal* land is not barred by limitation under Art. 131, Limitation Act, where the defendant repudiates the right of the plaintiff to assess and recover rent for the first time within twelve years of the suit.²³ Under Art. 131, **the right to levy assessment** would, as a **recurring right**, accrue when there had been a demand and refusal only in those cases where the relationship of landlord and tenant or landlord and occupant had ever existed. Where the tenant claims the land to be a part of the tenancy, meaning that rent is being already paid for the land, and so more rent is not payable, in that case a suit to establish a right to assessment of rent is governed by Art. 131, Limitation Act, and **limitation does not run until there has been a proper demand and a refusal.**²⁴ A **suit for enhancement of rent** of the holding of an occupancy tenant, who has been wrongly entered in the record-of-rights as a *raiyat* at fixed rates, is governed by Art. 131 and not by Art. 120 of the Limitation Act.²⁵ The claim to enhanced rent is a recurring cause of action, and limitation runs from the date of refusal.²⁶ However, a **recurring right** within Art. 131 of the Limitation Act **can be time-barred**, where the limitation has started **on a demand and refusal.**²⁷ In *Gopal Rao v. Mahadev Rao*,²⁸ an *inamdar* gave his permanent tenant notice to pay enhanced rent or quit the land on a certain date. The tenant denied the liability to pay enhanced rent and, stating that he held the land on payment of Government assessment only, refused to quit. The *inamdar*, more than twelve

of rent can be claimed in a case under the Bengal Tenancy Act); also see *Sukhraj Rai v. Ganga Dayal Singh*, (1922) 1922 Pat. 169=6 P.L.J. 665=2 Pat.L.T. 569 (Abatement may be claimed in a rent suit).

21. *Barhamdat Missir v. Krishna Sahay*, (1913) 20 I.C. 910 (Cal.)=18 C.W.N. 466 (Suit for *kabuliat*).

22. *Jotindra Mohan Tagore v. Chandra Nath Sagi*, 6 C.W.N. 360.

23. *Akbar Sarkar v. Ramesh Chandra*, (1923) 72 I.C. 329=1923 Cal. 392=38 C.L.J. 207.

24. *Devendra Narayan v. Jhumur Pramanik*, (1926) 95 I.C. 622=43 C.L.J. 387.

25. *Brij Behari Singh v. Sheo Shanker Jha*, (1917) 39 I.C. 85=2 Pat. L.J. 124=1 P.L.W. 434.

26. *Ibid.*, (1917) 39 I.C. 85=2 P.L.J. 124.

27. *Ganesh Vinayak v. Sitabai Narayan*, 38 I.C. 54=18 Bom.L.R. 950=41 Bom. 159 (Payment of *dhara* or assessment or customary rent is a recurring right within Art. 131, Limitation Act); also see *Sheopratap Dube v. Sheogulam Lal*, 72 I.C. 780=1924 Pat. 193 (To same effect).

28. 21 Bom. 394.

years after the date mentioned in the notice, sued the tenant to recover enhanced rent. It was held that the plaintiff's right to enhance the rent and to recover the land in default of payment of such rent was barred by limitation, the tenant, so far as the right was concerned, having been held adversely to him for more than twelve years.²⁹ A claim for an additional rent for increased area is a recurring right of a similar nature, and cannot be time-barred.³⁰ However, a suit by a tenant for a declaration that the levying by the landlord of enhanced rent is illegal is not a suit to establish a periodically recurring right to which Art. 131 of the Limitation Act applies. The suit is governed by **Art. 120**, as each exaction of enhanced rent is a separate injury and gives rise to a new cause of action.³¹ Similarly, a claim to recover a water-cess illegally levied is not a suit to establish a periodically recurring right governed by Art. 131, Limitation Act, but the cause of action arises on each occasion when the cess is demanded.³²

1950. PERPETUAL RIGHT.—Art. 131, which relates to periodically recurring rights, has no application to perpetual rights, which are always there, though sums of money are paid periodically as they fall due.³³ The distinction is found in *Eshan Chunder Roy v. Monmohini*,³⁴ and it was pointed out in *Ghulam Ghouse v. Jannia*,³⁵ where the right to receive the **Yoemiah allowance** payable to a mosque was held to be a perpetual and not a periodically recurring right; the distinction being that

"in the one case the right is always vested in one person to receive periodical payments; in the other, the right which at one time is vested in one person, at another time passes away to some body else, which of course, is a periodically recurring right in the true sense of the term".

In *Kirpa Ram v. Jaichand*,³⁶ a jagir patta was held limited to the term of a settlement, and not evidencing a lease in perpetuity. Art. 131 was held inapplicable in the absence of proof of a definite demand and refusal within 12 years before the suit was brought.

1951. ARTICLE EXPLAINED.—It has been noticed in S. 1959, (*ante*), that there is a conflict of opinion on the question whether a suit fall-

29. 21 Bom. 394; Relied in *Shri Bala Maharaj v. Sakharam Venkatesh*, 95 I.C. 851=28 Bom.L.R. 633=1926 B. 345.

30. *Jotindra v. Chandra*, (1902) 6 C.W.N. 360.

31. *Sriman Madabhust v. Gopi Setti Narayanaswamy*, (1909) 3 I.C. 747=33 Mad. 171; Relied on *Gopaladas v. Perraju*, 12 M.L.J. 126.

32. *The Secretary of State v. Kannepalli*, (1913) 18 I.C. 770=24 M.L.J. 365=37 Mad. 322; Relied on 33 Mad. 171=3 I.C. 747, *supra* and 12 M.L.J. 126.

33. *Ghulam Ghouse v. Jannia*, (1920) 58 I.C. 788=39 M.L.J. 492.

34. 4 Cal. 683.

35. 58 I.C. 788=39 M.L.J. 492=1920 M.W.N. 394=12 L.W. 100.

36. (1914) 23 I.C. 445=46 P.W.R. 1914=140 P.L.R. 1914.

ing under Art. 131, are declaratory suits with or without consequential relief, and whether this article covers suits for recovery of arrears also.

(1) In *Ratnamasari v. Akilandammal*,³⁷ it was observed that Art. 131, does not relate to a mere declaratory suit, and the expression used is not “for a declaration,” but “to establish”, which is correlative of “set aside” in Art. 11, Limitation Act. A Full Bench of Madras High Court, held in *Zamorin v. Achutha*,³⁸ that the word “establish” must be construed as dealing with the existence of the right, as also with the claim to recover monies under such a right. In *Balkrishna v. The Secretary of State*,³⁹ it had been held that this article would apply only to suits in which a decree for consequential relief (e.g., recovery of arrears) is asked for by virtue of a periodically recurring right and where no such relief is asked, a suit to obtain a mere declaratory decree would be governed by Art. 120. In *Srinivasa Ramanujachariar v. Subbachariar*,⁴⁰ the six years’ rule was held to apply to a suit for a declaration of a right to receive a certain *tasdik* amount every year direct from Government. This result was somewhat surprising as pointed out in *Zamorin of Calicut v. Achuta*,⁴¹ that Art. 120 should cover suits for mere declaration, and Art. 131 should govern suits for declaration with consequential relief. The Madras Full Bench overrules the case of *Balkrishna v. Secretary of State*,⁴² A suit to recover arrears for twelve years under the right which is sought to be established of a periodically recurring nature, would be governed by Art. 131.⁴³

(2) The Allahabad High Court has held in *Luchmi v. Turabulnissa*, that the words “to establish” cannot be extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a periodically recurring right. The Patna High Court has, similarly, taken the view in *Baidyanath v. Har Dutt*,⁴⁴ that Art. 131, applies only to suits for a declaration of right, but that it does not apply to arrears claimable by reason of such rights which may fall under Art. 62, or some other article according to circumstances of each case. This view is also held by the Lahore

37. (1902) 26 Mad. 291 (314)—Per Bhashyam Ayyangar, J.

38. (1914) 38 Mad. 916 (F.B.).

39. (1892) 16 Mad. 294.

40. (1903) 13 M.L.J. 267.

41. 38 Mad. 916 (921) (F.B.) [O.R. 16 Mad. 294 (295)].

42. 16 Mad. 294 (295) [O.R. by 38 Mad. 916 (921)].

43. *Ramnad v. Dorasami*, 7 Mad. 341 (343) and *Alubi v. Kunhi*, 10 Mad. 115 (117).

44. (1926) 94 I.C. 826=1926 Pat. 205=5 Pat. 249=7 P.L.T. 465; also see *Saiyudad Din v. Avadh Behari*, 40 I.C. 468.

High Court in *Dost Muhammad v. Sohan*,⁴⁵ and in *Parshotam Singh v. Bhawant Singh*,⁴⁶ where it has been held that Art. 131 of the Limitation Act is confined in its application to a suit in which the plaintiff seeks simply to establish his right to maintenance but does not ask for a consequential relief.

(3) In *Raoji v. Bala*,⁴⁷ and in *Chamanlal v. Bapubhai*,⁴⁸ the

Bombay High Court has held that a suit by a co-sharer to establish his title to a share in an annual allowance received by

The Bombay view— Arts. 62, 131.

the defendant from Government is one falling under Art. 131, and not under Art. 144, Limitation Act, but it was observed that a claim for the **arrears of the allowance fell under Art. 62** of the Limitation Act. This view has been preferred by the Bombay High Court, in *Janardhan Trimbak v. Dinkar Hari*,⁴⁹ to the opposite view taken by the **Allahabad** and **Patna High Courts**. According to the **Bombay** view, the suit may conceivably claim both the reliefs, and while the claim to establish a periodically recurring right falls under Art. 131, the claim for arrears falls under Art. 62, Limitation Act. In *Sakharam Hari v. Laxmi Priya*,⁵⁰ Chandavarkar, J., observed that

"the important question in all these cases is, who is the person sued, and what is it that is sued for"?

He says:

"If what is sued for is the establishment of a title to the right itself, then Art. 131 applies, whether the defendant is the person originally liable to pay, or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is an amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay, and a co-sharer of the plaintiff who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and Art. 62 applies to a co-sharer who has received the payment."¹

(4) The **Patna High Court** has observed recently, that

"the test of the proper article to apply is to consider the facts alleged in the plaint and the remedy granted by the Court. It is not necessarily to be measured by the remedy, which the plaintiff may have asked for but which has been refused. It is the duty of the Court to consider the facts and then to give such remedies as are not barred by limitation".²

45. 83 P.R. 1906.

46. 1929 Lah. 872=121 I.C. 428.

47. (1890) 15 Bom. 135.

48. (1897) 22 Bom. 669.

49. (1931) 131 I.C. 465=55 Bom. 193=1931 Bom. 189.

50. (1910) 34 Bom. 349=12 Bom. L.R. 157=5 I.C. 868; Relied on *Harmukh v. Hari Sukh*, 7 Bom. 191.

1. *Ibid.*, (1910) 34 Bom. 349=12 Bom. L. R. 157=5 I.C. 868.

2. *Naga Manjhi v. Kini Mahatama*, 1933 Pat. 695 (Where plaintiff in a civil suit for declaration that defendant was not an under-raiyat under him,

The practice of the Courts in India is not to take so very strict a view of the pleadings as to deny a relief to a party to which he may be held to be entitled for the reason that there was some defect or other in the wording of the prayer made in a plaint.³ Accordingly, where in a suit the relief claimed was a declaration as to the existence of a custom, but what really was meant by the plaintiff was a declaration that the villagers had the right based upon custom, it was held that the plaintiff ought to be granted the relief meant though not exactly claimed by him: and that Art. 131, was the only article applicable so far as the plea of limitation raised in the case was concerned.⁴

1952-1955. STARTING POINT OF LIMITATION.

1952.—(1) Article 131, provides in Column 3, that limitation begins to run from the date “*when Refusal of the enjoyment of the right. the plaintiff is first refused the enjoyment of the right*”.⁵ This means that there must be a definite demand and refusal of the enjoyment of the right claimed.⁶ As Beaman, J., observed, in *Ganesh Vinayak v. Sitabai Narayan*,⁷

“In order that such a recurring right should be time-barred, it is necessary for the defendant to show, that there has been a definite demand and refusal. Mere omission on the part of the person having such right to exercise it, will not start a period of adverse possession under Art. 131.”

A claim for a declaration of title to an allowance governed by Art. 131, would not be barred by the mere fact of the plaintiff's exclusion from enjoyment of their share for twelve years before suit unless it were shown that such exclusion was the result of refusal made upon a demand. The period of twelve years provided by that article would run from the time when the plaintiffs were first refused the enjoyment of the right.⁸ According to **Patna High Court** also, the Art. 131 means no more than this: that if a party

prayed for his eviction, it was held that the Civil Court had jurisdiction only to decide whether the relationship of landlord and tenant existed, but the relief for grant of possession was in the jurisdiction of the Revenue Court and Art. 131 applied, not Art. 142 or 143).

3. *Dinanath Kar v. Jitendra Nandan*, 160 I.C. 121=1935 Cal. 744.

4. *Ibid.*

5. *Janardhan Trimbak v. Dinkar Hari*, (1931) 131 I.C. 465=55 Bom. 193=1931 Bom. 189.

6. *Ganesh Vinayak v. Sitabai*, 38 I.C. 54=41 Bom. 159; *Raoji v. Bala*, 15 Bom. 135; *Devendra Narayan v. Jhumur Pramanik*, (1926) 95 I.C. 622=1926 Cal. 883=43 C.L.J. 387.

7. (1917) 38 I.C. 54=41 Bom. 159=18 Bom.L.R. 950 (*Held*, that the payment of *dhara* or assessment or customary rent was a recurring right within Art. 131 and such a recurring right could be time-barred); also see *Hem Chandra v. Atul Chandra*, 21 I.C. 179=19 C.L.J. 118=19 C.W.N. 386 (The *onus* is on defendant to prove that the suit is barred by reason of a demand and refusal made more than 12 years before suit).

8. *Raoji v. Bala*, (1890) 15 Bom. 135.

entitled to claim a periodically recurring right is refused the enjoyment of his right after demand, he must establish his right by suit brought within 12 years from the date of such refusal.⁹ The **Madras High Court** also accepts the Bombay view that "express repudiation of the claim is required to set limitation running in such cases."¹⁰ The **Calcutta High Court**, also holds that in a suit to establish a right (to assessment of rent), governed by Art. 131, Limitation does not run until there has been a proper demand and refusal.¹¹ Accordingly, where there has been no previous demand, or has any case of adverse possession been made, the suit would be in time, as plaintiff has in such cases a recurring cause of action, and limitation runs from the date of refusal.¹²

1953. ILLUSTRATIVE CASES.—

(1) In *Sri Bala Maharaj v. Sakharam*,¹³ where an *Inamdar* continued to receive a smaller rate of assessment from his tenants than the actual assessment, and made no demand for the actual assessment, that fact was not held to debar him from claiming the actual assessment at any time if he chose to do so. Once, however, he claimed the assessment and the right to claim such assessment was denied by the tenant, limitation began to run against the *Inamdar*, and the fact that a fresh survey rate was subsequently introduced did not create a new right in the *Inamdar* to recover that particular rate of assessment from the tenant.

(2) Where an *inamdar* gave his permanent tenant notice to pay enhanced rent or quit the land on a certain date, and the tenant denied the liability to pay enhanced rent, and refused to quit, a suit by the *inamdar* to recover enhanced rent, and to recover the land in default of payment of such rent, more than 12 years after the date mentioned in the notice, was held barred by limitation.¹⁴

(3) In *Hem Chandra v. Atul Chandra*,¹⁵ where a suit was brought to recover *dasturat*, in respect of which on many previous occasions, the predecessors of the plaintiffs had obtained decrees against the predecessors of the defendants, but there had been no demand and refusal within 12 years of the commencement of the suit, it was held that the right alleged by the plaintiffs existed, and the burden was on the defendants to establish that the plaintiffs had made a demand and that the defendants had refused, and that as there was no evidence of this, the suit was not barred by limitation. Similarly, in *Kamman v. Budh Singh*,¹⁶ it was held by the Punjab Chief Court, that in a suit for *Kamiana*, where the right to levy such dues formerly existed, limitation would not begin to run against the plaintiffs simply from their refraining to exercise the right, but from the time when they were first refused enjoyment of the right.

9. *Saiyiduddin v. Avadh Behari*, (1917) 40 I.C. 864 (Pat.) ; Relied on 15 Bom. 135.

10. *Bangarayya v. Jagannath Raju*, (1910) 5 I.C. 615=7 M.L.T. 378; Relied on 15 Bom. 135 (144).

11. *Devendra Narayan v. Jhumur Pramanik*, 95 I.C. 622=1926 Cal. 883=43 C.L.J. 387.

12. *Brij Behari Singh v. Sheo Shanker*, (1917) 39 I.C. 85=2 P.L.J. 124=1 P.L.W. 434.

13. (1926) 95 I.C. 851=28 Bom.L.R. 633=1926 Bom. 357.

14. *Gopal Rao v. Mahadeo Rao*, 21 Bom. 394.

15. (1913) 21 I.C. 179=19 C.L.J. 118=19 C.W.N. 386.

16. 146 P.R. 1882.

(4) In *Mt. Zinat v. Murtaza Khan*,¹⁷ where on the death of a jagirdar, the sole surviving sharer sued for recovery of certain instalments alleged to have been wrongly enjoyed by the defendant, it was held that no demand having been made prior to that which immediately preceded the claim, the suit was within limitation, under Art. 131, Limitation Act.

(5) But, where in a suit by a Zamindar against the grantee of an inam, to recover arrears of *kattubadi*, it appeared that no payment had been made in respect of *kattubadi* for a period of twelve years before suit, and plaintiff's alleged right had been *denied* by the defendant, the claim was found barred by limitation.¹⁸

(6) In a suit to recover arrears of jagir income wrongfully received by defendant from third persons, (Art. 62 was applied to the claim), it was held that Art. 131 of the Limitation Act would not be applicable to a case unless it was proved that more than 12 years before the institution of the suit the plaintiff expressly demanded from the defendants the enjoyment of his right and was refused.¹⁹

1954. In cases falling under Art. 131, for a periodically re-
curring right, it is necessary to determine
Non-payment with- whether the plaintiff was *refused* the enjoy-
in 12 years. ment of the right 12 years previously to the
suit. In this connection it is to be noted that the mere fact that
no collection of the allowance had been made within 12 years by
the plaintiff, would not imply that such non-collection was in conse-
quence of a denial of the plaintiff's right by the defendant.²⁰ As
observed by the **Lahore High Court**, in *Lekhu Ram v. Mohammad
Ramzan*.²¹

"Mere waiver does not imply abandonment of the rights, though it does involve a loss of the dues for which no suit was brought within limitation. Mere failure to pay dues, however, does not establish adversity."

When the plaintiff's title to the right (a grant of revenue) was *admitted*, a suit brought by him (against the owner of the land) to recover arrears of revenue, accruing due within 12 years of suit, was held to be within time, it being immaterial that the plaintiff had not recovered the revenue which accrued due more than 12 years prior to the suit.²²

1954-A. ILLUSTRATIONS.—

(1) Where a person having previously obtained a decree declaratory of his title, sued his co-sharer, in a *deshpande vatan*, for recovery of arrears, it was held that non-participation of profits by the plaintiff for more than twelve years from the date of the previous decree did not extinguish his title, and under Art. 62, he could recover arrears for three years preceding the date of his suit to recover them.²³ But, if the claim for a declaration

17. 108 P.R. 1901.

18. *Ramchandra v. Jaganmoha*, (1891) 15 Mad. 161.

19. *Kirpa Ram v. Jaichand*, (1914) 23 I.C. 445=46 P.W.R. 1914=140 P.L.R. 1914.

20. *Lakshminarayan v. Venkata Narasimha*, (1905) 29 Mad. 42=16 M.L.J. 35.

21. 1923 Lah. 122=5 L.L.J. 196=69 I.C. 6.

22. *Alubi v. Kunhi*, 10 Mad. 115.

23. *Dulabh Vahuji v. Bansidhar Rai*, (1884) 9 Bom. 111.

of title to the allowance were barred, the claim for arrears would also be barred.²⁴

(2) In *Bhimabai v. Saamirao*,²⁵ where a claim was made to recover assessment on land, it was held that once the relationship of landlord and tenant is established, the mere non-payment of rent or assessment would not be sufficient to enable the tenant or occupant to begin to set up a title by adverse possession. The right to have rent assessed must continue so long as the relationship of landlord and tenant continues in respect of land liable to be assessed;²⁶ and this right can only be lost by one or other of the modes recognised by law.²⁷

(3) In *Chandra Shekhar Singh v. Jagjivan Baksh*,²⁸ the Oudh Chief Court has held that *Nankar* allowance is a recurring right and in order to establish adverse possession in respect of such a right it must be clearly established by cogent evidence that the right of the plaintiffs to receive the *nankar* was clearly and openly denied to their knowledge, and that after such denial, the persons setting up adverse possession had been continually in receipt thereof by virtue of such an asserted right. The mere fact that the plaintiffs had not received their allowance for some years would not destroy their right to such allowance.²⁹

1955. If a suit to establish a periodically recurring right is not brought within the prescribed period of 12 years from the date of refusal of the enjoyment of the right, the effect of bar of limitation is to extinguish the right itself, and the plaintiff's claim to recover any further arrears of such periodical payments would be barred.³⁰

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
132.	To enforce payment of money charged upon immoveable property.	12 years.	When the money sued for becomes due.

Explanation.—

For the purpose of this Article,

(a) The Allowance and fees respectively called *malikana* and *haqq*s,

(b) The value of any agricultural or other produce the right to receive which is secured by a charge upon immoveable property, and

24. *Raoji v. Bala*, (1890) 15 Bom. 135; Relied in *Saiyiduddin v. Avadh Behari*, (1917) 40 I.C. 864=2 P.L.W. 64; cf. *Chhagan Lal v. Bapubhai*, (1880) 5 Bom. 68 (Suit to establish title, on basis of previous decree, and for arrears. Held, that Art. 131 did not apply).

25. 1921 Bom. 175=45 Bom. 638=60 I.C. 892=23 Bom.L.R. 100.

26. *Birendra Kishore v. Nazir Mahomed*, 30 I.C. 917=22 C.L.J. 122; Relied in *Akbar Sarcar v. Ramesh Chandra*, 72 I.C. 329=1923 Cal. 302.

27. *Akbar Sarcar v. Ramesh Chandra*, 72 I.C. 329=1923 Cal. 302.

28. (1929) 115 I.C. 279=1929 Oudh 215.

29. *Ibid.*

30. *Shivram v. Secretary of State*, 11 Bom. 222 (223).

(c) Advances secured by mortgage by deposit of title-deeds, shall be deemed to be money charged upon immoveable property.

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- 1978. Charge under operation of law.
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Title III: Starting point of limitation.

- 1992-2000. "When money becomes due."
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 1996. Calcutta—Default clause.
 1996-A. Calcutta—Suit for contribution.
 1997. Lahore—Default clause.
 1998. Madras—Default clause, etc.
 1999. Patna and other High Courts—Default clause.
 2000. Patna and other High Courts—Subrogation.

NOTES.

1956. CORRESPONDING PROVISIONS.—Under Act XIV of 1859, suits of this nature were governed by S. 1, cl. 12, which gave twelve years' period.

The corresponding Art. 132, in Act IX of 1871, began with the word "*for*" instead of "to enforce payment of." . . . The Explanation ran as follows:—

"The allowance and fees called *malikana* and *Haqq*s shall, for the purpose of the clause, be deemed to be money charged upon immoveable property."

Under Act XV of 1877, the corresponding Art. 132, had an Explanation worded thus:

"The allowance and fees respectively called *malikana* and *haqq*s shall, for the purpose of this clause, be deemed to be money charged upon immoveable property".

1957. LEGISLATIVE CHANGES.—The present Act, had Art. 132, same as in Act XV of 1877: but this has been amended by the Indian Limitation (Amendment) Act I of 1927, (which came into force on the 1st January, 1928, by which the following Explanation was added to give effect to the recommendation of the Civil Justice Committee that

"Art. 132 should be amended so as to make it clear that a suit to recover the value of paddy and such like produce charged on immoveable property comes within the article."

The amended Explanation ran thus:—

"*Explanation:* For the purpose of this article—

(a) The allowance and fees respectively called *malikana* and *haqq*s, and,

(b) *the value of any agricultural or other produce the right to receive which is secured by a charge upon immoveable property*, shall be deemed to be money charged upon immoveable property.

Clause (c) has been inserted by S. 9 of the Transfer of Property (Amendment) Supplementary Act, XXI of 1929, after cl. (b), adding the words “(c) *Advances secured by mortgage by deposit of title-deeds*,” before the concluding words “shall be deemed . . . etc.”

The effect of these changes will be noticed, in its proper place, in notes under the heading “**Explanation**,” “**clause (b)**” and “**clause (c)**”.

1958-1960. PREVIOUS HISTORY.

1958. Under Act XIV of 1859, there was no special provision for mortgages, and a suit for money charged upon immoveable property by way of a simple mortgage, might be claimed as a mere **personal debt, founded upon the contract** to pay the money, in which case the period of limitation prescribed was six years or three years, according as the covenant to pay was registered or unregistered.³¹ But, when there was an unregistered bond to secure the payment of a sum of money with interest, by which bond also lands were charged (by way of simple mortgage) with the payment of the debt, a **suit to have it declared that the lands were charged** with the payment of the debt and for an **order for the sale of the lands** (as subject to the charge) in satisfaction of the debt fell within cl. 12, S. 1, Act XIV of 1859, and had to be brought within twelve years from the cause of action.³² Where *B*, having borrowed money from *A*, executed in his favour a bond (which was afterwards duly registered), in which he engaged to repay the amount with interest on a day named, and hypothecated certain lands by way of security, with a condition that in the event of the mortgaged lands being sold in the execution of a decree obtained by another creditor, before the term for repayment expired, *A* should be at liberty at once to sue for the recovery of the debt, a suit by *A* against *B*, and the purchasers of the land at the execution sale, charging *B* personally and also seeking to realize the amount due on his bond by the sale of the mortgaged lands, was held to be in substance a

31. *Chetti Goundan v. Sundaram Pillai*, (1864) 2 M.H.C.R. 51; *Krishna Rao v. Hachapa*, 2 M.H.C.R. 307; *Peary Mohun Bose v. Gobind Chunder Addy*, (1868) 10 W.R. 56 (Action for debt on deposit of title-deeds).

32. *Surwan Hossein v. Shahzadali Golam Mahomed*, (1868) 9 W.R. 170 (F.B.); *Peary Mohun Bose v. Gobind Chunder Addy*, (1868) 10 W.R. 56 (Suit to realize lien, held to be a claim to realize an interest in land).

claim for the recovery of immoveable property, or of an interest in immoveable property, within the meaning of cl. (12), S. 1, Act XIV of 1859, and, consequently was governed by the twelve years' rule of limitation therein provided, and not by the rules provided by cls. (10) and (16) of the same section.³³ If the object of a suit was the realization of the debt as against the hypothecated house and lands, it was treated as a suit for the recovery of an interest in immoveable property to which no other provision than S. 1, cl. (12) applied.³⁴ Where an equitable mortgage by deposit of title-deeds was created, and the plaintiff, as the assignee of the equitable mortgage, sued for foreclosure, it was held, by the **Bombay High Court**, that the period of limitation prescribed for a suit for foreclosure by the Limitation Act IX of 1871, was either twelve years under Art. 132, or sixty years under Art. 149 of Sch. II of that Act.³⁵

1959. Article 132 of the Limitation Act, IX of 1871, enacted a provision for a suit "*for money charged upon immoveable property*," which gave a period of 12 years from the date when the money sued for became due.

1960. To obviate the ambiguity arising from a **literal interpretation** of the article under Act IX of 1871, the language of Art. 132, was changed in the Act of 1877, as the words now stand, *viz.*, "*suit to enforce payment of money charged upon immoveable property*". In *Pestonji Bazonji v. Abdool Rahman*,³⁶ the **Bombay High Court** held that where plaintiff sued on a personal covenant in the deed of mortgage of certain immoveable property given to him by the defendant to secure the re-payment of a loan of money with interest, Art. 132 was inapplicable. The view was similarly taken by **Calcutta High Court**, in *in the matter of T. Agabeg*,³⁷ that Art. 132 applied only to suits *to enforce, against the land*, "money charged upon immoveable property"; and by **Allahabad High Court** in *Raghubar Dayal v. Lachmin*,³⁸

33. *Juneswar Das v. Mahabbeer Singh*, (1875) 1 Cal. 163=3 I.A. 1=25 W.R. 84 (P.C.).

34. *Chetti Goundan v. Sundaram*, 2 M.H.C.R. 51; *Krishna Row v. Hachapa*, 2 M.H.C.R. 307; *Raja Kaundan v. Muttammal*, 3 M.H.C.R. 92; *Surwar Hosein Khan v. Gholam Mahomed*, B.L.R. (Sup. Vol.) 879=9 W.R. 170 (F.B.); *Munoolal v. Pigue*, 10 W.R.C.R. 379; *Jonna Venkatasawmy v. Basireddy*, 5 M.H.C.R. 364.

35. *Ganpat Pandurang v. Adarji Dadabhai*, (1879) 3 Bom. 312.

36. (1881) 5 Bom. 463.

37. (1882) 12 C.L.R. 165 (168).

38. (1883) 5 All. 461 (462).

TITLE II: SCOPE AND APPLICATION.

1961-1970. SUB-TITLE I: SUITS "TO ENFORCE PAYMENT".

1961. A Full Bench of the Bombay High Court held in

(i) Conflict of views— of *Lallubhai v. Naran*,³⁹ that this article in Sch. II of Act XV of 1877, was applicable to a suit by a mortgagee to obtain a mere money-decree, to which suit, therefore, the

Bombay view.

the limitation of 12 years from the time the money sued for became due applied. The language was interpreted literally, and the word "charge" was not taken in the sense of Transfer of Property Act,

Madras.

as meaning a transaction not amounting to mortgage. The Madras High Court,

following this view, held in *Davani v. Ratna*,⁴⁰ that in suits to recover the principal and interest of a loan secured by a mortgage of immoveable property, interest for 12 years was recoverable by virtue

Allahabad.

of Art. 132 of Act XV of 1877: and the

Allahabad High Court, in *Muhammad Zakhi v. Chatkur*,⁴¹ adopted the Bombay view, applying Art. 132 to a suit for money charged on the rents and profits of immoveable property; but in two other cases, it took the contrary view.⁴² In the Full Bench case of *Shiblal v. Ganga Prasad*,⁴³ the Allahabad High Court held that a suit upon a bond for money payable on demand, by which immoveable property was hypothecated as security for the debt, wherein the relief prayed for was recovery of the amount with interest by establishment of the plaintiff's right to enforce the hypothecation by sale of the interest of the obligor was not governed by Art. 147. According to this Full Bench decision, the suits governed by Art. 132 will be those in which the relief sought is to enforce payment of money as a charge on immoveable property, where the transaction does not amount to a mortgage. Differing from the Bombay Full Bench view in *Lallubhai v. Naran*,⁴⁴ it was held that Art. 132 was not intended to include suits by a mortgagee to recover money secured on mortgage as a mere money or personal claim: the words in Art. 132 "to enforce payment of money charged" were interpreted to refer to suits to enforce a claim against the property charged to the exclusion of mere money claims.⁴⁵

39. (1882) 6 Bom. 719 (F.B.); O.R. 5 Bom. 463.

40. (1882) 6 Mad. 417; Reld. on 6 Bom. 719 (F.B.).

41. (1884) 7 All. 120=4 A.W.N. (1884) 283.

42. *Raghubar Dayal v. Lachmin*, (1883) 5 All. 461 and *Shib Lal v. Ganga Prasad*, (1884) 6 All. 551 (556) (F.B.).

43. (1884) 6 All. 551 (556) (F.B.).

44. 6 Bom. 719 (F.B.).

45. *Shib Lal v. Ganga Prasad*, 6 All. 551 (F.B.); also see *Srinathji v. Panna Kunwar*, 1934 A.L.J. 230=3 A.W.R. 397 (Held, that where the plaintiff asks for a money decree only and does not seek to enforce a charge on immoveable property, Art. 132 does not apply).

1962. SUITS FOR PERSONAL REMEDY—ART. 132

NOT APPLIED.—In *Ram Din v. Kalka Prasad*,⁴⁶ their Lordships of the Privy Council set at rest this conflict of view, so far as the question of limitation for personal liability under a bond for a debt charged on land was concerned. It was settled that Art. 132 was to be read “as having reference only to suits for money charged on immoveable property to raise it out of that property”. As pointed out by the Madras High Court in *Raja of Vizianagram v. Raja Satracherla*,⁴⁷ in this view Art. 132 does not extend to the personal remedy on the covenant, and it must be enforced within three or six years according as the instrument is registered or unregistered: and it would apply only to claim to realise money by a sale of the property upon which it is charged. In

Calcutta. *Miller v. Ranganath Moulick*,⁴⁸ Mitter, J., draws attention to the language of Art. 132 in Act XV of 1877, which is

“more in favour of the contention that the article in question refers only to suits ‘to enforce payment of money charged upon immoveable property’ by the sale of the said property, a construction which was put by the Judicial Committee of the Privy Council upon Art. 132 of the Limitation Act of 1871, the language of which did not suggest it so clearly as that of the present Limitation Act.”

In *Khemji v. Rama*,⁴⁹ Birdwood, J., observed that the **Bombay Full Bench** decision in *Lallu Bhai's case*,^{49-a} that Art. 132 was applicable as well to the personal liability of the debtor as to the liability of the immoveable property charged was no longer of authority: and that under the Privy Council decision in *Ramdin's case*,^{48-b} while three years' rule applies to the personal remedy sued for by the mortgagee, as was done by Sir Charles Sargent in *Pestonji's case*,^{48-c} under the Act of 1877,

“their Lordships would clearly have applied the twelve years' rule, prescribed by Art. 132, to a suit by a mortgagee for sale in a case falling under that Act”.

In *Chunilal v. Baijethi*, it was held that unpaid purchase-money is a charge on the property in the possession of the vendee, and a suit

46. (1884) 7 All. 502=12 I.A. 12 (P.C.); also see and cf. *Baraboni Coal Concern, Ltd. v. Deba Prasanna Mukherjee*, 1934 P.C. 119=38 C.W. N. 481=59 C.L.J. 207=66 M.L.J. 479 (P.C.) (Held, that a suit to recover royalties charged upon leasehold premises is subject to twelve years' limitation period).

47. (1903) 26 Mad. 686 (714).

48. (1885) 12 Cal. 389 (395); also see *Khub Lal v. Padmanund*, 15 Cal. 542; *Sitab Chand v. Hyder*, 24 Cal. 281 (282).

49. (1886) 10 Bom. 519 (525).

49-a. 6 Bom. 719.

49-b. 7 All. 502 (P.C.).

49-c. 5 Bom. 463.

to enforce it against the property so charged falls under Art. 132 of the Limitation Act. But the article does not extend the time allowed otherwise under the Act to claims to recover the money from the defaulter personally or his other property.⁵⁰ A similar

Madras. view has been taken as to the applicability of Art. 132, by the **Madras High Court** in *Seshayya v. Annamma*,¹ and the Privy Council decision in *Ram-din's* case was followed by the **Allahabad**

Allahabad. **High Court** in *Lachhmi Narain v. Turabunnissa*,² where in a case under Act IX of 1908, it was held that Art. 132 of the Limitation Act is applicable only to suits in which plaintiff claims to recover money charged upon immoveable property, to raise it out of that property and not to a claim in which a personal decree is prayed for. In *Chattar Mal v. Thakuri*,³ where the mortgagee brought a suit for sale upon his bond, and obtained a decree, and brought the property to sale, but the proceeds of the sale being insufficient to satisfy the mortgage-debt, the mortgagor brought a suit to realize the amount remaining due from the obligors personally, and from their other property, it was held that an application for a decree under S. 90 of the Transfer of

Lahore. Property Act was not maintainable. Similarly, **Lahore High Court**, has held in *Rukan Din v. Hassan Din*,⁴ that "there is ample authority to show that Art. 132 is restricted to cases in which payment is sought to be enforced out of the property on which it is charged," and not where the plaintiff is only seeking a personal remedy. The **Upper**

Upper Burma. **Burma Judicial Commissioner's Court**, held in *Nga Ya Baw v. Nga Bya*,⁵ that Art. 132 appears to provide for cases brought by the person who has a charge.

"For instance, if a simple mortgagee paid Government revenue on the mortgaged property in order to prevent its being sold by auction, he would have a charge on the property for the amount paid, and he could see the mortgagor to enforce payment, and his suit would fall under Art. 132."

50. (1897) 22 Bom. 846; Reld. on *Virchand v. Kumaji*, 18 Bom. 48 (Unpaid purchase-money is a charge on property sold and a suit to recover money from the property falls under Art. 132).

1. (1886) 10 Mad. 100; also see *Rathnasami v. Subramanya*, 11 Mad. 56.

2. (1912) 14 I.C. 505=34 All. 246=9 A.L.J. 297; also see *Srinathji v. Mt. Punna Kunwar*, 1935 All. 239=56 All. 711=155 I.C. 390=1934 A.L.J. 230.

3. (1898) 20 All. 512=18 A.W.N. (1898) 133.

4. 1923 Lah. 23=72 I.C. 897; also see *Devi Das v. Ishar Das*, 55 P.R. 1884 (F.B.) (Held, that the limitation of twelve years provided by Art. 132, for suits to enforce payment of money charged upon immoveable property, was not applicable to a suit by a mortgagee to obtain a decree merely for the mortgage money against the mortgagor).

5. (1914) 22 I.C. 959=U.B.R. (1913) I, 178.

Thus it has been recognised by various High Courts that a suit for sale on the basis of a mortgage-deed is one to enforce payment of money charged upon immoveable property within the meaning of Art. 132, Limitation Act.⁶ A decree for the *balance* of the mortgage-debt after the sale of mortgaged property can be passed under O. 34, R. 6, Civil Procedure Code where the suit was within time for personal remedy.⁷ The previous decisions to the contrary were overruled by their Lordships of the **Privy Council** in the case of *Vasudeva Mudaliar v. Srinivasa Pillai*.⁸ This view has been accepted by the Legislature and the wording of Art. 132 has remained unaltered.⁹

1963. SUIT FOR SALE ON BASIS OF MORTGAGE-DEED.—

Privy Council ruling
—30 M. 426 (P.C.).

In 30 Mad. 426, P.C., their Lordships of the Privy Council, held that a suit on a simple mortgage-bond to enforce payment of the amount due on the bond by the sale of the mortgaged property is governed by Art. 132 of Sch. II of Limitation Act XV of 1877, and not by Art. 147. The latter article is **limited** in its application to the one class of mortgages in which alone the suit can be, and always is, brought for foreclosure or sale, that is to **mortgages in the English form**. Their Lordships notice

“the great diversity of opinion among the several High Courts in India for many years past, almost from the time of the passing of the Act of 1877”

and in balancing the two views which had been taken of the effect of Arts. 132, and 147, they examined the law as it stood when they were passed. The preponderating considerations in adopting the narrower interpretation of Art. 147 were the following:—

“The narrower construction escapes the necessity of attributing to the Legislature a great and sudden change of policy. It also gives effect to the ordinary presumption, that the Legislature, when it repeats in substance in a later Act an earlier enactment, that has obtained a settled meaning by judicial construction, intends the words to mean what they meant before. The other construction fails in both these particulars.”¹⁰

6. *Shibdayal v. Mcharban*, (1922) 69 I.C. 981 (983)=1923 All. 1=20 A.L.J. 819=45 All. 27 (F.B.).

7. *Chattar v. Thakuri*, (1898) 20 All. 512; also see *Ratna Sabapathy v. Devasigamony*, 1929 Mad. 53=116 I.C. 817 (F.B.); *Raghunath v. Lalji*, (1895) 23 Cal. 397 (401, 402) and *Sahib Singh v. Gurdial Singh*, (1930) 129 I.C. 201=1930 Lah. 993 (Suit to recover deficiency on sale of mortgage property under a decree—Art. 116 applied to personal relief).

8. 30 Mad. 426=34 I.A. 186=17 M.L.J. 444=2 M.L.T. 333 (P.C.); Appd. *Girwar Singh v. Thakur Narain Singh*, (1887) 14 Cal. 730 (F.B.).

9. *Shib Dayal v. Mcharban*, 45 All. 27=1923 All. 1=69 I.C. 981 (F.B.).

10. *Vasudeva Mudaliar v. Srinivasa Pillai*, 30 Mad. 426=34 I.A. 186 (P.C.); also see *Girwar Singh v. Thakur Narain*, 14 Cal. 730 (F.B.); *Nilcomal v. Kamini*, 20 Cal. 269; *Sitab Chander v. Hyder*, 24 Cal. 281; *Balaram v. Mangta*, 34 Cal. 941 (945); *Ramchandra v. Madhupadi*, 21

1964. Where a mortgage-deed gives option to mortgagee either to sue for interest or principal on default in paying interest half yearly, or to wait for full mortgage term and then sue for the whole, Art. 132 would apply to the suit, and time begins to run from default in payment of interest, as despite the authority given by the contract, the operation of the clause which gave an option to the mortgagee for his own benefit could not be waived so as to prevent or postpone the starting of limitation against him.¹¹ The essential characteristic of a mortgage by conditional sale is that on the breach of the condition of payment, the contract executes itself, and the transaction is closed, and becomes one of absolute sale to be enforced in a particular manner.¹² In *Bala Ram v. Mangta Das*,¹³ a Special Bench of the Calcutta High Court, followed the Full Bench decision in *Girwar Singh v. Thakur Narain Singh*,¹⁴ and applied Art. 132, Limitation Act, to a suit for foreclosure on a mortgage by conditional sale.

1965. Article 132 of Sch. I of the Limitation Act, applies only to a suit brought to enforce a charge in existence and recognised at the date of the suit. A suit to declare that plaintiff had a charge upon the property to the extent of the money advanced by him, is provided in Art. 120 of the Limitation Act, and limitation for such a suit for declaration of charge began to run from the date on which the money was advanced.¹⁵

1966. A suit to enforce payment of money charged on *moveable* property, does not fall under this article, and must be governed by the residuary Art. 120 of the Limitation Act.¹⁶ A decree for sale obtained on the basis of a mortgage by the mortgagee is moveable property, and a suit to enforce a hypothecation of such a decree is governed by Art. 120.¹⁷

Mad. 326 (F.B.); *Rangasawmy v. Muthukumarappa*, 10 Mad. 509 (F.B.); *Ram Saran v. Mehtab*, 112 P.R. 1890; cf. *Shibal v. Ganga Prosad*, 6 All. 551; *Motiram v. Vithal*, 13 Bom. 90; *Onkar Ramshet v. Govardhan*, 14 Bom. 577; *Venkatesh v. Narayana*, 15 Bom. 183; *Datto Dudheshwar v. Vithu*, 15 Bom. 408; *Khurshed Ali v. Ram Dial*, 3 O.C. 156; *Ghasiram v. Devi Chand*, 2 C.P.L.R. 57.

11. *Sheoram Singh v. Babu Singh*, 1926 All. 493=48 All. 302=94 I.C. 849=24 A.L.J. 295; Reld. on *Shib Dayal v. Meharban*, 1923 All. 1 (F.B.).

12. *Ibid.*, 1926 All. 493=48 All. 302=94 I.C. 849.

13. (1907) 34 Cal. 941=11 C.W.N. 959=6 C.L.J. 237 (S.B.).

14. (1887) 14 Cal. 730 (F.B.).

15. *Chhotilal Karsondas v. Vishnu Ganesh*, (1921) 60 I.C. 903=1921 Bom. 182=45 Bom. 697=23 Bom. L. R. 84.

16. See notes under S. 57, ante; also *Nim Chand v. Jagabandhu*, 22 Cal. 21; *Mahalinga v. Ganapathi*, (1902) 27 Mad. 528 (F.B.).

17. *Mt. Jamna Dei v. Lalla Ram*, (1917) 37 I.C. 4=39 All. 74=14 A.L.J. 1025.

But money charged on rents and profits of land is money charged upon immoveable property.¹⁸

1967. SUITS ON SIMPLE MORTGAGE.—We have seen that according to the Privy Council Ruling in *Vasudeva Mudaliar v. Srinivasa Pillai*,¹⁹ a suit on a simple mortgage-bond to enforce payment of the amount due on the bond by sale of the mortgage property is governed by Art. 132, and not by Art. 147. The latter article is limited in its application to the mortgages in the English form, in which alone the suit can be and always is brought for foreclosure or sale.^{19-a}

A **Full Bench of the Calcutta High Court**, in *Girwar Singh v. Thakur Narain Singh*,²⁰ referred to the change in the language of the Art. 132 of Act IX of 1871 from the words “for money charged upon immoveable property”, to the words “to enforce payment of money charged upon immoveable property”, as indicating that the article will not apply to a suit for money charged upon immoveable property when the payment of the money is not sought to be enforced upon the property hypothecated. In *Nilcomal Pramanick v. Kamini Koomar*,²¹ in a suit for possession of land on the allegation that it was mortgaged by the defendant's father to the plaintiff's predecessors, by way of conditional sale, by a deed which fixed no time for payment, and made no provision as to the mortgagee taking possession, it was held that inasmuch as the suit was brought more than twelve years after the date of the mortgage-deed, and also more than twelve years after the date of the alleged last payment to the mortgagee, the suit was barred by Art. 132, Limitation Act. In *Balaram v. Mangta Das*,²² a suit for foreclosure of a mortgage by conditional sale was not held governed by Art. 147 of the Limitation Act, following the **Full Bench decision** in *Girwar Singh v. Narain Singh*,²³ supra. Similarly a **Full Bench of Madras Court** has applied Art. 132, and not Art. 147, Limitation Act, to a suit by plaintiff mortgagee, who had not obtained possession, under an instrument purporting to be a mortgagee with possession, but which contained a covenant to repay the mortgage

18. *Muhammad Zaki v. Chatku*, (1884) 7 All. 120; also see *Ram Jivan v. Jadunath*, (1916) 33 I.C. 555 and *Deputy Commissioner v. Jagjivan*, (1916) 33 I.C. 461.

19. 30 Mad. 426 (P.C.).

19-a. See S. 1963, ante.

20. (1887) 14 Cal. 730 (F.B.); Diss. from *Shiblal v. Ganga Prasad*, 6 All. 551 (F.B.); see and cf. *Madho Prasad Singh v. Baij Nath*, 1905 A.W.N. 152 (Where the mortgagee sued for a simple money decree, relinquishing rights against the mortgaged property) and *Inderpal Singh v. Mezwamal*, (1914) 36 All. 264 (Suit for sale on foot of the mortgage, after obtaining a mere money decree).

21. (1891) 20 Cal. 269.

22. (1907) 34 Cal. 941 (945).

23. (1887) 14 Cal. 730 (F.B.).

amount, and the suit was to recover the principal and interest by the sale of the land.²⁴ A **Full Bench** of the **Punjab Chief Court**, held to same effect, in *Ram Saran Das v. Mehtab*,²⁵ that a suit by a mortgagee for recovery of the principal and interest alleged to be due under a simple mortgage, or deed of hypothecation, by sale of mortgaged property, was governed by Art. 132, and not Art. 147 of the Limitation Act. Rivaz, J., pointed out that before the Act XV of 1877, the period of limitation prescribed for a suit by a simple mortgagee to recover his money by sale of the mortgaged property was 12 years, and Art. 147 introduced without any particular remarks or discussion was not intended to effect a radical change in the law, but was probably enacted to make special provision for suits based upon an "English mortgage", which sought for "foreclosure, or sale" in the alternative. Plowden, J., was of opinion that Art. 147 of the Limitation Act (of 1877), could not be interpreted with reference to the Transfer of Property Bill, which became law in 1882: and that Art. 147 can only apply to a suit by a mortgagee for sale in cases where the mortgagee could apply for foreclosure, if he desired to do so. Where the creditor's remedy for enforcing the personal obligation of the debtor in respect of the loan is barred by limitation, the debt is not extinguished thereby, for the reason that the remedy for enforcing the charge on immoveable property still subsists.²⁶

1968. It has been explained by *Srinivasa Ayyangar, J.*, in *Vyapuri v. Sonamma*,²⁷ that the rights of a mortgagee of immoveable property are now settled by statute. A simple mortgage does not vest any estate in the mortgagee. His only right is to cause the property to be sold through Court. The right of a **simple mortgagee is however, a real right, and he is entitled to enforce his charge even against a purchaser for value** without notice except for a possible difference as regards their enforceability against purchasers for value without notice, there is no difference in their legal incidents between a simple mortgage and a charge.²⁸ A suit by a simple mortgagee to enforce payment of the mortgage-money by a sale of the property is governed by Art. 132 of the Limitation Act, and he is entitled to bring such a suit within 12 years after the

24. *Ramchandra Rayaguru v. Modhu Padhi*, (1897) 21 Mad. 326 (F.B.); Reld. on *Rangasami v. Muthukumarappa*, 10 Mad. 509 (F.B.); also see and cf. *Jainandan Parshad v. Baijnath Saran*, (1921) 63 I.C. 297 = 2 P.L.T. 229 (Covenant in a usufructuary mortgage to pay in event of dispossession of mortgagee—Art. 132, not 116, applied).

25. 112 P.R. 1890 (F.B.).

26. *Kuar Behari Lal v. Beni Madho*, (1924) 79 I.C. 942 = 1925 Oudh 92 = 27 O.C. 268.

27. (1914) 39 Mad. 811 (822) = 29 M.L.J. 645 (F.B.).

28. *Vyapuri v. Sonamma*, (1914) 39 Mad. 811 (823) (F.B.); Reld. on *Balasubramania v. Sivaguru*, (1911) 21 M.L.J. 562 (568).

mortgage-money had become due.²⁹ **Article 132 makes no distinction between suits against mortgagors and against strangers in possession of the mortgaged property.**³⁰ A suit for sale on a mortgage can always be brought under Art. 132 against all persons in possession, whose possession is subsequent to the date of the mortgage, provided that the suit is brought within 12 years from the time at which the money became due.³¹ When in a suit by a mortgagee a defendant claims adverse possession against the mortgagor by virtue of the title acquired after the date of the mortgage, Art. 132 is applicable as against him, and not Art. 120 nor Art. 134.³² Adverse possession against the mortgagor is not *per se* adverse also against the mortgagee in the case of a simple mortgage.³³ Thus, **a suit to enforce a charge even as against a trespasser who has acquired a title to the property by adverse possession is governed by Art. 132 of the Limitation Act.**³⁴ Where before the term for repayment under a registered bond hypothecating certain lands by way of security, expired, the mortgaged lands were sold in execution of a decree obtained by another creditor on a second bond made by the debtor subsequently and subject to the first bond, a suit by the creditor against the debtor personally, and also seeking to realize the amount due on his bond by the sale of mortgaged lands, the claim was held in substance to be a suit for the recovery of immoveable property, or of an interest in immoveable property, within the meaning of Cl. (12), S. 1 of Act XIV of 1859 (corresponding to present Art. 132, Limitation Act, 1908).³⁵ **This article applies to a suit to enforce charge even in the hands of a purchaser of the mortgaged property.** The principle is recognised that where defendants have appropriated a part of the plaintiff's security and converted it into money, he is entitled in equity to treat it as part of the security or as security substituted for the original one.³⁶

29. *Vyapuri v. Sonamma*, (1914) 39 Mad. 811 (823) (F.B.); Reld. on *Vasudeva Mudaliar v. Srinivasa Pillai*, (1907) 30 Mad. 426 (P.C.).

30. *Vyapuri v. Sonamma*, (1914) 39 Mad. 811 (F.B.); *Raj Nath v. Narain Das*, (1914) 36 All. 567 (F.B.) and *Priya Sakhi v. Manbodh Bibi*, (1916) 44 Cal. 425 (L.P.A.).

31. *Raj Nath v. Narain Das*, (1914) 36 All. 567 (F.B.).

32. *Galstann v. Abid Husain*, 1924 Oudh 19=10 O.L.J. 263=73 I.C. 428.

33. *Priya Sakhi v. Manbodh Bibi*, (1916) 44 Cal. 425 (L.P.A.)=21 C.W.N. 177.

34. *Raj Nath v. Narain Das*, (1914) 36 All. 567 (F.B.) and *Priya Sakhi v. Manbodh Bibi*, (1916) 44 Cal. 425 (L.P.A.)=21 C.W.N. 177.

35. *Juneswar Das v. Mahabbeer Singh*, (1875) 1 Cal. 163 (P.C.); also see *Kamla Kanta Sen v. Abdul Barkat*, (1899) 27 Cal. 180 (Art. 132, held not confined to suits to raise money out of the property charged; it applies to suits to raise money out of the property or what is now substituted for the property); also see *Jogeshur Bhagat v. Ghaneshamdas*, (1901) 5 C.W.N. 356; *Umatara Gupta v. Umacharan Sen*, (1904) 3 C.L.J. 52.

36. *Berhamdeo Pershad v. Tara Chand*, 33 Cal. 92=9 C.W.N. 989=

The mere fact that **mortgaged property exists in a different shape** from that in which it was at the time of the mortgage, would not extinguish the mortgagee's right against the property in its converted state, and if the person who has converted it has appropriated it to his own use, either in the shape of money, or in the shape of materials, he would still be liable as a mortgagor.³⁷

1969. It has been pointed out, by the **Lahore High Court**, in *Sunder Das v. Beli Ram*,³⁸ that the nature

Arts. 132 and 148 and scope of the Arts. 132 and 148 is entirely different. Art. 132 prescribes the

period of limitation for suits *to enforce payment* of money charged on immoveable property and the *terminus a quo* is the date when the *money sued for* became due. Art. 148, on the other hand, fixes the time during which a suit against a *mortgagee to redeem* or recover possession of immoveable property may be instituted. It was held that Art. 148 is not limited to suits by the mortgagor, but governs all suits for redemption by parties entitled to redeem the mortgage. This view was taken by the Punjab Chief Court in *Budha v. Mool Raj*,³⁹ and in *Basant v. Inwar Singh*.⁴⁰ The **Patna High Court** has held to same effect in *Ramjhari Koer v. Kashi Nath Sahai*.⁴¹ The **Allahabad High Court**, has in a recent case, *Narotam Das v. Sanwal Das*,⁴² followed its earlier view in *Priyalal Bhora v. Champa Ram*,⁴³ dissenting from the Madras,⁴⁴ and Calcutta,⁴⁵ decisions where Art. 132 has been applied to a suit by a subsequent mortgagee to redeem the mortgaged property from an auction-purchaser in execution of prior mortgage-decree. In *Lakshmanan Chettiar v. Sella Muthu Naicker*,⁴⁶ the **Madras High Court** took the view that where a prior and a subsequent mortgagee,

41 I.A. 45 (P.C.) and cf. *Surapudi Muniappa v. Nookala Seshayya*, (1916) 32 I.C. 901=3 L.W. 341.

37. *Punayya v. Venkatappa*, (1925) 91 I.C. 754=1926 Mad. 343; also see *Kamala Kanta Sen v. Abu Barkat*, (1899) 27 Cal. 180 (Property mortgaged sold by auction for arrears of revenue—Art. 132 applied).

38. (1933) 142 I.C. 805=1933 Lah. 503=34 P.L.R. 502.

39. (1919) 48 I.C. 916=8 P.W.R. 1919.

40. 2 Lah. L. J. 419.

41. (1926) 94 I.C. 284=5 Pat. 513=1926 Pat. 337=7 P.L.T. 788.

42. 1934 All. 946=153 I.C. 664=1935 All. L. R. 41=4 A.W.R. 70.

43. (1922) 45 All. 268=1923 All. 271 (2).

44. *Appayya v. Venkataramanayya*, (1925) 82 I.C. 864=1925 Mad. 150=20 L.W. 620; also *Lakshmanan Chettiar v. Sellamuthu Naicker*, (1924) 84 I.C. 301=1925 Mad. 76=1924 M.W.N. 508=47 M.L.J. 602; cf. S. A. No. 304 of 1926 [dated 10th December 1929; follows 57 Cal. 704 (F.B.)].

45. *Nidhiram v. Sarbessur*, (1910) 5 I.C. 877=14 C.W.N. 439; cf. *Sayamali v. Anisuddin*, 57 Cal. 704=119 I.C. 135=1929 Cal. 609 (F.B.).

46. (1924) 84 I.C. 301=1925 Mad. 76=47 M.L.J. 602=1924 M.W.N. 508.

each brought a suit upon his respective mortgage without impleading the other as a party, and each purchased the mortgaged property in execution of his decree, the second mortgagee-purchaser had acquired only the right which he had under his second mortgage and could enforce his right to redeem the first mortgagee-purchaser by suit only within the period of 12 years from the due date of his mortgage as provided for in Art. 132 of Sch. I to the Limitation Act. This was so decided on the ground that the second mortgagee had no absolute right *to redeem*, but his right was only ancillary to his right to work out his remedy against the mortgaged estate, with a view of enforcing his own mortgage by sale.⁴⁷ This view is supported by a decision of the **Calcutta High Court** in *Nidhiram Bandopadhyaya v. Sarbessar Biswas*,⁴⁸ but as observed by the **Lahore High Court**

"this Calcutta case has since been reconsidered at great length by a Full Bench of five Judges of the same Court in *Sayamali v. Anisuddin*,⁴⁹ who have held that the decision in that case proceeded in its peculiar facts, but that if it be supposed that it was decided in that case that a suit by a puisne mortgagee to redeem a prior mortgage is governed by Art. 132, then it is wrongly decided. The learned Judges definitely ruled that a suit of this kind was governed by Art. 148".

It would appear that a Division Bench of the **Madras High Court** has recently adopted a view, dissenting from the two earlier single Bench decisions referred to above, that Art. 148, and not Art. 132, applies to a suit by the assignee of second mortgagee to redeem the first mortgage.⁵⁰ The **Oudh Chief Court**, has held recently, following the **Lahore**, and **Allahabad** view, that **Art. 132, is inapplicable to a suit by the representatives of the puisne mortgagee to redeem the mortgaged property from the hands of the representatives of the prior mortgagee, which falls within the terms of Art. 148, Limitation Act.**¹ It may be noticed also that the **Bombay High Court**, has likewise held in *Nathmal v. Nilkanth*,² that a puisne

47. *Lakshman Chettiar v. Sella Muthu Naicker*, (1924) 84 I.C. 301; *Reld. on Muhammad Usman v. Abdulla*, 24 Mad. 171 and *Goverdhan Das v. Veerasami Chetti*, 26 Mad. 537.

48. 5 I.C. 877=14 C.W.N. 439.

49. (1929) 119 I.C. 135=57 Cal. 704=1929 Cal. 609=33 C.W.N. 1067=50 C.L.J. 152 (F.B.); also see *Nilmadhab v. Joy Gopal*, 1926 Cal. 560=91 I.C. 719 (Suit by puisne mortgagee for possession against prior mortgagee purchasing property under his decree—Art. 132 applied) and *Lakshmanan Chettiar v. Sella Muthu Naicker*, (1924) 47 M.L.J. 602=1924 M.W.N. 508=1925 Mad. 76=84 I.C. 301.

50. 57 M.L.J., Notes of Recent Cases, p. 59; *cf.* 84 I.C. 301=1925 Mad. 76=47 M.L.J. 602 and 82 I.C. 864=1925 Mad. 150=20 L.W. 620.

1. *Ram Adhar v. Shanker Baksh Singh*, (1935) 153 I.C. 808=1935 O.W.N. 40=1935 Oudh 139.

2. 34 Bom. L. R. 1519=1933 Bom. 25=141 I.C. 811; *cf.* *T. C. Bose v. Obedur Rahman*, (1928) 6 Rang. 297=1928 Rang. 189.

mortgagee whose right to enforce his mortgage is barred under Art. 132 of the Limitation Act, may nevertheless still be entitled to redeem a prior mortgage under a right conferred upon him by S. 75 of the Transfer of Property Act, 1882. It is well settled that the rights of a prior mortgagee who is not made a party to a suit by a puisne mortgagee, and similarly the rights of a puisne mortgagee who is not made a party to a suit of the prior mortgagee are preserved in every respect without being affected by the decree obtained by any of them. If in a suit by the prior mortgagee, the puisne mortgagee is not made a party, the latter's right to redeem would remain unaffected.³

SUB-TITLE II: MONEY CHARGED UPON IMMOVEABLE PROPERTY.

1970. **ARTICLE EXPLAINED—"MONEY".**—It has been observed, by the **Calcutta High Court**, that

"the tendency of modern cases has been to place a wide interpretation on the term 'money', as including not merely what would be technically considered 'cash', but also whatever is redeemable by money or saleable for money".⁴ "That the word 'money' is comprehensive enough to include, not merely money which has been advanced or will be advanced by way of loan, or money which is due on account of an existing debt, but also money which has or will become due on account of non-performance of an engagement that might give rise to a pecuniary liability".⁵

Thus in Art. 132 of the Limitation Act, the expression "**money charged upon immoveable property**" must be understood to include money due for non-performance of an obligation when such money is secured by a mortgage of immoveable property. And a suit to recover the value of paddy charged upon immoveable property falls under this article.⁶

Article 132 has been applied by the **Calcutta High Court** to suits to recover value of paddy secured under mortgage, the mortgagee's interest being the money value of paddy.⁷ In *Joy Narain v. Mangobinda*,⁸ following the **Full Bench** decision, it was held that the period of limitation for a suit upon a mortgage-bond by which the mortgagor took a loan of a certain quantity of paddy

3. Mitra's Limitation Act, Vol. II, pp. 1562-1563, citing *Mulla Vittil Seethi v. Achutan Nair*, (1911) 21 M.L.J. 213 (F.B.); *Mahomed Ibrahim v. Ambika Pershad*, (1912) 39 I.A. 68=39 Cal. 527 (P.C.); also *Mt. Ram Jhari v. Kashinath*, (1926) 5 Pat. 513=94 I.C. 284; *Jageshwar Mandal v. Sridhar Lal*, 1928 Pat. 589; *Chinnu v. Venkatasami*, (1915) 40 Mad. 77=30 M.L.J. 347 and *Chita Chandramma v. Seetha Naidu*, 61 M.L.J. 316.

4. *Ram Chand Sur v. Iswar Chandra*, (1921) 61 I.C. 539=25 C.W.N. 57=48 Cal. 625 (F.B.).

5. *Ibid.*

6. *Ibid.*

7. *Jogendra Nath Singh v. Mohanlal*, (1920) 58 I.C. 995=23 C.W.N. 951 and *Dinabandhu v. Bishen Bewa*, (1921) 60 I.C. 715=32 C.L.J. 221.

8. (1921) 64 I.C. 210 (Cal.).

and agreed to re-pay the same with an additional quantity of paddy as interest, is 12 years as prescribed in Art. 132 of the Schedule to the Limitation Act. The Nagpur Judicial Commissioner's Court held in *Soamlal v. Dhanwa Jhaboolal*,⁹ dissenting from *Rash Behari Dass case*,¹⁰ that where a bond hypothecates property to secure payment of grain, the suit brought upon that bond is a suit to enforce payment of "money charged upon immoveable property", and consequently Art. 132 of the Limitation Act, 1908, would be applicable, and that neither Art. 116 nor Art. 120 of the Act applies to such a case. Where a subsequent mortgagee who has discharged a prior encumbrance sued to enforce his claims to priority as against an intermediate encumbrancer the suit is governed by Art. 132.¹¹ In *Rajeswar Prosad Bhakat v. Rajani Nath Banerjee*,¹² where a *darpatnidar* who had obtained possession of a *patni mahal* under the provisions of S. 171, Bengal Tenancy Act, sought to recover payments actually made by him to save the *patni mahal* from being sold, from those who were liable to make such payments if in point of fact the realisations from the property were not sufficient for the purpose of re-imbusement, it was held that

"in view of the provisions contained in Ss. 170 and 171 of the Bengal Tenancy Act, the claim as made in the suit could well be held to be a claim to enforce payment of money charged upon immoveable property."

When a mortgage-bond provides that the amount due thereunder should be paid in certain instalments, and contains a further clause that if any of the instalments due is not paid in time, the mortgagee would be at liberty to call in the entire money, it is well settled that Art. 132, applies to the case,¹³ though the question is sometimes raised whether Art. 132, will not bar his suit if acting on the terms of the bond, the plaintiff-mortgagee refrains from bringing a suit on there being a default in payment of any the instalments and prefers to sue on the expiry of the due date. This question is one of those on which there has been considerable conflict of opinion; and it will be dealt with under the heading of "starting point of limitation",—"successive or recurring cause of action", and "waiver on default".

1971-79. ARTICLE EXPLAINED.—

1971. "CHARGED UPON IMMOVEABLE PROPERTY."—The Transfer of Property Act

Charge distinguish-
ed from a mortgage. draws a clear distinction between a charge and a mortgage, of which the former is a generic term, and the latter is a species. Before the Transfer of

9. (1922) 18 N.L.R. 111=1922 Nag. 23=65 I.C. 697.

10. 24 C.L.J. 348.

11. *Ram Sahai v. Kunwar Singh*, 11 O.L.J. 370=8 O.W.N. 522.

12. (1931) 134 I.C. 75=35 C.W.N. 678=1931 Cal. 493.

13. *Mukhdeo Singh v. Harakh Narayan Singh*, (1931) 134 I.C. 609=1931 Pat. 285=11 Pat. 112=12 P.L.T. 755.

Property Act was passed, there was a conflict of view whether an instrument not giving a power of sale would be construed at all as mortgage.¹⁴ Under S. 100 of the Transfer of Property Act, where immoveable property of one person is, by Act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge upon the property.¹⁵ A charge within the meaning of that section must be one arising immediately on the execution of a document, and not operative only as a charge at some future time, such as in the event of non-payment of the money secured by it.¹⁶ This is also the object of a mortgage, and in this respect there is no distinction between a charge and a mortgage; in fact this is a common feature of both. But a charge differs from a mortgage in the following other respects:—

(1) A charge may arise by operation of law, but a mortgage is only created by act of parties.

(2) A charge need not be created in respect of a *specific* property, as in a transfer by way of mortgage.

(3) A charge is only a security *for the payment of money to another*, whether due as a debt or a claim for maintenance, etc. But a mortgage is always a security for the payment of a debt or the performance of an engagement.

(4) A charge, being only a *collateral* security, involves no transfer of an interest in property as in a mortgage.¹⁷

1972. It would be noticed that in its remedial incidents, under the present law, there is not much practical difference between a charge, and a simple mortgage, and Art. 132 of the Limitation Act has been held to be quite general in its terms, which embrace any kind of charge whatever, whether created under the Transfer of Property Act or otherwise.¹⁸

14. *Chetti Goundan v. Sundaram Pillai*, (1864) 2 M.H.C.R. 51 and *Rangaswami v. Muthukumarappa*, (1887) 10 Mad. 509 (511) and compare *Girwar v. Thakur Narain*, (1887) 14 Cal. 730 (F.B.); *Sheoratan v. Mahipal*, (1884) 7 All. 258; *Moti Ram v. Vitai*, (1888) 13 Bom. 91 (97).

15. *Mehdi Alikhan v. Chunnilal*, 1929 All. 834=1929 A.L.J. 902 (906).

16. *Madho Misser v. Sidh Binaik*, (1887) 14 Cal. 687; Followed in *Abdul Samad v. The Municipal Committee, Delhi*, (1922) 67 I.C. 939 (Lah.).

17. See Dr. Gour's Transfer of Property Act, S. 82, Introduction.

18. *Nagalla Kotayya v. Koganti Kottappa*, (1925) 90 I.C. 551=1926 Mad. 141=49 M.L.J. 117; also see *Abdul Samad v. Municipal Committee, Delhi*, (1921) 67 I.C. 939 (Lah.) and *Ma Lon v. Ma Nyo*, (1923) 1 Rang. 714.

Art. 132 does not apply where the case does not fulfil the requirements of S. 100 of the Transfer of Property Act as to a valid charge, *e.g.*, where the beneficiary was not specifically named as being the person in whose favour the charge existed.¹⁹ But, where the wording of a security-bond specified certain lands given as security, and the executant under it, and their heirs were bound to pay the money on the liability of the said security, a charge enforceable under Art. 132 of the Limitation Act was held to be created.²⁰ A suit to enforce payment of money under a document which creates a charge on immoveable property is governed by Art. 132, even though the document is a **contract to indemnify**, or a contract in writing registered such as would ordinarily be governed by Arts. 86 and 116 respectively.²¹ It has been held by the **Madras High Court**, that the word "charge" in this article is used in a comprehensive sense, and

"the mere fact that the charge does not come within the meaning of S. 100 of the Transfer of Property Act does not necessarily imply that it is not a charge within the meaning of Art. 132, which is very general in its terms."²²

There was no distinction drawn between a charge given under S. 5 of the Madras Estates Land Act, and the charge given under S. 2 of the Madras Rent Recovery Act.²³

1972-A. ILLUSTRATIONS.

(1) In *Ma Lon v. Ma Nye*,²⁴ where a **third party L**, purchased an oil-well subject to a mortgage in favour of *B*, and right of pre-emption in favour of *N*, and he **made payments to the mortgagee B**, in part-satisfaction of the mortgage-decree on the oil-well, such payments being necessary to save the oil-well, it was held by the **Rangoon High Court** that "the payments constituted a charge if not within the meaning of S. 100 of the Transfer of Property Act, certainly within the meaning of Art. 132 of the First Schedule to the Limitation Act."

(2) Where in a suit between two brothers, with regard to the right to the estate of their deceased father, the defendant elder brother, who was declared entitled to the estate, undertook to pay a fixed maintenance allowance to the younger brother, a suit for arrears of the maintenance allowance brought by the younger brother against the defendant was held to fall under Art. 132, Limitation Act, as the plaintiff was found entitled to his maintenance as a charge

19. *Mehdi Ali Khan v. Chunnilal*, 1929 All. 834=1929 A.L.J. 902 (906).

20. *Ramasami Iyengar v. Kuppusami Iyer*, 66 I.C. 554=1921 Mad. 514=1921 M.W.N. 472.

21. *Ibid.*

22. *Nagalla Kottayya v. Koganti Kottappa*, (1925) 90 I.C. 551=1926 Mad. 141=49 M.L.J. 117=23 L.W. 178=1925 M.W.N. 722.

23. *Ibid.*

24. 1921 Rang. 204=1 Rang. 714=79 I.C. 766; cf. *Gopalasamy v. Nummachy*, (1923) 74 I.C. 416=1923 Mad. 392=17 M.L.W. 254 (Person

upon the property which had come from the father.²⁵ Where a compromise decree charged immoveable properties for maintenance, and reserved personal liability, a suit for arrears of maintenance due was held governed by Art. 132, Limitation Act.²⁶

(3) Where a will devising immoveables stated that the father of the devisee had lent a sum of money to the testator, and directed the devisee to pay the debt with interest, this was construed to be a charge on immoveables, and it was held that a suit, brought by the auction-purchaser of the creditor's claim, to recover the above mentioned debt was within Art. 132, Limitation Act.²⁷

Will devising immoveables directing payments of debts. (4) Where a decree makes a certain sum of money charge upon immoveable property, a suit for that money is within the purview of Art. 132.²⁸ Where a person makes a payment on account of a decree for rent of a tenure or holding under S. 170 (3), Bengal Tenancy Act, he is, under S. 171 (1) (c), entitled as mortgagee to the possession of the tenure or holding in respect of which the payment has been made, and has a right under S. 171 (2) to sue for enforcement of his charge, under Art. 132, Limitation Act.²⁹

Hand-note, followed by security-bond. (5) Where a hand-note is first passed for a certain debt, and subsequently immoveable property is hypothecated under a security-bond, the proper article governing the period of limitation of a suit to recover the loan is Art. 132, Limitation Act; the suit being expressly one for the enforcement of a charge created by the document.³⁰ Similarly Art. 132, applies to a suit to enforce a second mortgage executed in consideration of a prior mortgage, and a fresh advance.³¹

Suit for account-money charged upon immoveable property. (6) In a suit for accounts by the executors of the estate of a deceased principal against his *gomashta*, where a question arose as to article of the Limitation Act applicable, it was held by the **Calcutta High Court**, that with reference to the relief claimed by the plaintiff, the suit was not merely one for account

paying off the debt of another, is ordinarily entitled to a personal decree against defendant); also see and cf. *Chhatilal v. Vishnu Ganesh*, (1921) 60 I.C. 903=1921 Bom. 182=45 Bom. 697 (Third party advancing monies to mortgagor for payment to mortgagee,—suit for declaration of charge—Art. 120 applied).

25. *Ahmad Hoosein v. Nihaluddin*, (1883) 10 I.A. 45=9 Cal. 945 (951) (P.C.); cf. *Bahuria Saraswati v. Bahuria Sheoratan*, 12 Pat. 869 (Held, that ordinarily, a Hindu widow's maintenance is not a charge upon immoveable property).

26. *Hemlata Debi v. Bhowani Charan Roy*, (1935) 39 C.W.N. 725.

27. *Girish Chunder Maiti v. Aunndomoyi*, (1887) 15 Cal. 66 (69)=14 I.A. 137 (P.C.).

28. *Narain Singh v. Narinjan and others*, 1921 Lah. 292=4 L.L.J. 398.

29. *Rajeswar v. Rajani*, (1931) 35 C.W.N. 678 (681)=134 I.C. 75=1931 Cal. 493.

30. (*Kuar*) *Beharilal v. Beni Madho*, (1924) 79 I.C. 942=1925 Oudh 92=27 O.C. 268; Relied on *Hafezuddin v. Jadu Nath*, 35 Cal. 298=27 C.L.J. 279=12 C.W.N. 820; and *Madhusudan Sen v. Rakhal Chandra Das*, 30 I.C. 697=43 Cal. 248=22 C.L.J. 552=19 C.W.N. 1070.

31. *Udho Ram v. Gobind Lal*, 1921 Lah. 293=4 L.L.J. 478 (Time runs from date the money became payable under the 2nd mortgage).

(Art. 89) but one to enforce in the plaintiff's favour the charge created to secure the money which might be found due from the agent to his principal on his accounts, and the case fell within Art. 132 of the Limitation Act.³² Where certain immoveable properties were hypothecated to the principal by the defendant as security for the valid discharge of duty as agent, in a suit for accounts by the principal, Art. 132 was applied, inasmuch as the claim was also by implication a suit to enforce a charge.³³

(7) Similarly, in a **suit by a minor against his guardian for account**, and for money found to be due, to be realized from property hypothecated as security by the guardian for due performance of his duties as manager, it was held that the property was charged by security-bond in such a manner as to make Art. 132 of the Limitation Act applicable, limitation running from the date when the money sued for became due on the dismissal of the guardian.³⁴

(8) A suit to enforce a simple money-bond executed by a surety for money due under a mortgage-bond by a third person, is governed by Art. 116. To such a suit Art. 132 has no application. S. 128, Contract Act which makes the liability of a surety co-extensive with that of the principal cannot have the effect of converting a suit against the surety on a mere money-bond into a suit for payment of money charged upon immoveable property.³⁵

1973. A charge is a security not amounting to a mortgage, but a charge alleged to have been made on immoveables must, in fact, be a binding one to be enforced within the meaning of Art. 132 of the Limitation Act.³⁶ It is obviously necessary, therefore, to examine the language of the instrument to see if there is an *effective and binding* charge (whether created under the Transfer of Property Act or otherwise) upon immoveable property, *i.e.*, whether it is so clear and definite in its terms as to be capable of having effect given to it.³⁷

1974. CHARGE CREATED BY ACT OF PARTIES.—

(1) **Intention to create a charge.** In *Ramsidh Pande v. Balgobind*, where the obligor of a bond acknowledged that he had borrowed a certain amount

32. *Hafezuddin v. Jadunath*, 35 Cal. 298=7 C.L.J. 279=12 C.W.N. 820; also see *Dasrathi Chatterji v. Asit Mohan Ghosh*, (1921) 59 I.C. 126=24 C.W.N. 879 (Article 132, applied to suit for account by shebait against Tahsildar).

33. *Madhusudan Sen v. Rakhal Chandra Das*, (1915) 43 Cal. 248=30 I.C. 697=22 C.L.J. 552; Dissented from *Jogesh v. Benode*, 14 C.W.N. 122.

34. *Mt. Fazal Nishan v. Muhammadji*, 33 P.R. 1897.

35. *Muthu Chettiar v. Rangappa Naidu*, (1927) 105 I.C. 168=53 M.L.J. 453=1927 Mad. 945=39 M.L.T. 408.

36. *Kameswar v. Raj Kumari*, 20 Cal. 79 (F.B.).

37. *The Collector of Etawah v. Beti Maharani*, 14 All. 162; also see *Abdul Samad v. The Municipal Committee, Delhi*, (1922) 67 I.C. 939 (Lah.) (Article 132, applies to all cases of an effective and binding charge upon immoveable property whether under Transfer of Property Act, or otherwise).

from the obligee at a given rate of interest, and promised to pay the principal with interest at the agreed rate upon a date named, and the bond stipulated that to secure this money, the debtor "voluntarily and willingly pledged his wealth and property in favour of the said banker," adding that "whatever property, etc., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void"; and this bond was registered under the Registration Act as a document affecting immoveable property, and the obligor was a party to such registration; it was held that the bond showed that the intention of the parties was to create by it a charge upon all the property of the obligor for payment to the plaintiff of the principal monies borrowed, together with interest at the agreed rate.³⁸ But, in the case of *Collector of Etawah v. Beti Maharani*,³⁹ where the debtor stipulated that if the principal and interest agreed upon were not paid on the due date, the creditor would be entitled to recover the money, by instituting a suit from "my moveable and immoveable properties, my own milk," it was held that the language of the bond was too vague to warrant the inference that the bond contemplated the creation of a mortgage of a definite estate, and the suit was governed by Arts. 66 or 116, Limitation Act.

1975. In suits to recover the principal and interest of a loan secured by a mortgage of immoveable property, interest for twelve years is recoverable by virtue of Art. 132 of the Limitation Act.⁴⁰ Where the plaintiff obtained an usufructuary mortgage of certain items of suit properties, which were leased out to the mortgagors by a document of even date, and later a similar mortgage and lease deed was executed in consideration of further advances, along with a simple mortgage of some other items of property, and the second document expressly made the mortgaged properties liable not only for the repayment of the principal but also for interest, it was held in a suit on the foot of both the mortgages for sale of the mortgaged properties and for the realisation of the mortgage amount, including the interest due, that the claim for interest was governed by Art. 132, and not Art. 110 of the Act, and that the plaintiff was entitled to recover the interest under the terms of the mortgage-deed irrespective of the fact of a usufructuary mortgage and lease arrangement by the mortgagee to the defend-

38. (1886) 9 All. 158; Referred in *Najibullah Mulla v. Nusir Mistri*, 7 Cal. 196.

39. (1891) 14 All. 162 (164).

40. *Davani Ammal v. Ratna Chetti*, (1882) 6 Mad. 417; Relied on *Lallubhai v. Naran*, 6 Bom. 719.

ants.⁴¹ Interest *post diem* awarded under the Interest Act, 1839, though not provided for in the mortgage-deed, would constitute a charge on the mortgage-premises.⁴² Claim to interest being subsidiary or incidental to the claim for the principal must impliedly be available for the interest also.⁴³

1976. In suits to enforce payment of money charged upon immoveable property, a question often arises whether the charge was validly created by a Hindu father as against his sons, who are under a moral obligation to pay their father's debts which are for necessary family purposes, and not immoral. Art. 132 is applied to such suits where the mortgagee sues against the sons and grandsons of the mortgagor to make them liable in respect of a mortgage executed by the father or grandfather, under the rule of Mitakshara Law.⁴⁴ In *Maheswar Dutt Tewari v. Kishun Singh*,⁴⁵ where in a joint Mitakshara family composed of father and sons the former executed a mortgage bond on receipt of a loan, which the sons failed to prove to have been taken for immoral purposes, the **Calcutta High Court** held that the mortgage-bond was binding on the sons and that the limitation applicable to a suit on the bond in respect of the sons as well as in respect of the father, was that provided by Art. 132, Limitation Act. The question of limitation was again raised in the Calcutta case of *Bisonath Prosad v. Brin-desri Prosad*,⁴⁶ where it was pointed out with reference to the provisions of S. 85 of the Transfer of Property Act, that a mortgagee must now in a suit on a mortgage of the joint property of a Mitakshara family, executed by a father, join as a party the executant's son though he was a minor at the date of the instrument, that such a son, therefore, is a person having an interest in the property comprised in the mortgage. This was followed in *Sheo-narain Roy v. Mokshoda Das Mitra*,⁴⁷ where it was held that a suit

41. *Vasudevan Attiseripad v. Konurupettamanna*, (1915) 30 I.C. 818=2 L.W. 853.

42. *Rama Reddi v. Appaji Reddi*, (1894) 18 Mad. 248; also see *Bikramajit Tewari v. Durga Dayal*, 21 Cal. 274 and *Vithoba v. Vigneshwar*, (1896) 22 Bom. 107 (Interest *post diem* held a charge for purposes of Art. 132).

43. *Kadar Miya v. Chand Miya*, 1923 Nag. 181.

44. *Ran Singh v. Sobha Ram*, (1907) 29 All. 544; Relied on *Dharan Singh v. Anganlal*, (1899) 21 All. 301 and *Ariabudra v. Dorasami*, (1888) 11 Mad. 413; also see *Jaleshar Rai v. Anrut Rai*, (1913) 35 All. 302.

45. (1907) 34 Cal. 184; Relied on *Nanomi Babuosin v. Madhun Mohun*, (1885) 13 Cal. 21=13 I.A. 1 (P.C.) and *Bhagbut Pershad v. Girja Koer*, (1888) 15 Cal. 717=15 I.A. 99 (P.C.) (Principles in cases of sales, applied to mortgages).

46. 17 I.C. 577=40 Cal. 342.

47. (1913) 19 I.C. 878=17 C.W.N. 1022; Dissented from *Suraj Prosad v. Golab Chand*, 27 Cal. 762 and *Bhagawat v. Subalae*, 7 C.L.J. 195.

to obtain payment of debts contracted by a father governed by the Mitakshara Law upon a mortgage of ancestral property, by a sale of the said property in the hands of the sons and grandsons, is a suit to enforce payment of money charged upon immoveable property, and the twelve years' rule of limitation provided by Art. 132 of the Limitation Act will apply to it. But, where a suit upon a mortgage effected by a Hindu father for a debt which was neither antecedent nor for family purposes, and not proved to be immoral, had been brought after the death of the father against the sons, some of whom were adult, and some minors at the time of the mortgage, it was held that Art. 132 had no application as there was no charge on immoveable property against the sons. Consequently, Art. 120 governed the case.⁴⁸

1977. Where the managing Agent of the defendant company

(4) Building contract—Charge created by agreement. had accepted plaintiff's tender, and allowed him, with full knowledge and consent of the directors, to undertake the building operations, and the tender expressly stipu-

lated that the sums due to the contractor were to be a charge upon the buildings, it was held, by the Punjab Chief Court, that Arts. 52 and 56 of the Limitation Act did not apply, as the claimant contracted to erect and supply a *building*, and not labour or labour and materials; and that Art. 132 was applicable, the claim being for money charged upon immoveable property, under the express stipulation of the tender.⁴⁹

1978. CHARGE UNDER OPERATION OF LAW.—

(i) Maintenance of Hindu widows. Under Hindu Law, so long as the estate remains joint and undivided, the maintenance of widows is a charge on the whole

of ancestral or joint family property; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share or shares, allotted to the son or sons, of whom she is mother.⁵⁰ In the regenerate classes of Hindus,

Maintenance of illegitimate sons. a son of illegitimate birth has no part in the family inheritance, but is entitled to maintenance out of the father's estate, a

48. *Brijnandan Singh v. Bidya Prosad*, (1915) 42 Cal. 1068 (F.B.); Relied on *Surja Prasad v. Golab Chand*, (1900) 27 Cal. 762 and *Luchman Doss v. Giridhur Chowdhry*, (1880) 5 Cal. 855 (F.B.).

49. *Doulat Ram v. Woollen Mills Company, Limited*, 95 P.R. 1908=165 P.W.R. 1908.

50. *Hemangini Dasi v. Kedarnath*, (1889) 16 Cal. 758 (P.C.); *Golab Kunwar v. The Collector of Benares*, 4 M.I.A. 246 (258); cf. *Bahuria Saraswati v. Bahuria Sheoratan*, 12 Pat. 869 (A Hindu widow's maintenance is not a charge on her husband's properties).

right which is personal to him and not inherited by his offspring.¹

A Muhammadan widow's claim for dower, under Muhammadan Law, is not a lien on her husband's property, such as is obtained by a mortgage, but ranks on a par with ordinary debts.²

Sums claimed by the Municipality on account of house-tax and water-tax are declared by statute to be a first charge upon the buildings, etc. Art. 132 would apply to a suit to enforce payment of such sums.³

1979. Under S. 100 of the Transfer of Property Act, a charge may be created by operation of law as well as by act of parties. Instances of charges created by operation of law will be found in Transfer of Property Act and other Acts. Under that Act they have been created by Ss. 39, 55 (4) (b), 72, 73 and 95. The charges

"are founded upon the consideration of a duty or implied intention on the part of the owner of property to make it answerable for a specific claim".⁴

1980. Under S. 55 (4) (b) of the Transfer Property Act, a vendor, is given a statutory charge for the unpaid purchase-money, and a suit to enforce this charge falls within Art. 132, Limitation Act.⁵ Where a suit is brought by the plaintiff as an unpaid vendor claiming for the recovery of a certain sum of money on the security of a part of the immoveable property sold, such a suit is governed by this article.^{5-a} The statutory charge upon the property in the hands of the buyer can be enforced by the vendor against the property within twelve years of the date of the sale deed, under Art. 132,⁶ while a suit for vendor's personal remedy against the vendee would fall

1. *Roshan Singh v. Balcant Singh*, (1900) 22 All. 191 (P.C.).

2. *Ameer Ammal v. Sankaranarayan Chetty*, (1901) 25 Mad. 658; also see and cf. *Mt. Kubra Begum v. Fazl Husain*, (1927) 99 I.C. 553=1927 All. 268 (Dower debt charged on immoveable properties—Art. 103 not applicable).

3. *Mahomed Ishaq v. Municipal Board, Cawnpore*, 1930 All. 530=123 I.C. 379.

4. *Fisher*, S. 504; *Gour*, S. 2201, p. 1492.

5. *Harlal v. Muhamdi*, (1899) 21 All. 454; *Munirun Nissa v. Akbar*, (1908) 30 All. 172; *Ahmad Ali v. Raihan Raza*, (1934) 148 I.C. 639=1934 All. 525=1934 A.L.J. 682; also see *Ramakrishna v. Subbrahmnya*, (1905) 29 Mad. 305 (F.B.) and *Authinarayana v. Krishnaswami*, (1924) 82 I.C. 481=1924 Mad. 854.

5-a. *Gulzarimal v. Maghimal*, 1933 Lah. 109.

6. *Harlal v. Muhamdi*, (1899) 21 All. 454; cf. *Rukan Din v. Hasan Din*, 72 I.C. 897=1923 Lah. 23 (Article 132 not applied to personal remedy).

under Art. 111 of the Limitation Act.⁷ The starting point is the date of sale unless the document fixes a period for the payment of the amount due.⁸

1981. Under S. 55 (6) (b) of the Transfer of Property Act, the purchaser has a charge on the

(iii) Purchaser's lien. property purchased by him in respect of the price repaid by him. Art. 132 applies to a relief for enforcement of a hypothecation lien or suit by vendor for recovery of amount reserved for payment of prior mortgage.⁹

1982. Under S. 73 of that Act, (prior to Amending Act, XX of 1929), a mortgagee had a charge

(iv) Mortgagee's charge on surplus of revenue sale. on the surplus of revenue-sale of mortgaged property, and suits to enforce such charge were held to be governed by

Art. 132, Limitation Act.¹⁰ But, after the amendment the mortgagee is under S. 73 only entitled to *claim payment* of the mortgage money out of the surplus.¹¹ Under S. 74 of the Act, a second mortgagee who discharges a prior mortgage acquires a charge on the property which he relieves of liability for that mortgage.¹²

1983. Similarly, prior to amendment of Act XX of 1929,

(v) Contribution between co-mortgagors. S. 95 of the Transfer of Property Act enabled a co-mortgagor redeeming the entire property to have a charge on the share of other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.¹³ This section is confined to case of a redemption of usufructuary mortgage alone.¹⁴ Whether under this section or

7. *Virchand Lalchand v. Kumaji*, (1892) 18 Bom. 48; *Chunni Lal v. Bai Jetha*, (1897) 22 Bom. 846; cf. *Natesan v. Soundararaja*, (1897) 21 Mda. 141.

8. *Authinarayana Iyer v. Krishnaswamy*, (1924) 82 I.C. 481=1924 Mad. 854.

9. *Kallu v. Ram Dass*, (1928) 107 I.C. 679=1929 All. 121=26 A.L.J. 53; also see *Ahmad Ali v. Raihan Raza*, 1934 All. 525=148 I.C. 639.

10. *Upendra v. Mohri*, (1904) 31 Cal. 745; *Kamala v. Abdul*, (1899) 27 Cal. 180; also see *Umatra v. Uma Charan*, 3 C.L.J. 52 (A mortgage of an estate executed between date of default, and the date of sale for arrears of revenue); and *Jogeshwar v. Ghanshyam*, 5 C.W.N. 356 (359); *Berhamdeo Prasad v. Tara Chand*, (1905) 33 Cal. 92. Affirmed in 41 Cal. 654 (661 (P.C.)) (the right of subsequent mortgagee to surplus sale proceeds of prior mortgagee's sale was recognised. But, it would not now be regarded as a charge after the amendment of S. 73, Transfer of Property Act).

11. *Mitra's Limitation Act*, Vol. II, p. 1552.

12. *Shib Lal v. Munni Lal*, (1921) 44 All. 67 (69)=63 I.C. 604=1922 All. 153.

13. *Moidin v. Oothumangunni*, (1888) 11 Mad. 416; *Vasudev v. Balaji*, (1902) 26 Bom. 500; also see *Shib Lal v. Munni Lal*, (1921) 44 All. 67 (69).

14. *Walikhan v. Shamsul Jehan*, (1908) 28 All. 482=16 M.L.J. 269 (P.C.); *Bhagwandas v. Hardei*, (1903) 26 All. 227.

otherwise the redeeming mortgagor had got his charge for amount paid towards his redemption and expenses, and the redeeming mortgagor's suit for contribution was held to be governed by Art. 132, Limitation Act,¹⁵ and could be enforced within twelve years from the date of payment. A suit to enforce such a charge by a redeeming co-mortgagor is independent of the right to enforce the original mortgage, and is governed by different principles.¹⁶ A suit by a co-mortgagor to redeem the property in the hands of another co-mortgagor who has redeemed the entire property mortgaged is within time if it is brought within twelve years from the date when the redeeming co-mortgagor sets up his adverse possession.¹⁷ Where a co-mortgagor redeeming mortgage acquires by virtue of S. 92, Transfer of Property Act, the same rights as the mortgagee, and under Ss. 92 and 95 of the Transfer of Property Act, he claims contribution from the other co-mortgagors with a charge on their share of the property, such rights arise only on the redemption of the mortgage and not on payment of a portion of the mortgage money to the mortgagee. Therefore a cause of action arises in his favour on the date when the mortgage debt is completely liquidated.¹⁸

Where the owner of a property which is mortgaged with other properties to secure a single debt acquires, by virtue of Ss. 82 and 100, Transfer of Property Act, a charge against such other properties, when his property has been sold in execution of a decree on the mortgage and has contributed more than its rateable share of the mortgage-debt, and none the less if the owner of such property has neither redeemed the mortgaged property nor has the sale of his property alone discharged the mortgage decree, a claim to enforce such a charge is governed by Art. 132, Limitation Act.¹⁹

15. *Bhagwandas v. Hardei*, (1903) 26 All. 227; *Ahmad Walikhan v. Shamsul Jehan*, (1906) 28 All. 482=33 I.A. 81=3 A.L.J. 360 (P.C.); *Hira Kuer v. Palkhu Singh*, (1918) 46 I.C. 479 (Pat.).

16. *Aziz Ahmad Khan v. Chhote Lal*, (1928) 50 All. 569=1928 All. 241; *Rameshwar v. Sheorani*, (1927) 105 I.C. 302=1927 Oudh 552; cf. *Nathu Ram v. Sheolal*, (1917) 42 I.C. 796 and *Muhd. Mian v. Barat Singh*, (1930) 7 O.W.N. 401=1930 Oudh 260=125 I.C. 402.

17. *Nankoo Das v. Rab Saran Singh*, (1929) 117 I.C. 409=1929 Oudh 290=6 O.W.N. 305.

18. *Nisar Ahmad Khan v. Mazur Ahmad*, (1935) 154 I.C. 267=1935 O. W.N. 278=1935 Oudh 245; compare *Umar Ali v. Asmat Ali*, (1931) 130 I.C. 889=1931 Cal. 251=53 C.L.J. 154=35 C.W.N. 409 (O.R. *Raj Kamini Debi v. Mukandlal*, (1920) 57 I.C. 868=1921 Cal. 166—Which is now statute law); also see *Raj Kamini Debi v. Mukandlal*, (1920) 57 I.C. 868=25 C.W.N. 283=1921 Cal. 166 (The position of a co-mortgagor redeeming mortgage is that of an assignee of the original security); and *Kotayya v. Kottappa*, 1926 Mad. 141=90 I.C. 551.

19. *Bhagwan Das v. Karam Husain*, (1911) 33 All. 708 (F.B.); Relied on *Ibu Hasan v. Brijbhukhan*, (1904) 26 All. 407; and *Muhammad Yahya v. Muhd. Rashiduddin*, (1909) 31 All. 65 (*Held*, that a right of contribution and a charge do not arise until the whole mortgage is discharged).

1984. Where several properties are liable for the payment of an annuity which has been discharged by the owner of one of such properties, a suit for contribution being a suit to enforce payment of money charged upon land, is governed by Art. 132, and not by Art. 99, Limitation Act.²⁰ Similarly where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save, and so does save, the estate from liability to be sold by Government for realising the arrears of revenue, he is by operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of the revenue, as between the co-sharers.²¹

1985. A Full Bench of the Calcutta High Court held in *Kina Ram v. Mozaffar Hossain*,²² that there is no general rule of equity to the effect that whoever having an interest in an estate, makes a payment in order to save the estate obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who has paid the whole revenue and thus saved the estate does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. Following this case, a suit by a co-sharer for payment of arrears of revenue was held to be governed by Art. 99, Limitation Act.²³ A similar view was taken by the Bombay High Court in *Shivrao Narayan v. Pundlik Bhaire*,²⁴ where Art. 132 was not applied to a suit by an owner making a voluntary payment of assessment due on the land of another proprietor, where their land formed part of a larger holding which stood in one name in the revenue records. But, the Full Bench of the Madras High Court,²⁵ dissented from the view taken by the Full Bench of Calcutta in *Kinu Ram Das v. Mozaffer Hossain*,²⁶ and by the Allahabad High Court in *Chitor*

20. *Yakubali Khan v. Kishanlal*, (1906) 28 All. 743 (746); Relied on *Bhagwandas v. Har Dei*, (1903) 26 All. 227.

21. *Rajah of Vizianagram v. Rajah Setracherla*, (1902) 26 Mad. 686 (F.B.); also see *Kottayya v. Kotappa*, (1925) 90 I.C. 551=1926 Mad. 141=49 M.L.J. 117=23 L.W. 178; cf. *Bhubeneshwari v. Manir Khan*, (1928) 111 I.C. 84=1928 Pat. 641 (Article 99, applied).

22. (1887) 14 Cal. 809 (F.B.); O.R. *Enayet Hossein v. Muddumonee*, 14 B.L.R. 155; *Nobin Chunder v. Rup Lal*, 9 Cal. 377; *Mohesh Chunder v. Ram Prosunno*, 6 C.L.R. 28.

23. *Khublal Sahu v. Pudmanund Singh*, (1888) 15 Cal. 542.

24. (1902) 26 Bom. 437; cf. *Achut v. Hari*, 11 Bom. 313 (318).

25. 26 Mad. 686 (F.B.); Folld. *Seshagiri v. Pichu*, 11 Mad. 452.

26. (1887) 14 Cal. 809 (F.B.).

Mal v. Shiblal.²⁷ This view has been followed in *Alayakammal v. Subbaraya Goundan*,²⁸ where a co-sharer paying Government revenue due on the land was held to have charge on the land for the amount so paid to the extent to which he was entitled to contribution from the other shareholders, and the period of limitation to enforce such charge was 12 years under Art. 132, Limitation Act. Similarly, where one of two or more *ryots* holding a joint-patta under a landholder paid the whole rent due to the landholder in order to save the holding from sale, he was, by operation of law, held entitled to a charge upon the share of each of his co-sharers for the realization of the latter's share of the rent.²⁹ A suit for the recovery of Government revenue, which the defendant was bound to pay, but which has been paid by the plaintiff to save the whole estate from sale, is governed by Art. 132, and not by Art. 99.³⁰

1986. CHARGE ON SUBSTITUTED SECURITY.—We have noticed in S. 1971, *ante*, that Art. 132 applies to a suit to enforce a charge even in the hands of a purchaser of the mortgaged property. This is so both on the basis of S. 73 of the Transfer of Property Act, and on general principles of equity.³¹ Under S. 73 of the Transfer of Property Act

“when mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereof of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part”.

The principle underlying this provision is that in case of a sale of the mortgaged property, the surplus money may be regarded as the subject of mortgagee's charge in the new form, which it had assumed and on which will be fastened the same right which he had against the original property.³² Section 73 is intended to relieve the mortgagee of the effects of the injury which he would suffer by the property which was a security for his money being sold, and give him a right over the residue of the sale-proceeds.³³ The rule

27. (1892) 14 All. 273.

28. (1905) 28 Mad. 493.

29. (*Nagalla*) *Kottayya v. Kottappa*, (1925) 90 I.C. 551=1926 Mad. 141=49 M.L.J. 117.

30. *Ramdutt Singh v. Horakh Narain*, (1880) 6 Cal. 549; cf. *Bhubeneshwari v. Manir Khan*, 1928 Pat. 641=7 Pat. 613=9 P.L.T. 573=111 I.C. 84 (Suit for contribution by co-sharer paying Government revenue for the whole property is governed by Art. 99, not Art. 132).

31. *Berhamdeo Pershad v. Tara Chand*, 33 Cal. 92=9 C.W.N. 989; s.c. 41 I.A. 45=41 Cal. 654 (P.C.); also see *Punnayya v. Venkatappa*, (1925) 91 I.C. 754=1926 Mad. 343 and *Kamla Kanta Sen v. Abu Barkat*, (1899) 27 Cal. 180.

32. *Berhamdeo Pershad v. Tarachand*, 41 Cal. 654 (P.C.).

33. *Beni Prasad v. Rewat Lal*, 24 Cal. 746 (749); *Hem Chandra v. Tafazzal Hossein*, 8 C.W.N. 332.

is a part of the general principle of substituted security, that if the mortgagee is, subsequently to his mortgage, deprived of his security for want of title in the mortgagor, he may either sue him for the recovery of his money,³⁴ or hold as security any property obtained by the mortgagor in lieu of the one mortgaged to him.³⁵ The principle is well recognized that where defendants have appropriated a part of the plaintiff's security, and have converted it into money, he can follow the same in their hands being entitled to treat that in equity as part of the security, or as security substituted for the original one.³⁶ Since the surplus sale-proceeds is regarded as representing the immoveable property which has been sold, it has been held that the charge on the money into which the immoveable property is so converted may be enforced within the twelve years allowed for enforcing a charge on immoveable property.³⁷ The Nagpur Judicial Commissioner's Court has held that a new cause of action does not arise on the coming into operation of S. 73, Transfer of Property Act, since the charge of the mortgagor is transferred from one item of property to another.³⁸ The starting point for limitation in each case is therefore the time when the money sued for becomes due.³⁹

1987. ILLUSTRATIONS.—

(1) In *Berhamdeo v. Tara Chand*,⁴⁰ where certain property was sold under a decree in the first mortgage in a suit in which second mortgagee had been impleaded, and the first mortgagee afterwards obtained another decree on the third mortgage, in execution of which he withdrew the surplus sale proceed, it was held that a suit by the second mortgagee for recovery of the surplus already paid to the first mortgagee should be regarded as money charged on immoveable property, so as to give the mortgagee twelve years' limitation under Art. 132 of the Limitation Act.

(2) A claim by the mortgagee for the satisfaction of the mortgage debt out of the sale-proceeds of the mortgaged property sold by the Collector

34. S. 68 (f), Transfer of Property Act; also see *Bhola Nath v. Hara Mohan*, 7 I.C. 251 (Cal.).

35. *Byjnath v. Ramoodeen*, 21 W.R. 233 (P.C.); Folld. in *Hem Chunder Ghose v. Thakomani Devi*, 20 Cal. 533; *Lakshman v. Gopal*, 23 Bom. 385; *Joy Sankari v. Bharat Chandra*, 26 Cal. 434; *Amoluk v. Chandan*, 24 All. 483.

36. *Jogeshur v. Ghanshyam*, 5 C.W.N. 356; *Kamala Kant v. Abdul Babul*, 27 Cal. 180 (184); *Umatara v. Uma Charan*, 3 C.L.J. 52 (56, 57); *Shyam Chand v. Land Mortgage Bank*, 12 C.L.R. 440 (443).

37. *Surapudi Muniappa v. Seshayya*, (1916) 32 I.C. 901 (Mad.).

38. *Vishwanath v. Shankarlal*, 12 N.L.R. 20=34 I.C. 704.

39. *Berhamdeo v. Tara Chand*, 41 Cal. 654 (P.C.).

40. 33 Cal. 92; s.c. 41 Cal. 654=21 I.C. 961 (P.C.); Folld. in *Mt. Chandra Kunwar v. Sheo Dayal*, (1924) 84 I.C. 539=11 O.L.J. 707 (Held, that surplus sale proceeds of a sale held in execution of a mortgage decree are money charged upon immoveable property and a suit for recovery thereof is governed by Art. 132).

for arrears of Government revenue, is governed by Art. 132, and not by Art. 120.⁴¹ When a mortgaged property, being a revenue paying estate, is sold free from all incumbrances for arrears of revenue, the lien of the mortgagee is transferred from the property itself to the balance of the sale-proceeds which remains after satisfying the Government demand.⁴² Where a mortgaged property was sold for arrears of Government revenue for no default of the mortgagee, and the surplus sale proceeds were withdrawn by the mortgagor: it was *held*, that the mortgagee had a right to sue for the amount and the period of limitation that applied to such a suit is twelve years from the date when the surplus proceeds were realised.⁴³

(3) In *Shamlal v. Johri Mal*,⁴⁴ it was held that a person who takes a mortgage of immoveable property in the name of another, loses his lien on the security if a *bona fide* transferee acquires it for value from the *benamidar* but has a remedy against the latter for the money wrongfully received and retained by him, and it being charged on immoveable property the limitation for such a claim is that which is provided by Art. 132, Limitation Act. The *ratio decidendi* in this and similar cases was that the lien which existed on the property as a charge was transferred under S. 73, Transfer of Property Act, to the purchase-money, and there was nothing in the Limitation Act to shorten the time within which the plaintiff could sue to recover the money, charged on the mortgaged property.⁴⁵

(4) Where a *patni taluk* having been sold for arrears of rent, the surplus sale-proceeds held in the Collectorate were withdrawn by holders of certain money decrees against the patnidars, the plaintiff, the mortgagee of the *taluk* was held entitled to proceed against the whole of the surplus, which was regarded as the shape into which the plaintiff's security was converted, as otherwise his security would be diminished.⁴⁶ Again, instead of the original security, there may be a substituted security, as for instance in cases where the original mortgage was of an undivided share of immoveable property for which by a subsequent partition, a particular portion is allotted.⁴⁷

(5) Where plaintiff, first mortgagee of an absolute occupancy holding, sued defendants, the legal representatives of a subsequent mortgagee, for the recovery of money due to him by the tenant mortgagor, and claimed a charge on the purchase-money paid by the *malguzar*, under the provisions of S. 38, Central Provinces Tenancy Act, it was held that the suit was governed by Art. 132, Limitation Act, and the mortgage debt was a charge on the purchase-money in exoneration of the land [S. 41 (6), Central Provinces Tenancy Act].⁴⁸

(6) Where a mortgagee of a tin shed which was attached and brought to sale in execution of a money-decree obtained by the defendant against the

41. *Upendra Chandra Singh v. Mohrilal*, (1904) 31 Cal. 745; Reld. on *Kamala Kant v. Abul Barkat*, (1890) 27 Cal. 180.

42. *Kamala Kant v. Abul Barkat*, (1890) 27 Cal. 180; Folld. in *Isri Prasad v. Gunga Prasad*, (1909) 3 I.C. 311 (Cal.).

43. *Isri Prasad v. Gunga Prasad*, (1909) 3 I.C. 311 (Cal.).

44. 37 P.R. 1909=1 I.C. 732=50 P.W.R. 1909=38 P.L.R. 1909.

45. *Mt. Aso v. Mt. Harnami*, (1920) 56 I.C. 944=1 Lah. L. J. 60.

46. *Gosto Behary Pyre v. Shib Nath Dutt*, (1892) 20 Cal. 241 (P.C.); Reld. on *Byjnath Lal v. Ramoodeen*, 21 W.R. 233=1 I.A. 106 (P.C.).

47. *Byjnath Lal v. Ramoodeen*, 1 I.A. 106=21 W.R. 233 (P.C.); Reld. in *Surapudi Muniappa v. Nookala Seshayya*, (1916) 32 I.C. 901 (904) (Mad.).

48. *Vishwanath v. Shankarlal*, (1916) 34 I.C. 704=12 N.L.R. 90.

mortgagor, brought a suit to recover from the defendant the amount due on the mortgage, held, that the suit fell under Art. 132 of the Limitation Act.⁴⁹

(7) Where a vendee of a mortgaged house pulls down the house and utilizes the materials for other buildings, or otherwise deals with them, he is liable in respect of the mortgage as vendee of the mortgaged property.⁵⁰

1988. ARTICLE EXPLAINED: "IMMOVEABLE PROPERTY."—Immoveable property includes lands, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.¹ A claim for the proceeds of what was once immoveable property but has been substituted by moveable property cannot be regarded as a claim for immoveable property or any interest therein or any benefit arising from land.² According to the definition of the Transfer of Property Act, the expression "immoveable property" does not include standing timber, growing crops or grass.³ The expression has not been defined in the Limitation Act, but for the purposes of Art. 132, it has been observed by Sargent, C.J., in 5 Bom. 330 that

"in order to property being immoveable it must be held in perpetuity and the fund out of which it is to be paid must also be permanent, or the enjoyment must be hereditary and the liability to make the payment *virtue tenure*, i.e., by reason of holding certain land or being member of a certain class".

Thus a house which is built on a site with foundations laid in it is "immoveable property" within the meaning of Art. 132 of Sch. I to the Limitation Act.⁴ Where a person mortgages his house without mortgaging the site on which it stands, if he pulls it down and sells the materials he cannot reasonably contend that the mortgagee should not hold him responsible for the mortgage-debt,

"and the period of limitation is not in any way curtailed by the mere fact that the mortgagor wilfully destroys the mortgaged property. If the vendee from a mortgagor destroys or pulls down the mortgaged property, the liability will still attach to him, and the period of limitation in such cases is the usual period of limitation applicable to the case of a mortgage".⁵

A building is immoveable property, and a mortgage with possession of a land is an interest in land because the mortgagee has a right to possession and enjoy the benefits arising out of the land until he is redeemed. In such a case, the mortgagee rights therein are immoveable pro-

49. *Abdul Kader Saheb v. Somasundaram*, (1927) 45 Mad. 827=1923 Mad. 76=70 I.C. 648=43 M.L.J. 467.

50. *Punnayya v. Venkatappa*, (1925) 91 I.C. 754=1926 Mad. 343.

1. See S. 3 (25), General Clauses Act, 1897.

2. *Radha Kishan v. Nauratan Lal*, (1918) 46 I.C. 627 (638)=3 P.L.J. 522.

3. *Punnayya v. Venkatappa*, (1925) 91 I.C. 754=1926 Mad. 343.

4. *Ibid.*, 91 I.C. 754 (755)=1926 Mad. 343; also see *Abdul Samad v. The Municipal Committee, Delhi*, (1922) 67 I.C. 939 (Lah.) and *Shanchi Khan v. Karam Chand*, (1923) 73 I.C. 704=1923 Lah. 150 (A transfer of the materials of a standing house is a transfer of immoveable property).

5. *Punnayya v. Venkatappa*, 91 I.C. 754 (755)=1926 Mad. 343.

erty.⁶ A right to ferry is immoveable property.⁷ A right to officiate as priest at funeral ceremonies is immoveable property.⁸ But a vatan office of a village accountant is not immoveable property.⁹ In a suit to establish plaintiff's right to a *toda giras hak* upon defendant's inam village, and to recover arrears due in respect of that *hak*, it was held that the term "immoveable property" comprehends all that would be real property according to the English Law and possibly more.¹⁰ It includes incorporeal hereditaments.¹¹ The explanation to S. 132 gives effect to the Privy Council decision. Money charged upon the rents and profits of land is treated as money charged on immoveable property for the purposes of Art. 132, Limitation Act, read with S. 3 (25) of the General Clauses Act (X of 1897).¹²

A decree for sale obtained on the basis of a mortgage by the mortgagee is moveable property, and a suit to enforce a hypothecation of such a decree is governed by Art. 120 of the Limitation Act.¹³ Where, however, the decree has been converted into immoveable property, the mortgagee of such decree is entitled not only to the benefit of the new security but also to the benefit of the larger period of limitation under Art. 132 of the Limitation Act.¹⁴ Jagir income being a benefit to arise out of land, is immoveable property.¹⁵ But a turn of worship at a temple is not an interest in immoveable property. Therefore, a suit to enforce a mortgage of a turn of worship is not governed by Art. 132 of the Limitation Act, but by Art. 120.¹⁶ Standing trees are immoveable property for the purposes of the Limitation Act.¹⁷ So are standing

6. *Muni Lal v. Kishore Chand*, 1927 Lah. 373=9 Lah. L. J. 157=28 P.L.R. 325=103 I.C. 742.

7. *Krishna v. Akilanda*, (1899) 13 Mad. 54.

8. *Raghu v. Kasy*, (1893) 20 Cal. 73.

9. *Vencat v. Surya*, 2 Mad. 683; cf. *Chhaganlal v. Bapubhai*, (1880) 5 Bom. 68 (A suit to recover the share of the income of a certain *vatan*, connected with an hereditary office held to be governed by Art. 132).

10. *Futtehsinghji Jaswantsinghji v. Dessai Kullianraiji*, 21 W. R. 178 (P.C.) (Act XIV of 1859, S. 1, cl. 12).

11. *Ibid.*, 21 W.R. 178 (P.C.).

12. *Muhammad Zaki v. Chatku*, (1884) 7 All. 120; also see *Ram Jiwan v. Jadunath*, (1916) 33 I.C. 555 and *Deputy Commissioner v. Jagjivan*, (1916) 33 I.C. 461.

13. *Mt. Jamnadei v. Lala Ram*, (1917) 37 I.C. 4=14 A.L.J. 1025=39 All. 74; *Folld. Gous Mahomed v. Khwas Ali*, 23 Cal. 750; *Jiwan Ali v. Basa Mal*, 9 All. 108 (F.B.).

14. *Ibid.*, 37 I.C. 4=14 A.L.J. 1025=39 All. 74.

15. *Muhammad Zaki v. Chatku*, (1884) 7 All. 120; also see *Ram Pershad v. Kishen Singh*, 4 P.R. 1894.

16. *Narasingha Bana v. Pholhodman*, (1918) 47 I.C. 25=22 C.W.N. 994=46 Cal. 455.

17. *The Secretary of State v. Ma Dae*, (1914) 24 I.C. 911 (L.B.); cf. *Muniappa v. Seshayya*, 32 I.C. 901=3 L.W. 341 (Trees cut and removed).

crops.¹⁸ A mortgage of a tenant's right in a grove, of fruit-bearing trees, was held to be a transfer of "immoveable property," where the parties did not contemplate the severance of the trees and use of their wood for industrial purposes.¹⁹ A mango grove, apart from the land on which it stands, is not immoveable property for the purpose of registration. For the purposes of limitation, however, such grove comes within the meaning of immoveable property as used in Art. 132 of the Limitation Act.²⁰

1989. MALIKHANA AND HAQQS.—See notes under Art. 131, *ante*.

In the Limitation Act XIV of 1859, there was no article or section directly applicable to claims for malikana. Under that Act, a claim for *malikana* was considered to be an interest in land, a suit in respect of which fell under the general cl. 12 of S. 1 of that Act.²¹ Such a claim was barred if not made within twelve years after the last receipt by the proprietor.²² It followed that if malikana was not claimed for twelve years after the passing of the Act, the claim was not only time-barred but the right was extinguished.²³

The nature of *malikana* was explained by Sir Barnes Peacock in *Bhoolee Singh v. Nehmu*,²⁴ as being

"a right to receive a portion of the profits of the estate for which the Government have made a settlement with another person, the real proprietor having neglected to come in and make a settlement".

The term denotes

"an allowance assigned to a Zemindar or to a proprietary cultivator, who from some cause as failure in paying his revenue, or declining to accede to the rate at which his lands are assessed, is set aside from the management of his estate, and from the collection and payment of revenue of Government; these offices being transferred to another person, or taken under the management of the Government Collector".

Under Art. 132 of Act IX of 1871, provision was first made for the recovery of *malikana* as money charged upon immoveable

18. *Pandah v. Janadhi*, 4 Cal. 665.

19. *Rammanlal v. Ram Gopal*, (1916) 35 I.C. 713=3 O.L.J. 367; Reld. on *Ali Baksh v. Ghurai*, 28 I.C. 180=2 O.L.J. 197=18 O.C. 122 and *Mirza Muhammad Ahmad v. Muhammad Taqi*, 30 I.C. 281.

20. *Mangal Sain v. Mt. Naoli*, (1911) 9 I.C. 478 (All.); Folld. *Ram Ghulam v. Manohar Das*, 1887 A.W.N. 59.

21. *Heeranund v. Mt. Ozeerun*, (1868) 9 W.R. 102; *Bebbee Churuman v. Koolsoom*, (1870) 13 W.R. 465; *Gobind Chunder v. Ram Chandra*, (1873) 19 W.R. 94 and *Kristochunder Sandel v. Shama Soonduree*, (1874) 22 W.R. 520.

22. *Jagannath v. Kharach*, (1905) 10 C.W.N. 151; cf. *Hurmuzi v. Hirdanarayana*, (1880) 5 Cal. 921.

23. *Nathu v. Ghansham Singh*, 41 All. 259 (260)=17 A.L.J. 177=49 I.C. 737.

24. (1869) 3 B.L.R. App. 102.

property, and arrears of *malikana* could be recovered within twelve years of the suit, as *malikana* was regarded an annually recurring charge.²⁵ The claim in the suit must be as a charge upon immoveable property.²⁶ A suit by some of the *malikanadars* of a village against the proprietors of the village and the remaining *malikanadars* to recover their share of the arrears of *malikana* is governed by the twelve years' rule of limitation.²⁷ A refusal of the enjoyment of *malikana* for more than twelve years would bar a suit to establish the right under Art. 131, Limitation Act.²⁸ Such a suit may be barred, yet the right to recover *malikana* may not be barred.²⁹ A mere *non-payment* of the *malikana*, which is a recurring right, would not extinguish the right, and the right to sue under Art. 132 accrues when the money sued for becomes due.³⁰ In the present Act IX of 1908, the claims for *malikana* and *haqq*, are governed by Art. 132, where it is said to be "claim to enforce payment of money charged upon immoveable property," so there has been a change of law on the subject.³¹ It has been held by the Judicial Committee of the Privy Council in *Ram Din v. Kalka Prasad*,³² that Art. 132 has reference only to cases in which the property charged is sought to be made liable; and following this view, the **Calcutta**³³ and **Madras High Courts**³⁴ have held that Art. 132 only refers to suits to enforce payment of money charged upon immoveable property by *the sale of such property*. (See S. 1962, *ante*.) Where in a suit to enforce the payment of *malikana* the plaintiff also claims a declaration of his right to recover *malikana*, the declaration is merely ancillary to the claim, and Art. 132 is applicable.³⁵ But, where the suit for *kattubadi* was so framed as to enforce the personal remedy only, Art. 132 had no application.³⁶

25. *Hurmuzi v. Hirdanarayan*, (1880) 5 Cal. 921; *Jagannath v. Kharach*, (1905) 10 C.W.N. 151.

26. *Nathu v. Ghansham Singh*, (1918) 41 All. 259 (260)=17 A.L.J. 177=49 I.C. 737; cf. *Shida v. Phulla*, (1913) 35 All. 185.

27. *Singh Bahadur v. Suraj Narain Jha*, (1921) 61 I.C. 130=6 P.L.J. 34=2 P.L.T. 174.

28. See notes under Art. 131; *Gopinath v. Bhagwat*, (1884) 10 Cal. 697.

29. *Midnapore Zemindary v. Muktakeshi*, 1926 Pat. 340=6 Pat. 51.

30. See notes under Art. 131; also see *Hurmuzi v. Hirdanarayan*, (1880) 5 Cal. 921.

31. *Nathu v. Ghansham Singh*, (1918) 41 All. 259 (260)=17 A.L.J. 177=49 I.C. 737.

32. 7 All. 502 (P.C.); see S. 1962, *ante*.

33. *Miller v. Runganath Mullick*, (1885) 12 Cal. 389.

34. *Seshayya v. Annamma*, 10 Mad. 100; *Rathnasami v. Subramanya*, 11 Mad. 56; Folld. in *Vizianagram v. Sitarama*, (1895) 19 Mad. 100.

35. *Midnapore Zemindary, Co., Ltd. v. Muktakeshi*, (1926) 96 I.C. 188=1926 Pat. 340.

36. *Vizianagram v. Sitarama*, (1895) 19 Mad. 100.

The word denotes "a privilege, fee, perquisite, or grant claimable under established usage by officers of Government, village officers, etc." Suits for **Haqq**.

haqq, are for mere money-decrees and for purposes of Art. 132, they are deemed to be money *charged* upon immoveable property. A right to receive a cash *nankar* out of the profits of a particular village is a benefit arising out of land within the meaning of S. 3 of Act X of 1897, and at all events a *haq* of the nature contemplated by the explanation to Art. 132.³⁷ Under Act XIV of 1859, a suit to recover **Toda Giras Hak**, upon the defendant's Inam village was held as governed by cl. 12 of S. 1, which provided a period of twelve years for the suit.³⁸ Zemindari dues called **Bhet** and **Khurak** payable by the inferior to the superior proprietors, are immoveable property within the meaning of the Explanation to Art. 132.³⁹ But, **Haqq-i-chaharam** (a Zemindari due *customarily* payable on the sale of a house situated in the *mehal*) is not a *haqq* within the meaning of this article.⁴⁰ A suit to recover **gharwara dues**, payable by custom to Zemindar or owner of land occupied by houses, is not within Art. 132, but is governed by Art. 120.⁴¹ Where the *Peishwa* by a *sanad* had granted to an ancestor of the plaintiffs, for the support of a Hindu temple, an annual cash allowance out of the *Antastha sadilvar* (meaning extra assessment levied to meet local charges analogous to the present local cess fund), and three *khandis* of rice out of the *kheraj jamabandi parbhare* (meaning extra assessment in kind upon land), to be levied from certain mahals and forts mentioned in the *sanad* held, that the grant made by the *sanad* was "**nibandha**," and that the subject-matter of the suit was immoveable property, or an interest in immoveable property within the meaning of Limitation Act XIV of 1859, S. 1, cl. 12.⁴²

1990. Suit to enforce charge on agricultural produce.—

Explanation: cl. (b). It has been noticed in S. 1957 *ante*, that cl. (b) to explanation of Art. 132 was added on the recommendation of the Civil Justice Committee. They reported at p. 495, that "Art. 132 has not been applied by some judges

37. *Deputy Commissioner, Fyzabad v. Jagjiwan Baksh Singh*, (1916) 33 I.C. 461 (Oudh).

38. *Maharana Futteh Singhji v. Dessai Kallianraji*, (1873) 21 W.R. 178 (P.C.).

39. *Rahat Ali v. Maharaj Singh*, (1882) 2 W.N. 30.

40. *Kirath v. Ganesh*, (1879) 2 All. 358 (361); also see *Sham Chand v. Bahadur Upadhia*, (1896) 18 All. 430 and *Nanku v. Board of Revenue*, (1877) 1 All. 444 (F.B.) (Art. 120 applied to a suit for *haqq-i-chaharam*) and cf. *Government of Bombay v. Kallianraj*, (1872) 14 M.I.A. 551 (**Palkhi haqq**, not a charge on immoveable property).

41. *Durga Baksh Singh v. Hasan Ali*, 3 O.C. 203.

42. *The Collector of Thana v. Hari Sitaram*, (1882) 6 Bom. 546 (F.B.) (Village Joshi *haks* are immoveables).

to cases in which not *money* specifically, but something which can be valued in money, such as grain, is charged on the immoveable property.⁴³ Not infrequently in Hindu families, maintenance is allotted to female members in the shape of grain from a particular parcel of land, and the maintenance is charged on that land. Money-lending cases are not uncommon in which money is repayable in the grain and the obligation is charged upon property described in the instrument. There has been difference of opinion whether Art. 132 applies to these cases, and after some conflict of opinion it has now been held in Calcutta, that a suit to recover the value of paddy charged upon immoveable property comes within Art. 132.⁴⁴ The nature of transactions of this class was analysed by Mookerjee, A.C.J. in the Full Bench case of *Ram Chandra v. Iswar Chandra*,⁴⁵ thus:—

"A cultivator takes a loan of paddy in the shape of interest for use of the paddy borrowed by him. The creditor requires real security in addition to the personal undertaking of the borrower, for the due performance of the obligation. The borrower thereupon gives his immoveable property by way of mortgage. It need not be disputed that the primary intention of the parties to such a transaction is, that the debt should be discharged by repayment of paddy, but it is equally clear that they also intend that, in the event of default of delivery of paddy, the mortgagee would be entitled to the market-value thereof. When the deed recites that the land is given to secure payment of the paddy (principal and interest), the essence of the matter is that the land is made security for the value of the paddy, because upon failure to deliver the paddy, the mortgagee becomes entitled to recover the price thereof by the sale of the land. In other words, the parties contemplate that, should it be necessary for the mortgagee to enforce his security, the land would be liable for the value of the paddy lent as well as the paddy payable as interest. A transaction of this character falls within the comprehensive definition of a 'mortgage' contained in S. 58 (a) of Transfer of Property Act."

1991. Equitable Mortgage.—The explanation, in cl. (c) removes the conflict of decisions regarding the period of limitation which governs a suit to recover money due on a mortgage by deposit of title-deeds. This explanation has been added by S. 9 of the Transfer of Property Amendment Supplementary Act (XXI of 1929). The

43. *Rash Bihari Das v. Kunja Behari*, 37 I.C. 805=24 C.L.J. 348; *Kandarpa Narain v. Sridhar Roy*, 44 I.C. 518 (Cal.); O.R. in *Ram Chand v. Iswar Chandra*, (1921) 25 C.W.N. 57=61 I.C. 539=1921 Cal. 172=48 Cal. 625 (F.B.).

44. *Ram Chand v. Iswar Chandra*, (1921) 25 C.W.N. 57=61 I.C. 539=1921 Cal. 172=48 Cal. 625 (F.B.); Reld. on *Nilmoney Singh v. Haradhan Das*, 2 I.C. 111=13 C.W.N. 184, notes; *Sripati Lal v. Sarat Chandra*, 46 I.C. 78=22 C.W.N. 790; *Sridhar Chandra v. Ram Gobinda*, 50 I.C. 608=29 C.L.J. 368; *Indra Narain v. Dijabar*, 51 I.C. 849=47 Cal. 125; *Jogindra Nath v. Mohanlal*, 58 I.C. 995=23 C.W.N. 951; also see *Dinabandhu v. Bishnu*, 60 I.C. 715=32 C.L.J. 221; *Mohesh v. Umesh*, 51 I.C. 241 (Cal.); *Gnanendra Nath Ghose v. Panchkouri Garain*, (1921) 64 I.C. 310 (Cal.).

45. (1921) 25 C.W.N. 57=61 I.C. 539=1921 Cal. 172=48 Cal. 625 (F.B.).

reasons for inserting this clause have been thus stated in the *Report of the Select Committee*:

"There is much conflict of decisions regarding the period of limitation which governs a suit to recover the money due on a mortgage by deposit of title-deeds. Some Courts have held that it is 60 years, while others hold that it is 12 years. We think that this conflict should now be set at rest; and as the preponderance of opinion is in favour of providing a 12 years' rule in such cases, we propose to bring these mortgages under Art. 132 of the Indian Limitation Act, 1908"—(*Gazette of India*, 1929, Part V, p. 126).

The **Bombay High Court** had held in *Manekji Framji v. Rustomji Nasserwanji Mistry*,⁴⁶ that an equitable mortgagee by deposit of title-deeds is a mortgagee within the meaning of Art. 147, Sch. II of the Limitation Act (XV of 1877), and the period of limitation for a suit by such a mortgagee was sixty years, as therein prescribed.

In *Srinath Roy v. Godadhur Das*,⁴⁷ where the defendant borrowed money from the plaintiff in Calcutta by the deposit of title-deeds relating to immovable properties situated partly inside and partly outside the limits of the town of Calcutta, it was held that the mortgage was valid under S. 59 (3) of the Transfer of Property Act (IV of 1882), and a decree for sale was made according to the practice in the Calcutta High Court. In such transactions the plaintiff is not entitled to a conveyance of the legal estate, his proper remedy being by sale of the mortgaged property.⁴⁸ Equitable mortgage effected by deposit of title-deeds is a mortgage in the sense of the Transfer of Property Act, and the concluding words of S. 59 actually use the word 'mortgage' to denote the security effected by delivery of documents of title.⁴⁹

The Legislature has adopted the view that Art. 132 will apply to suits to enforce payment of money secured by deposit of title-deeds, and as the addition of Explanation (c) to this article would work an injustice to the holders of equitable mortgages in Bombay, a **saving clause** was enacted by S. 15, cl. (2) of Act XXI of 1929, which provided as follows:—

"Notwithstanding anything contained in S. 9 of this Act, in the Presidency of Bombay and such other territories as the Governor-General in Council may, by Notification in the *Gazette of India*, specify in this behalf, a suit by a mortgagee for foreclosure or sale on a mortgage by deposit of title-deeds may be instituted within two years from the date of the commencement of this Act, or within sixty years from the date when money secured by the mortgagee became due, whichever period expires first; and no such suit instituted within the said period of sixty years and pending at the

46. (1889) 14 Bom. 269.

47. (1897) 24 Cal. 348 (350).

48. *Oo Noun v. Moung Htoon Oo*, (1886) 13 Cal. 322.

49. *The Imperial Bank of India v. U Rai Gyan Thar & Co., Ltd.*, (1923) 1923 P.C. 211=51 Cal. 86=45 M.L.J. 505 (P.C.).

date of the commencement of this Act, either in the Court of first instance or of appeal, shall be dismissed on the ground that the twelve years' rule of limitation is applicable."

TITLE III: STARTING POINT OF LIMITATION.

1992. "WHEN THE MONEY BECOMES DUE".—

Privy Council Ruling
—1932 P.C. 207. (1) The question "when the money becomes due," depends on the terms of the document.⁵⁰ In *Lasa Din v.*

Mt. Gulab Kunwar,¹ their Lordships of the Privy Council think that this expression does not mean "when did the mortgagee's cause of action arise, i.e., when did he first become entitled to sue for the relief claimed by his suit." It was held by the **Allahabad High Court** in two **Full Bench decisions**, that money under a bond "becomes due" as soon as it is legally recoverable, quite irrespective of when the suit is instituted.² This view was followed in *Nathi v. Tursi*,³ where it was held

"that the liability to pay, or in other words, the test of whether money becomes due or not is the obligation which the borrower has taken upon himself by his signature to the written document. It cannot depend on the volition of the creditor".

In *Shib Dayal v. Mehrban*,⁴ the **Allahabad Full Bench** had laid down distinctly

"that the question whether the mortgagee is bound to sue or not and whether he does sue or not, is wholly irrelevant to the issue. So long as he can sue even though he does not choose to sue, the money has become due".

The **Chief Court of Oudh** had followed this view in several cases, that money became "due" as soon as it could be legally demanded, i.e., upon the first default.⁵ Similar view was held by the **Calcutta High Court** in *Sital Chand v. Hyder Malla*,⁶ where the principal mortgage money was not repayable for a term of years, and there was a super-added proviso that if there was default in payment of interest, then the money should become due at once. It was held that limitation ran from the time when the money first became due by reason of the default in payment of interest which made

50. *Mukhdeo Singh v. Harakh Narain Singh*, 1931 Pat. 285=134 I.C. 609=12 P.L.T. 755.

1. 1932 P.C. 207=9 O.W.N. 638=63 M.L.J. 187; 138 I.C. 779=7 Luck. 442=59 I.A. 376 (P.C.).

2. *Gayadin v. Jhumanlal*, (1915) 28 I.C. 910=13 A.L.J. 510=37 All. 400 (F.B.) and *Shib Dayal v. Mehrban*, (1922) 45 All. 27=1923 All. 1=69 I.C. 981 (F.B.).

3. (1921) 43 All. 671; also see *Collector of Jaunpur v. Jamna Prasad*, 44 All. 630 and *Shoram v. Babu*, 48 All. 302=94 I.C. 849=1926 All. 493.

4. (1922) 45 All. 27 (38) (F.B.); Relied on *Ram Dass v. Muhd. Said Khan*, (1922) 20 A.L.J. 346.

5. *Pheri v. Pudai Ram*, (1925) 85 I.C. 280=27 O.C. 318; 1 O.W.N. 647 (Article 80).

6. (1897) 24 Cal. 281=1 C.W.N. 229.

the whole of the principal sum immediately due. The **Bombay High Court** had followed the **Allahabad** decision in *Gaya Din v. Jhumman Lal*,⁷ in *Ganpati v. Bhiku*⁸ and in *Shrinivas v. Chanasapagowda*.⁹ In *Pancham v. Ansar Hussain*,¹⁰ their Lordships of the Privy Council gave some indication of doubting the soundness of the Allahabad decision which had been followed by the Oudh Chief Court in dismissing the mortgagee's suit as out of time, it not having been brought within twelve years of the mortgagor's default in payment of an instalment, which gave the mortgagees the right without waiting for the expiry of the stipulated period, to enforce their security. But, the appeal was dismissed on the short ground of pleadings *re. cause of action*, and that the plaintiff could not be allowed to revert to the position taken in his unamended plaint. Their Lordships did not pronounce

"in any way upon matters which must one day call for most serious consideration at the hands of the Board".

This consideration their Lordships have given in *Lasa Din v. Mt. Gulab Kunwar*,¹¹ where the Allahabad cases have been disapproved and the decision of the Chief Court of Oudh based thereon held wrong; and, where the opposite view taken by the **Madras**¹² and **Patna**¹³ High Courts has been approved.

1993. ALLAHABAD.—(1) In *Sheocharan Singh v. Lalji Mal*,¹⁴ where in a usufructuary mortgage

(i) **Usufructuary mortgages.**

it was covenanted that if the mortgagee was not given possession, he should have a

right to obtain the sale of the mortgage property, the mortgage debt meanwhile being payable on a certain specified date, it was *held*, that in respect of the mortgagee's remedy under S. 90 of the Transfer of Property Act, which was a distinct remedy from any suit under S. 68 of the Transfer of Property Act, limitation began to run from the **breach of the covenant to pay on due date**, and not from the breach of the covenant to put the mortgagee in possession. A decree in a suit under S. 68 of the Transfer of Pro-

7. 28 I.C. 910=37 All. 400=1915 All. 189 (F.B.).

8. (1930) 125 I.C. 701=1930 Bom. 297=32 Bom.L.R. 683.

9. 25 Bom.L.R. 203=72 I.C. 290=1923 Bom. 201.

10. (1926) 24 A.L.J. 736=1926 P.C. 85 (P.C.).

11. 1932 P.C. 207=7 Luck. 442=138 I.C. 779=59 I.A. 376 (P.C.) (English decisions not relied on in interpreting the terms of this article; also see *Pancham v. Ansar Husain*, 1926 P.C. 85=48 All. 457=53 I.A. 187=99 I.C. 650).

12. *Narva v. Ammani Amma*, (1916) 39 Mad. 981=35 I.C. 418; Followed, Banerji's view in *Gaya Din v. Jhulanlal*, 28 I.C. 910=37 All. 400=1915 All. 189 (F.B.).

13. *Ganga Bishan v. Raghunath*, (1930) 128 I.C. 786=1930 Pat. 615=10 Pat. 173 (F.B.).

14. (1896) 18 All. 371.

erty Act against the heirs of a deceased debtor, as such heirs, for payment of money originally due under a mortgage, which however had become unenforceable by lapse of time, could be executed against any property of the deceased in the hands of the heirs, including the property once the subject of the mortgage, and R. 14 of O. 34 (S. 99, Transfer of Property Act, 1882), did not apply to bar the sale of property there being no subsisting and effective mortgage.¹⁵

Where a usufructuary mortgagee was dispossessed from part of the mortgaged property in which he acquiesced, and ultimately being dispossessed from the remainder, he sued for the recovery of mortgage money, his **cause of action** was held to have arisen only **on dispossession** from the last portion of the mortgaged property.¹⁶

1993-A. Where a mortgage-bond payable by instalments, made the total amount exigible on default of payment of any instalment, without waiting for the expiry of the stipulated period, the Allahabad High Court applied the rule that *terminus a quo* was the **date of the first default**. This was so held by two **Full Bench decisions** in *Gaya Din v. Jhumman Lal*¹⁷ and in *Shib Dayal v. Meharban*,¹⁸ followed in several other cases.¹⁹ The test laid down, whether money becomes due or not, was the obligation which the borrower had taken upon himself by the signature to the written documents, and it was held that it could not depend on the volition of the creditor. In *Mendai Lal v. Dulary Lal*,²⁰ where option was given to the mortgagee to add interest to principal, the interest was awarded only for twelve years prior to suit.

But, their Lordships of the Privy Council doubted this view **Opposite view.** in the case of *Pancham v. Ansar Hussain*,²¹ and have now overruled the Allahabad Full Bench view, by their

15. *Chedilal v. Saadat Un-nissa Bibi*, (1916) 39 All. 36 (43)=14 A.L.J. 902=36 I.C. 907; Relied on *Ganesh Singh v. Debi Singh*, (1910) 32 All. 377.

16. *Muhammad Hanif v. Ishri Prasad*, (1921) 44 All. 77=1922 All. 197=64 I.C. 768=19 A.L.J. 827.

17. (1915) 37 All. 400=28 I.C. 910=13 A.L.J. 510 (F.B.).

18. (1922) 45 All. 27=1923 All. 1=20 A.L.J. 819=69 I.C. 981 (F.B.).

19. *Pancham v. Ansar Hussain*, (1921) 63 I.C. 441=1921 All. 296=43 All. 596=19 A.L.J. 592; s.c., on appeal (1926) 24 A.L.J. 736=48 All. 457=53 I.A. 187=1926 P.C. 85 (P.C.); *Nathi v. Tursi*, (1921) 63 I.C. 886=1921 All. 192 (2)=43 All. 671=19 A.L.J. 712; *Ram Dass v. Muhi. Sayeed Khan*, (1922) 67 I.C. 160=1922 All. 524=20 A.L.J. 346 and *Sheoram Singh v. Babu Singh*, (1926) 94 I.C. 849=1926 All. 493=48 All. 302=24 A.L.J. 295 (No waiver of option allowed).

20. (1926) 95 I.C. 249.

21. (1926) 24 A.L.J. 736=1926 P.C. 85=48 All. 457=53 I.A. 187 (P.C.).

Lordship's decision in *Lasa Din v. Mt. Gulab Kunwar*,²² which has since been followed.²³

In *Girdharilal v. Gobind Ram*,²⁴ where interest under a mortgage-bond was payable half-yearly, and the creditor had the option to sue for principal and interest, on default or to sue for interest only, and he had the further option of treating, the unpaid interest as principal and to benefit by the condition regarding the compound interest; it was held, that the mortgagee was given three options in case of default and that if he did not choose to exercise his option of suing for the whole amount due on default of the payment of two consecutive instalments of interest, it could not be said that time began to run from such abstention. Similarly in *Mata Tahal v. Bhagwan Singh*,²⁵ it was held that where a mortgage-deed fixed a certain period for redemption and provided for payment by the mortgagor of interest annually, and in case of default gave the mortgagee the option of suing for the whole of the mortgage-money, the mortgagee was not bound to sue for the whole of the mortgage money as soon as there was failure in payment of instalment of any year. The dissenting judgment of Banerji, J., in *Gaya Din v. Jhuman Lal*,²⁶ is another illustration of the view opposite to that held by the Full Bench decisions above noticed, which latter have now been overruled by the decision of the Judicial Committee. In *Ashiq Hussain v. Chatturbhuj*,²⁷ the **Allahabad High Court**, though feeling bound by the Full Bench decision in *Shib Dayal v. Meharban*,²⁸ was not prepared to extend the principle beyond the limits of decided cases, more especially in view of the warning note sounded by the Privy Council in *Pancham v. Ansar Hussain*.²⁹ In *Ram Dayal v. Aminuddin*,³⁰ where the bond in suit hypothecating immoveable properties stipulated that the money was to be repaid in the course of one year, and the mortgagors had agreed that they would pay interest every six months, and on default at the end of six months, interest would be added to the principal and compound interest was chargeable, and there was such default in payment of interest at the end of the first six months, it was held that the cause of action for a suit for sale of properties arose after one year from date of bond. A similar view

22. 1932 P.C. 207=138 I.C. 779=7 Luck. 442=59 I.A. 376 (P.C.).

23. *Abdul Rahman v. Shoa Dayal*, 1934 All. 152; *Muhd. Hussain v. Samwaldas*, 1934 All. 397=56 All. 954=148 I.C. 951 (F.B.); *Bohra Hati Lal v. Mithu Lal*, 1935 All. 421=157 I.C. 675=1935 A.L.J. 515.

24. (1921) 63 I.C. 25=1921 All. 171=19 A.L.J. 456.

25. (1921) 63 I.C. 477=1921 All. 104=19 A.L.J. 406.

26. 37 All. 400=28 I.C. 910=13 A.L.J. 510 (F.B.).

27. (1928) 108 I.C. 152=1928 All. 159=50 All. 328=26 A.L.J. 41.

28. (1922) 45 All. 27=1923 All. 1=69 I.C. 981 (F.B.).

29. (1926) 24 A.L.J. 736=1926 P.C. 85 (P.C.).

30. 1931 All. 203=1931 A.L.J. 29=133 I.C. 311,

has been taken in *Muhammad Hussain v. Sanwal Das*,³¹ by a **Full Bench of the Allahabad High Court** where the mortgage amount was to be paid in eight years, and in default of one year's interest the mortgagee had power to recover interest or to recover principal and interest without regard to stipulated period. It was held that limitation for a personal decree under O. 34, R. 6, commenced to run not after the expiry of one year within which the mortgagor continued default for payment of interest, but it commenced to run after the expiry of eight years' term stipulated in the deed. The view is now taken that **under S. 132 money can become due only when the mortgagee can sue for his money, and also the mortgagor can redeem the mortgaged property.** Accordingly, where a mortgage deed provides a period for the payment of money but the mortgagee is given an option to sue for the money in case of default to pay interest, such **option is meant for the benefit of the mortgagee exclusively**, and if he does not choose to exercise it, time does not run against him. He can either sue on such default or wait for the expiry of the period fixed in mortgage.³²

1994. OUDH CHIEF COURT.—(1) In *Tulshi Ram v. Muhammad Hadi*,³³ the **Oudh Judicial Commissioner's Court** purported to follow the Madras view in *Perumal v. Alagirisami*,³⁴ in holding that where a mortgage-deed gave the mortgagee a right to enforce payment on default in payment of interest, and also gave him the option of not enforcing payment on such date, the period of limitation began to run from the date of the first default notwithstanding any stipulation in the deed giving the mortgagee the option of not enforcing payment on such date. Again, in *Pherai v. Pudai Ram*,³⁵ the **Allahabad Full Bench** view in the case of *Shibdayal v. Mehrban*,³⁶ was followed in holding that limitation begins to run from the date of first default in payment of interest, and that it makes no difference whether the right to sue for the re-payment before the stipulated period is optional or compulsory. In *Lasadin v. Mt. Gulab Kunwar*,³⁷ the words "when the money sued for becomes due" were

31. 1934 All. 397=3 A.W.R. 431=1934 A.L.J. 261=1934 All. L. R. 494=148 I.C. 951=56 All. 954 (F.B.).

32. *Abdul Rahman v. Shco Dayal*, 1934 All. 152=1934 A.L.J. 371=151 I.C. 900=56 All. 496=4 A.W.R. 1535; also see *Bohra Hatilal v. Mithulal*, 1935 All. 421=157 I.C. 675=1935 A.L.J. 515=1935 All. L. R. 852=1935 A.W.R. 543.

33. (1916) 33 I.C. 551 (Oudh).

34. 20 Mad. 245=7 M.L.J. 222.

35. (1925) 85 I.C. 280=27 O.C. 318=1 O.W.N. 647=1925 Oudh 502.

36. 45 All. 27=69 I.C. 981=20 A.L.J. 819=1923 All. 1 (F.B.).

37. 1929 Oudh 536=6 O.W.N. 925=125 I.C. 390 [O.R. by 1932 P. C. 207=7 Luck. 442=9 O.W.N. 638=138 I.C. 779=59 I.A. 376 (P. C.)].

held to refer to the earliest date on which it becomes due, *i.e.*, at the earliest date when it is possible for the mortgagee to enforce payment of it. This view has been held to be wrong by their Lordships of the **Privy Council**,³⁸ and recently, it has been held in *Nathoo Singh v. Kalloo*,³⁹ that where a mortgage deed provides that the mortgage-money should be re-paid within 5 years by certain monthly instalments, and further provides that in case three consecutive instalments remain unpaid the mortgagor should either cancel period of re-payment and recover entire amount due to him or should wait until expiry of fixed period, if three consecutive instalments are not paid, the starting point of limitation, under Art. 132, begins to run from the date of the third consecutive default and not from when the period of four years expired.

1994-A. In *Mubarik Ali v. Gopinath*,⁴⁰ it was held that a con-

Mortgage for a term
—Option to creditor.

tract which gives the mortgagee one of two options does not bind him to either of them, if he chooses to stick to the other;

for example, where a mortgage-deed provided for the re-payment of the principal with interest in 12 years, and further empowered the mortgagee to sue for the recovery of the entire money in case of default in payment of interest before the expiry of the period, it was held that the mortgagee was at liberty to waive the default in the payment of interest and to wait for the expiry of the period fixed for redemption before bringing his action.⁴¹ In *Bhutnath Bose v. Kali Prosad Patra*,⁴² a mortgage-bond providing for re-payment of principal and interest by a certain month, was held extended to the period of succeeding three years, mentioned for giving the produce to the mortgagee, if the mortgagor failed to repay the amount upon the given date where a deed of further charge provided that should the mortgagor fail to pay the amount within the stipulated period of one year that amount should be paid at the redemption of the original mortgage, it was held that the period of limitation for a suit to recover the amount of the further charge cannot commence before redemption is claimed by the mortgagor.⁴³ Where a deed

38. 1932 P.C. 207=9 O.W.N. 638=138 I.C. 779=7 Luck. 442=59 I. A. 376 (P.C.).

39. 1932 Oudh 253=9 O.W.N. 444=138 I.C. 145; also see *Ram Pershad v. Mt. Qadro*, (1917) 40 I.C. 232=20 O.C. 132 (*Held*, that mortgagee's option, if waived, limitation cannot start running against him inspite of that waiver).

40. 45 I.C. 613 (Oudh); also see *Ram Pershad v. Mt. Qadro*, 40 I.C. 232 (The option given cannot be taken away by statute unless there is anything to show that the grant of such an option is illegal or forbidden by law).

41. *Mubarik Ali v. Gopinath*, 45 I.C. 613 (Oudh).

42. (1919) 50 I.C. 71.

43. *Ganga Dayal v. Mathura Prasad*, 1928 Oudh 493=111 I.C. 406; Distinguished in 1923 All. 1=45 All. 27 (F.B.).

of mortgage for a term of nine years provided that the mortgagor was not entitled to redeem the property within the said period, and there was also a condition in favour of mortgagee that the mortgagee could not bring the property to sale on account of a default till the expiry of that period, and there was a further peculiar condition to the effect that the mortgagee may recover at his wish either by mutual settlement or through suit in Court the entire principal and interest even before the expiry of the said period, a **Full Bench of the Oudh Chief Court** held that a suit on the mortgage for sale of the mortgaged property instituted more than 12 years after the date of the mortgage but within 12 years of the expiry of the term was not barred, the cause of action for recovery of the mortgage money by sale of the property having arisen only on the expiry of the term.⁴⁴ Where a mortgagor executed two successive mortgage-deeds in favour of the mortgagee, and it was intended that both the debts should be paid together, but the Court held that the two mortgages had not been consolidated and so, the first mortgage-deed could be redeemed without paying up the amount due on the second, it was held that as regards the second mortgage-deed time began to run only when the debt became payable according to the terms of the deed and not when money was paid in the redemption suit on the first deed.⁴⁵

In *Ram Sarup Singh v. Gaya Prasad*,⁴⁶ where mortgagees were entitled to possession immediately after execution of deed, but they were not let into possession, and according to a clause in the mortgage deed the mortgagor had no power to repay the mortgage money during the period of 5 years following the execution of the deed and the mortgagee had the right to recall the mortgage money and to sue for foreclosure only, in the event of the mortgagor's default in redeeming the mortgage on the expiry of 5 years, it was held that the rights of redemption and foreclosure being co-extensive the period of limitation began to run after the period of five years. Where under the terms of the mortgage-deed, if interest or compound interest for any two periods of six months be not paid in full, the mortgagees had the right, without waiting for the expiration of the amount fixed in the mortgage-deed to recover the whole amount due and the mortgagor defaulted, and the mortgagees exercised their option to enforce the mortgage by registered notice, it was held that the suit for the recovery of the whole amount was not premature, and was properly instituted.⁴⁷ A Full Bench of the Oudh Chief Court has held that

44. *Mt. Roer v. Mt. Patraj Koer*, 1928 Oudh 289=112 I.C. 130=5 O.W.N. 385=3 Luck. 439 (F.B.).

45. *Sheo Bahadur Singh v. Naubat Singh*, 1929 Oudh 214=121 I.C. 286.

46. 1932 Oudh 178=9 O.W.N. 280=139 I.C. 61.

47. *Rajendar Bahadur Singh v. Raghubir Singh*, 1934 Oudh 473=11 O.W.N. 1141=151 I.C. 856=1934 O.L.R. 780.

where under the terms of the mortgage-deed for a specified term it was provided that if interest for any year were not paid, the mortgagee had power to start foreclosure proceedings and enter into possession of the property irrespective of the term: it was held that the money under the mortgage did not 'become due' under Art. 132, until both the mortgagor's right to redeem and the mortgagee's right to enforce the security had accrued and a suit for foreclosure filed within twelve years of expiry of the term of the mortgage, was not barred under Art. 132, Limitation Act, even though default had been made in the payment of interest during the term.⁴⁸

1995. BOMBAY.—In *Shrinivas Laxman v. Chanbasappa Gowda*,⁴⁹ the **Bombay High Court**, following the **Allahabad Full Bench** view in *Gaya Din's* case, that if in a mortgage repayable by instalments, the whole amount could be recovered in the case of default, the mortgage money became due on such default, which was also in conformity with the **Bombay** case of *Rai Chand v. Dhondo*,⁵⁰ relating to the execution of an instalment decree, the principle applicable being the same. Again, in *Ganpati v. Bhiku*,¹ the **Bombay High Court** followed the **Allahabad Full Bench** view, observing that though doubted in *Pancham v. Ansar Hussain*,² it had not been so far overruled by the Privy Council. This Allahabad decision has since been overruled, and the opposite view taken by the Madras and Patna High Courts has been approved by their Lordships.³ (2) In the case of a **usufructuary mortgage**, where the mortgage terms had been departed from and the mortgagor had deprived the mortgagee of possession, their Lordships of the Privy Council held that where a mortgagee is not bound by the terms of the mortgage to enter into possession of the mortgaged property, and to apply the rents and profits thereof towards the payment of the debts though he has power to do so, the mere fact that the mortgagee permits the mortgagor to receive the rents and profits from a certain year does not give rise to a cause of action. It does not arise until the demand for the payment of the mortgage debt is made by the mortgagee and is refused by the mortgagor.⁴

48. *Parbati v. Mohammad Abraham*, 142 I.C. 64=9 O.W.N. 1202=1933 Oudh 66 (F.B.).

49. (1923) 72 I.C. 290=1923 Bom. 291; Followed *Gayadin v. Jhumanlal*, 28 I.C. 910=37 All. 400 (F.B.); and *Nathi v. Tursi*, 63 I.C. 886=43 All. 671.

50. 47 I.C. 313=20 Bom.L.R. 773=42 Bom. 728.

1. 1930 Bom. 297=32 Bom.L.R. 683=125 I.C. 701.

2. 1926 P.C. 85=48 All. 457=53 I.A. 187 (P.C.).

3. *Nama v. Ammani Amma*, (1916) 39 Mad. 981=31 M.L.J. 865=35 I.C. 418; also see *Ganga Bishan v. Raghunath*, (1930) 128 I.C. 786=1930 Pat. 615=10 Pat. 173 (F.B.).

4. *Nilkanth Balwant v. Vidyashankar*, 1930 P.C. 188=57 I.A. 194=126 I.C. 417=54 Bom. 495 (P.C.) [O.R. (1924) 80 I.C. 393=1924 Bom. 387].

1996. **CALCUTTA.**—(1) In *Sitab Chand v. Hyder Malla*,⁵

Default clause.

the Calcutta High Court took the view that where, by a mortgage bond (hypothecating immoveable property) executed by the defendants, a sum of money was made payable by certain instalments, the plaintiffs to be at liberty in case of any default to sue either for the amount of that instalment or for the whole amount due on the bond, that limitation ran from the date of the first default. This view is no longer good law in view of the Privy Council decision in *Lasa Din v. Gulab Kunwar*.⁶

However, in *Surendra Nath v. Raja Reshec Case Law*,⁷ the doctrine of waiver of default in payment, by acceptance of an overdue instalment was laid down, which remits the parties to the same position as they would have been in if no default had occurred. In a case of **usufructuary mortgage** where the mortgage-bond contained a stipulation to the effect that the mortgage money was to be repaid on a certain date, but, in the meanwhile, the mortgagee had been dispossessed by the mortgagor, it was held that the period of limitation began to run from the time when the plaintiff was dispossessed by the mortgagor, and this did not stop running because of the accrual of a fresh cause of action on the due date of payment.⁸ In *Bhutnath Bose v. Kali Prasad Patra*,⁹ where a mortgage bond provided for repayment of principal and interest by the month of *Chaitra*, 1305, and if the mortgagor failed to repay the amount upon that date, he was to give to the mortgagee the produce of the mortgaged property for the succeeding three years, namely, for B.S. 1306, 1307 and 1308, together with a further provision that the mortgagor would not thresh the produce without the permission of the mortgagee, and that if he did so the mortgagee would realise the principal and interest in *Magh*, 1308; it was *held* that before 1308 no cause of action accrued for the realization of the money due upon the mortgage-bond inasmuch as the proviso with regard to the question of produce extended the period of limitation until the year 1308.

1996-A. (2) A Full Bench of the Calcutta High Court has

Suit for contribution
by co-mortgagor.

held in *Umar Ali v. Asmat Ali*¹⁰ that the case of *Sreemati Raj Kumari*^{10-a} was wrongly decided in so far as it was held in that case that a suit by a redeeming co-mortgagor for contribu-

5. 24 Cal. 281 [O.R. in 1932 P.C. 207=138 I.C. 779=7 Luck. 442=59 I.A. 376 (P.C.).

6. 1932 P.C. 207 (P.C.).

7. (1924) 79 I.C. 271=27 C.W.N. 893=1924 Cal. 139.

8. *Afiruddi v. Joy Chandra Naha*, (1931) 129 I.C. 108=1930 Cal. 703.

9. (1919) 50 I.C. 71 (Cal.).

10. 1931 Cal. 251=53 C.L.J. 154=35 C.W.N. 409=130 I.C. 889=58 Cal. 1167 (F.B.).

10-a. 1921 Cal. 166.

tion, instituted beyond the period within which the original mortgagee could institute his suit on the mortgage, had it not been redeemed, was barred.

Section 95, Transfer of Property Act, has by Act XX of 1929 been amended in such a way that Ss. 92 and 95 as they now stand, make it clear that the right of the co-mortgagor redeeming is the "same right as the mortgagee whose mortgage he redeems may have against the mortgagor". In effect therefore the decision in *Sreemati Raj Kumari's* case is now statute law. But cases arising prior to the amendment of 1929 must be decided on the basis of the Act as it then stood.¹¹

1997. LAHORE.—The Punjab Chief Court took the view in *Sham Sundar v. Abdul Ahad*,¹² that
Default clause. where a mortgage deed provided for half-yearly interest, and a default clause giving option to the mortgagee, on two consecutive defaults, of maintaining the period of the mortgage and suing only for the interest or of cutting short the mortgage (*miyad-i-rabu faikh karkar*) and suing for the whole debt, principal and interest, and the two half-yearly payments of interest were not made, that the money became due after one year of the date of the mortgage. It was observed that the plaintiff had the option and was not *bound* to sue but forbearance to sue would not stop limitation from beginning to run, not being sufficient proof of waiver. The same view was taken by the Lahore High Court in *Nanak Chand v. Muhammad Khan*,¹³ where default in payment of each instalment constituted a separate cause of action, and limitation in respect of each instalment was held to begin running from the date of default in respect of that instalment. In *Zaida v. Gurdas Ram*,¹⁴ the mortgagor being at liberty to pay at any time, it was held that the mortgagee was also, therefore, equally at liberty to foreclose, and his limitation under Art. 132 began to run at once. In *Sahib Singh v. Gurdial Singh*,¹⁵ it was held, following the Allahabad Full Bench view, that in a suit on a mortgage the limitation begins to run from the date of the first default, and claim to the relief against the mortgagor is to be brought within six years under Art. 116, although the claim to realization of debt from the property can be brought within twelve years under Art. 132. This view is no longer good law, having been overruled in 1932 P.C. 207 (S. 1992, *ante*).

11. *Umar Ali v. Asmat Ali*, 1931 Cal. 251 (252) (F.B.).

12. (1915) 31 I.C. 808=153 P.W.R. 1915; Followed in *Khair Uddin v. Atu Mal*, 188 P.R. 1883 (F.B.) (A case under Art. 75, Limitation Act).

13. (1923) 75 I.C. 1048=1924 Lah. 702.

14. (1926) 92 I.C. 656=1926 Lah. 225.

15. 1930 Lah. 993=129 I.C. 201; Followed (1922) 45 All. 27=1923 All. 1=20 A.L.J. 819=69 I.C. 981 (F.B.).

1998. **MADRAS.**—In *Perumal v. Alagirisami*,¹⁶ the **Madras High Court** had held that when a hypothecation bond provided for the repayment of the principal sum on a certain date with interest in the meantime payable monthly, and further provided that, on default in payment of interest, the principal and interest should become payable on demand, the period of limitation prescribed by Art. 132, began to run from the date of default. Where in a suit to recover principal and interest due on a hypothecation bond executed before the Transfer of Property Act was passed to secure a loan payable on demand, it appeared that the plaint was filed more than twelve years after the date of the document sued on, it was held that an actual demand was not necessary to establish a starting point for limitation and that the suit was barred by limitation.¹⁷ However, in *Kalliappa v. Sami Iyer*,¹⁸ where the entire balance due was payable on failure to pay any instalment on demand, the cause of action was held to arise from the mortgagee's exercise of option to demand payment of the whole amount. In *Narna v. Ammani Amma*,¹⁹ the **Madras High Court** observed that suits for money due on hypothecation bonds, though containing stipulations for payment in instalments, are governed by Art. 132, and not by Art. 75, Limitation Act, and there is no warrant for importing into the former the words of the latter article. A hypothecatee is not *bound* to take advantage of a clause in his bond, which, in case of default in payments of interest, enables him (a) to demand the principal before its due date, and (b) also claim a higher rate of interest from the date of default. Hence, a suit restricted to a claim to recover the principal and interest at the original rate, brought within twelve years from the date originally fixed for payment of the principal, though beyond twelve years from the date of first default in respect of interest, is not barred by limitation. In *Jagana Sanyasiah v. Atchanna Naidu*,²⁰ the principle was enunciated that where the **date of payment** is not mentioned expressly in a mortgage bond, it must be assumed that the amount secured by the mortgage was payable on the date of the execution of the document. But, where a mortgage-deed, by which the principal amount was to be paid on a fixed date, provided that if the mortgagor should

16. (1925) 20 Mad. 245=7 M.L.J. 222; Followed in *Tulsi Ram v. Muhd. Hadi*, (1916) 33 I.C. 551 (Oudh); cf. *Kaliappa Nadar v. Sami Iyer*, (1921) 62 I.C. 762=1921 M.W.N. 384.

17. *Perianna Goundan v. Muthuvira*, (1897) 21 Mad. 139=7 M.L.J. 315.

18. (1921) 62 I.C. 762=1921 M.W.N. 384; Followed in *Muthiah Chettiar v. Venkata Subbarayulu Naidu*, (1925) 90 I.C. 1033=22 L.W. 67=1926 Mad. 160=49 M.L.J. 394.

19. (1916) 39 Mad. 981=4 L.W. 77=20 M.L.T. 174=31 M.L.J. 865=35 I.C. 418 (Approved in 1932 P.C. 207).

20. (1922) 70 I.C. 759=15 L.W. 289=42 M.L.J. 339=1921 Mad. 624.

fail to pay the interest on the due date, the mortgagee would be at liberty to recover the whole amount together with principal and interest, it was held by another Division Bench, on a construction of the document, that an **option was reserved to the mortgagee** to enforce the clause at his pleasure, and that the period of limitation for a suit to enforce the mortgage under Art. 132, started to run not on the date of default in the payment of interest but when the money became due under the terms of the main contract.²¹ This directly differed from the view taken by **Allahabad High Court** in *Gayadin v. Jhumanlal*,²² and in the subsequent cases following the same,²³ and their Lordships of the Privy Council have now definitely held in favour of the Madras view (*vide* 1932 P.C. 207—S. 1992, *ante*). In *Kotappa v. Raghavayya*,²⁴ the rule was laid down that a **subsequent mortgagee has the right to pay off the prior mortgagee**: but he can exercise these rights only **within the period of limitation allowed to enforce the first mortgage**. The date of payment or of decree does not afford a fresh cause of action. Where a mortgage bond gave the mortgagee an option to call in at once the principal amount and interest due on the mortgage bond without reference to the period stipulated for payment, if there was default, it is for the mortgagee to exercise the option or not as he chooses; and the time will not run against him unless he exercises the option.²⁵ Where on the date of suit in respect of a single default, no election has been made by the mortgagee, the suit would amount to a **waiver on his part of the benefit reserved under the default clause**. If again, after the default has occurred, he keeps the question open and does nothing, but finally sues for the whole amount, the fact that he has so sued, shows that he has waived the benefit reserved to him under the contract.²⁶ In the case of a **mortgage with possession**, if the mortgagor fails to deliver possession, the mortgagee is deprived of his interest and the claim for damages in the shape of interest is not barred so long as the main claim for the principal is not barred.²⁷

21. *Muthia Chettiar v. Venkata Subbarayulu*, (1925) 90 I.C. 1033=22 L.W. 67=1926 Mad. 160=49 M.L.J. 394; Folld. 39 Mad. 981; also see *Ramadh Bibi v. Kandasami*, 51 I.C. 724=1919 M.W.N. 82; *Lachakkammal v. Sokayya Naick*, 48 I.C. 191=1918 M.W.N. 586; *Appaya v. Venkataramanayya*, 82 I.C. 864=1925 Mad. 150.

22. 28 I.C. 910=37 All. 400=13 A.L.J. 510.

23. *Nathi v. Tursi*, 63 I.C. 886=43 All. 671=19 A.L.J. 712 and *Collector of Jaunpur v. Jamna Prasad*, 66 I.C. 171=44 All. 360=20 A.L.J. 140=1922 All. 37.

24. (1927) 102 I.C. 316=50 Mad. 626=1927 Mad. 631=47 M.L.J. 316.

25. *Rangaswamy Pillai v. Kuppuswamy*, 1928 Mad. 637=107 I.C. 650; Reld. on 39 Mad. 981; 22 Mad. 20.

26. *Rego v. Phillip Tauro*, 1929 Mad. 371=120 I.C. 853=56 M.L.J. 580.

27. *Subramaniya Aiyar v. Panchanada*, 1932 Mad. 175=136 I.C. 785=1931 M.W.N. 751.

In *Bappu v Venkatachalapathi*,²⁸ where the **principal amount** was payable within two years, and the interest was payable each month, the default clause provided that compound interest at a much higher rate and also the principal and interest would become payable. The mortgagor having committed default in payment of the interest in the first month itself, it was held that limitation for a suit by the mortgagee should be computed only from the date of the expiry of the term of two years; the **default clause** was inserted exclusively **for the benefit of the mortgagee**, and as such it gave him an option to enforce the security at once or to stand by his investment for the full term of the mortgage, and that the mortgagee had option to sue within twelve years either from the date of default or date of expiry of term. The mere fact that in the plaint the compound interest was calculated from date of first default in payment of interest did not necessarily indicate that the option given to him of suing within twelve years from expiry of two years had been waived.

In *Gopalan Nair v. Moideen Madar*,²⁹ Madhavan Nair, J., has held recently that the purchaser of the equity of redemption in a suit by the first mortgagee gets a cause of action on the mortgage against the second mortgagee who could not have been sued on the mortgage because his existence was not known. The period of limitation in such a **suit by first mortgagor**, for enforcing his rights, is to be calculated from the date of the purchase by him and a **suit within twelve years from the date of the sale certificate** granted to the purchaser is not barred by limitation.

1999. PATNA AND OTHER HIGH COURTS.—In

Default clause. *Mukhdeo Singh v. Harakh Narain Singh*,³⁰

it was observed that the question of option express or implied has to be decided with reference to the terms of each bond, and

“the two important features which are found almost invariably in instalment mortgage bonds are, (1) a time is generally fixed, by which the entire principal money and interest due thereon are to be paid up; (2) a clause is inserted for the benefit of the mortgagee, that, if any of the instalments due is not paid in time, the mortgagee would be at liberty to call in the entire money”.

The mortgagee has in such cases a successive or recurring cause of action, and it is left to his option to avail himself of any one of these causes of action, and base his suit upon any of them. Art. 132 will not bar his suit, if acting on the terms of the bond, he refrains from bringing a suit on there being a default in payment of any of

28. 1934 Mad. 227=1933 M.W.N. 331=64 M.L.J. 606=37 L.W. 751=148 I.C. 311.

29. 1935 Mad. 680=157 I.C. 1050.

30. 1931 Pat. 285=134 I.C. 609=11 Pat. 112; Folld. 4 Pat. 280.

the instalments and prefers to sue on the expiry of the due date. Where there is a clause in a mortgage bond fixing instalments, and providing for default in payment thereof on which the whole amount is realisable, the more liberal view has prevailed in Patna High Court, that the creditor mortgagee has it at his **option either to enforce the payment of the whole amount at once or to continue to abide by the instalments.**³¹ The view has been thus stated in *Ramsekhar Prashad v. Mathura Lal*³²:

"It was left to the option of the creditors to demand the entire amount if there was default in payment of any one of the instalments. It was open to the creditors to avail themselves of this right or not to do so. They could exercise their option and demand payment of the entire amount on default of any one of the instalments or they could under the terms of the bond wait till the last instalment fell due. It was not obligatory for the creditors to bring a suit for realization of the entire amount as soon as any one of the instalments fell due. If they waited until the expiry of the time for payment of all the instalments, their claim would not be barred in so far as the instalments within the period of limitation were concerned."

This view has been taken in a number of cases,³³ and has now the approval of their Lordships of the Privy Council in *Lasa Din v. Mt. Gulab Kunwar*.³⁴ In an instalment mortgage bond a default clause is inserted exclusively for the benefit of the mortgagee and confers no right on the mortgagor.³⁵ In the case of a usufructuary mortgage, where the mortgagee has been dispossessed by the mortgagor, a suit lies for possession, or for mortgage money under Art. 132, and limitation begins to run from date of dispossession.³⁶

2000. Where a second mortgagee pays off a prior mortgage, he does not acquire a charge on the property on the date on which he pays off the prior mortgagee. The charge is already there; all that he acquires is a right to enforce the charge and to a cession in his favour of the securities held by the prior mortgagee. There is a clear distinction to be drawn between the right of reimbursement accruing, to a person paying off a debt, on the date on which he pays it off, and the right to enforce a security

31. *Ganga Bishun v. Raghunath*, (1930) 128 I.C. 786 (790)=11 Pat. L. T. 609=1930 Pat. 615=10 Pat. 173 (F.B.); Reld. on *Manindra Nath Roy v. Kanhai Ram*, 48 I.C. 728=4 P.L.J. 365 and *Ramsekhar v. Mathura Lal*, 90 I.C. 249=4 Pat. 820=1925 Pat. 557.

32. (1925) 90 I.C. 249 (250)=4 Pat. 820=1925 Pat. 557; also see *Mukhdeo Singh v. Harakh Narain Singh*, 134 I.C. 609.

33. *Narna v. Ammani Amma*, (1916) 39 Mad. 981=35 I.C. 418=31 M.L.J. 865; also see *Mata Tahal v. Bhagwan Singh*, 63 I.C. 477=19 A.L.J. 406; *Rup Narain Bhattacharya v. Gopinath Mandol*, 11 C.W.N. 903.

34. 1932 P.C. 207=138 I.C. 779 (P.C.).

35. *Punaji v. Govinda Raghoba*, 1934 Nag. 191=30 N.L.R. 290=152 I.C. 438.

36. *Mt. Jugesri Kunwar v. Aftab Chand*, 1928 Pat. 582=8 Pat. 68.

which latter arises from the date of mortgage.³⁷ The true principle of subrogation is, that where money due upon a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, as may best serve the purposes of justice and the just intention of the parties. In a suit for recovery of amount paid by the plaintiff, under Art. 132, limitation therefore runs from the date when the mortgage amount fell due and not from the date when the amount was paid in Court.³⁸ Where a subsequent mortgagee pays off a prior mortgage, an intention to hold up the mortgage redeemed for his own benefit is to be presumed, on the principle that there is an assignment in his favour by operation of law. The question as to whether the claim of a subsequent mortgagee based upon an earlier mortgage redeemed by him is within time depends upon the question, when the amount sued for became due to the prior mortgagee with reference to Art. 132, Limitation Act.³⁹ Under S. 74 of the Transfer of Property Act, a puisne mortgagee on paying off a decree obtained by a prior mortgagee acquires all the rights and powers of the prior mortgagee as such as determined by the decree and the rights so acquired by the puisne mortgagee can be enforced by him by a separate suit, to which Art. 132 would apply, the period of limitation commencing to run from the date on which the puisne mortgagee paid off the prior mortgagee's decree and became entitled under the provisions of S. 74 of the Transfer of Property Act to the rights created by the decree.⁴⁰ The **Oudh Chief Court** has also held that a suit by a subsequent mortgagee paying off an earlier mortgage claiming priority over intermediate mortgagee is governed by Art. 132. It is immaterial whether the priority is claimed by mortgagee or his sub-mortgagee.⁴¹ The **Rangoon High Court** takes the same view. Limitation for a suit by a purchaser in Court auction of mortgaged property in execution of a decree obtained by a mortgagee without impleading an assignee of the mortgagor's interest, to recover the mortgage-money by a fresh sale of the property runs in the same way as though the original mortgagee was the plaintiff, and the time from which the period runs is when the money sued for becomes due.⁴²

37. *Sibanand v. Jagmohanlal*, (1922) 68 I.C. 707=3 P.L.T. 533=1922 Pat. 499=1 Pat. 780.

38. *Nathuram v. Sheolal*, (1917) 42 I.C. 796=13 N.L.R. 217; also see and cf. *Udho Ram v. Gobind Lal*, 1921 Lah. 293 (Mortgage executed in renewal of old mortgage—Art. 132 applied to suit to enforce the later mortgage and time held to run from the date the money became payable under second mortgage).

39. *Narayan v. Syed Hafiz*, (1925) 87 I.C. 264=1925 Nag. 21.

40. *Suryabhan v. Renuka*, (1926) 92 I.C. 118=8 N.L.J. 232=1926 Nag. 84.

41. *Ram Sahai v. Kanwar Sah*, 1932 Oudh 314=7 Luck. 26=8 O.W.N. 522=139 I.C. 626.

42. *Bose v. Obedur Rahman Chowdhry*, (1928) 111 I.C. 132=1928

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
133.	<i>Repealed</i> , with effect from 1st January, 1929, by Act I of 1929, which however re-enacted the same as Art. 48-A with a reduced period of three years.		
134.	To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration.	12 years.	When the transfer becomes known to the plaintiff.

SYNOPSIS.

Title I: Previous History.

- 2001. Corresponding provisions.
- 2002. Legislative changes.

Title II: Scope and application.

- 2003. "Purchased" or "Transferred".
- 2004. Transfer with possession.
- 2005. Execution sale, not a "transfer".
- 2006. Scope and object.
- 2007. Suits against trustees.
- Application of Art. 134.**
- 2008. Where this article does not apply.
- 2009. Privy Council Ruling.
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- 2012. Question of good faith and notice.
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Title III: Article explained.

- 2014. Suit to recover possession.
- 2015. Conveyed or bequeathed in trust.
- 2016. Mortgagee.

Title IV: Starting point.

- 2017. The transfer—Date of.
- 2018. Knowledge of plaintiff.
- 2019. *Onus probandi*.
- 2020. Effect of time-bar.

NOTES.

2001. CORRESPONDING PROVISIONS.—Under S. 5 of Act XIV of 1859, "in suits for the recovery from the purchaser or any person claim-

ing under him of any property purchased *bona fide* and for valuable consideration from a trustee depositary, pawnee or mortgagee," the cause of action was deemed to arise "at the date of the purchase", and the ordinary rule of limitation as to moveable and immoveable

Rang. 189=6 Rang. 297 (Limitation for a suit to recover money due under a mortgage-bond which is payable on demand runs from the time when the loan is made, and not from date of demand).

property would apply to such suits. The proviso to the section added that "in the case of purchase from a depositary, pawnee or mortgagee, no such suit shall be maintained, unless brought within the time limited by Cl. (15), S. 1." Section II of the Act laid down the rule of *nullum tempus* as against *trustees*.

Section 10 of Act IX of 1871 provided that "notwithstanding anything herein before contained, no suit
Act IX of 1871. against a person in whom property has be-

come vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time": and, the explanation added, that "a purchaser in good faith and for value from a trustee is not his representative within the meaning of this section".

Article 134, Act IX of 1871, also provided a period of limitation for a *bona fide* purchaser for value.

Article 134 of Act XV of 1877, omitted the words "in good
Act XV of 1877. faith", to exclude the possible inference that absence of notice of the limited title of the vendor was necessary to enable the purchaser to avail himself of this article. The words "*or bequeathed*" were first added after the words "conveyed", and the words "for a valuable consideration" were substituted for the words "and for value".

2002. LEGISLATIVE CHANGES.—(1) Under S. 5 of
Good faith. Act XIV of 1859, a *bona fide* purchaser for valuable consideration from a trustee was alone benefitted.⁴³ If, however, the purchaser was not a *bona fide* one, this section was not applicable.⁴⁴ The same period of 12 years from date of purchase applied to suit against *bona fide* purchasers for valuable consideration from a mortgagee.⁴⁵ What the legislature intended by S. 5, Act XIV of 1859, was to give a cause of action and to limit the arising of that cause of action in the case of property which has been purchased *bona fide* and for valuable consideration from a depositary, trustee, mortgagee, or pawnee, for the trial of which cause of action the ordinary rule as to moveable and immoveable property would have to be applied; and then by way of proviso on that rule, it was laid down that, in the case of a purchase from a depositary, pawnee, or mortgagee, no such suit could be maintained unless brought within the time limited by Cl. (15), S. 1, that is, within 60 years from the time of deposit, pawn or mortgage.⁴⁶ The proviso to Act XIV of 1859 has not been re-

43. *Radhanath Doss v. Gisborne & Co.*, (1871) 14 M.I.A. 1=15 W.R. (P.C.) 24; *Juggernath Sahoo v. Shah Mahomed Hossein*, (1874) 2 I.A. 48=23 W.R. 99 (P.C.).

44. *Mt. Khyroonissa v. Salcoonissa Khatoon*, (1863) 5 W.R. 238 (Art. 148 applied).

45. *Sitha Ammal v. Rangasami*, 5 Mad. H. C. R. 385.

46. *Ram Dhun Bhugut v. Guneshee Mahton*, (1871) 16 W.R. 96.

enacted in later acts. But the transferees for value are entitled to the benefit of Arts. 145, and 148, Limitation Act.⁴⁷ Art. 134 of Act IX of 1871, also provided a period of limitation for a suit

“to recover possession of immoveable property conveyed in trust or mortgaged and afterwards purchased from the trustee or mortgagee in good faith and for value—12 years—the date of the purchase”.

If the purchaser was not a *bona fide* one, Art. 148 was held applicable.⁴⁸

There was no mention of “in good faith”, in Art. 134, Act XV of 1877: Under the Limitation Act IX of 1871 the period of limitation for suits to recover possession of property purchased from a mortgagee depended upon the good faith of the purchaser. Art. 134 of the later Act XV of 1877, by omission of the words “in good faith” made 12 years from the date of the purchase the period of limitation for all such suits, without reference to the question of good faith on the part of the purchaser. The result was, that, in cases of a purchase *not in good faith* from a mortgagee, the period of limitation allowed by Act XV of 1877 from a suit to recover the property was shorter than the period allowed by Act IX of 1871; and consequently, under the provisions of Art. 2 of the Limitation Act XV of 1877, the plaintiff in such a suit has two years from the 1st October, 1877.⁴⁹ Art. 134 is now not restricted to a purchaser in good faith, but applies also to an alienee from a trustee who takes the property with full knowledge that the alienor was acting in excess of his power.⁵⁰

TITLE II: SCOPE AND APPLICATION. SECTIONS 2003-2013.

2003. “PURCHASED,” OR “TRANSFERRED”.—(1) Act XIV of 1859, IX of 1871, and XV of 1877, “Purchased.” all used the word “*purchased*”. In *Radhanath v. Gisborne & Co.*,¹ the Judicial Committee observed that

47. *Ram Dhun v. Guneshee*, (1871) 16 W.R. 96; *Seeti Kutti v. Kunhi Pathuma*, (1915) 40 Mad. 1040 (1050) (F.B.); also see *Radhanath v. Gisborne & Co.*, (1871) 14 M.I.A. 1 (The object of this article explained).

48. *Radhanath Das v. Elliot*, (1870) 6 B.L.R. 530; *Baiva Khan v. Bhiku*, (1885) 9 Bom. 475.

49. *Baiva Khan v. Bhiku*, (1885) 9 Bom. 475; Folld. in *Vishnu Chintaman v. Balaji bin Raghuji*, (1887) 12 Bom. 352 (358) (A *bona fide* purchaser for value from the mortgagee protected after more than twelve years' possession; cf. *Bhagwan Sahai v. Bhagwan Din*, (1886) 9 All. 97 (Held, that the omission of words “in good faith” was immaterial); also see *Pandu v. Vithu*, (1894) 19 Bom. 141 (143) and *Yesu v. Balkrishna*, 15 Bom. 583.

50. *Fazal Din v. Mahomed Hafiz*, 130 I.C. 780=32 P.L.R. 1917=1931 Lah. 129.

1. (1871) 15 W.R.P.C. 24.

the word could not cover the purchaser of a mortgage as a mortgage,

"because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordship's opinion, **some person who purchases that which *de facto* is a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title**".

Following this ruling, their Lordships held in a later case, that in a suit founded upon a right to redeem, the defendant, in order to claim the benefit of Act XIV of 1859, must show three things—*first*, that he is the purchaser according to the proper meaning of that term; *second*, that he is a *bona fide* purchaser; and, *third*, that he is a purchaser for valuable consideration.² The word "*purchaser*" in the Acts of 1871 and 1877, gave rise to a conflict of view. The **Bombay High Court** held that a mortgagee of the property was a purchaser within the meaning of this article.³ He was not an out-and-out purchaser but only a purchaser *sub modo*. He purchased a mortgagee's interest in the land, *i.e.*, a right to hold the mortgaged property until the debt is paid.⁴ The **Madras High Court** applied Art. 134 to a suit to redeem by assignee of equity of redemption against a title of mortgagee purchased at execution sale, as if the mortgaged premises formed part of the mortgagee's family property.⁵ Where the mortgagees professed to transfer absolute rights, alleging ownership of the property, and not merely the interest which they possessed, a **Full Bench of the Madras High Court**, held the term purchased in Art. 134, to include a mortgagee.⁶ The word "purchased" was not taken as restricted to transactions dealing with, or purporting to deal with, the whole proprietary, but was applied equally to cases in which a less interest was expressed to be created.⁷ The **Calcutta High Court**, in *Nilmony Singh v. Jagabandhu Roy*,⁸ were prepared to construe Art. 134 as it had been construed by Bombay and Madras High Courts. A **Full Bench of the Allahabad High Court**, recorded conflicting

2. *Juggernath Sahoo v. Syed Shah Mahomed Hossein*, (1874) 23 W.R. 99 (P.C.).

3. *Yesu v. Balkrishna*, (1891) 15 Bom. 583; also see *Pandu v. Vithu*, 19 Bom. 140 and *Ramchandra v. Mohideen*, (1899) 23 Bom. 614.

4. *Maluji v. Fakir Chand*, (1896) 22 Bom. 225 (229); also see *Narayan Manjaya v. Shri Ramchandra Devasthan*, (1903) 27 Bom. 373 (A *malguzari* lease held to be a purchase *pro tanto* of the interest thereby assured).

5. *Muthu v. Kambalinga*, (1889) 12 Mad. 316.

6. *Manavikraman v. Ammu*, (1900) 24 Mad. 471 (F.B.); cf. *Muthu v. Kambalinga*, 12 Mad. 316.

7. Cf. *Narsya U'dpa v. Venkataramana*, (1912) 16 I.C. 53 (55); Folld. 36 Cal. 1003 (P.C.).

8. 23 Cal. 536 (544); also see *Ram Kanai v. Raja Sri Sri Hari Narayan*, (1905) 2 C.L.J. 546.

decisions on the meaning of "purchased" in Art. 134. Blair, J., held it unnecessary to consider what the term exactly conveyed. Banerji, J., held that Art. 134 was as much applicable to a suit against a mortgagee for value from a trustee as to a suit against a person to whom the trustee had sold trust property for value. Aikman, J., held that the term "purchased" as used in Art. 134 (Act XV of 1877) could not be taken as including "mortgaged".⁹ But, in *Husaini Khanum v. Husain Khan*,¹⁰ it was taken to be settled law that a mortgage as well as an out and out sale by a trustee or a mortgagee was a purchaser within the meaning of Art. 134, Limitation Act. The **Punjab Chief Court** held the view that only a transfer of full ownership was contemplated by the word "purchaser".¹¹ Their Lordships of the **Privy Council** in *Abhiram Goswami v. Shyama Charan Nandi*,¹² repudiated the contention that a *mokurari* lease was tantamount to a conveyance in fee simple, and that the lessees must, therefore, be treated as "purchasers," within the meaning of Art. 134, Limitation Act XV of 1877. It was held that the words "*purchased* for a valuable consideration" in that article meant that the ownership of the property sold had been absolutely transferred from the vendor to the purchaser in consideration of the price. But a lease in perpetuity left some interest in the lessor, and such a lease, though permanent, was forfeitable. The purchaser must be a purchaser of an absolute title to fall within Art. 134, Limitation Act, XV of 1877. This view was again followed in *Ishwar Shyamchand Jiu v. Ramkani Ghose*,¹³ where a permanent lessee was not held to be a purchaser within the meaning of Art. 134, Act XV of 1877.

The words "purchased from" and "purchased" in the corresponding Art. 134, under Act XV of 1877, were altered in Act IX of 1908, which substituted the words "transferred by" in the first column and the word "transfer", in the third column in Act IX of

1908. (2) The word "transferred" in the new Act IX of 1908, would include a mortgage and a permanent lease.¹⁴ In *Bagas Umarji v. Nathiabhai Utamram*,¹⁵ the alteration in the language was taken to be "a

9. *Behari Lal v. Muhammad Muttaki*, (1898) 20 All. 482 (F.B.).

10. (1907) 29 All. 471 (478).

11. *Bashesar Lal v. Natha Singh*, 30 P.R. 1908 (F.B.).

12. (1909) 36 Cal. 1003=36 I.A. 148 (P.C.); also see *Kalidas Mullick v. Kanhyalal*, (1884) 11 I.A. 218=11 Cal. 11 (Where the right, title and interest of the holder of a life-estate was sold, and the suit was by a reversioner).

13. (1911) 10 I.C. 683=8 A.L.J. 528=13 Bom. L. R. 421=38 Cal. 526=38 I.A. 76=9 M.L.T. 448 (P.C.).

14. *Yesu v. Balkrishna*, (1891) 15 Bom. 583; *Maluji v. Fakirchand*, (1896) 22 Bom. 225, and *Ram Chandra v. Sheikh Mohidin*, (1899) 23 Bom. 614; Folld. in *Bagas Umarji v. Nathabhai Utamram*, (1911) 36 Bom. 146.

15. (1911) 36 Bom. 146 (150)=12 I.C. 737; also see *Rameshwar v. Sri Sri Jiv Thakar*, 43 Cal. 34 (43); *Ram Kanai v. Sri Sri Hari Narain*,

legislative recognition of the soundness of the view that the article was intended to give protection to all transferees for value including mortgages. This alteration, by subsequent legislation was noticed by the Judicial Committee in *Ishwar Shyam Chand Jiu v. Ram Kanai*.¹⁶ The term "transfer", which was substituted in Act of 1908 for the term "purchase" used in previous Acts, put an end to the long discussions which had taken place whether property mortgaged or leased was property "purchased" within the meaning of the article. The cases are collected by Mookerjee, J., in *Ram Kanai Ghosh v. Hari Narayan*.¹⁷

"The term 'transfer' appears in the Title of the Transfer of Property Act and seems to have been selected as the widest and most general term which could be found. The change therefore settled the law in the sense in which it had been generally understood in India. It is not disputed that a mortgage is a transfer."¹⁸

Their Lordships of the Privy Council have observed in *Vidya Varuthi v. Balusami*,¹⁹ that the alteration in the language of the old Act (XV of 1877) "was made with the object of including permanent leases in transactions of the character contemplated in the article.

2004. (3) In *A. T. A. R. M. M. Chetty Firm v. Mahomed Kasim*,²⁰ the **Rangoon High Court** has observed that before Art. 134 can be applied against a transferee from an original mortgagee, the transferee must be in possession.

"A mere transfer of certain mortgagee rights in the land without delivery of possession can give no right of suit whatever under this section, nor in such a case would the original mortgagor have any right of suit against the subsequent transferee."²¹ "It appears to us reasonable to hold that a transfer in such a case means a transfer of such a nature that the original mortgagor cannot enforce his rights to the land against the original mortgagee. A subsequent non-usufructuary mortgage by the original mortgagee to a third person would clearly not have this effect. It would be a transfer of certain rights of the mortgagee, but would not be a transfer in any way affecting the original rights of the owner of the land and would give him no right of action against the third person."²²

2 C.L.J. 546; *Baluswamy v. Venkataswamy*, 40 Mad. 745 (749) and *Rama Reddi v. Ranga Dasan*, 49 Mad. 543=1926 Mad. 769=96 I.C. 371 (A grant of a permanent lease is a transfer for valuable consideration).

16. (1911) 38 Cal. 526 (P.C.).

17. (1905) 2 C.L.J. 546.

18. *Narain Das Arora v. Haji Abdur Rahim*, (1920) 47 I.C. 866 (880).

19. (1921) 44 Mad. 831 (843) (P.C.); also see *Arumugam Pillai v. Khazi Moideen*, 144 I.C. 541=1933 Mad. 533=64 M.L.J. 706 (There is no distinction in this respect between a lease and a sale) and *Lakshminarayana v. Rajamma*, 95 I.C. 1002=1925 Mad. 796=21 L.W. 256.

20. 1925 Rang. 377=3 Rang. 367=90 I.C. 1011.

21. *Ibid.*, 1925 Rang. 377 (379).

22. *Ibid.*, 1925 Rang. 377 (379); cf. (1929) 117 I.C. 22 (28)=51 All. 367 (P.C.).

Allahabad.

The Allahabad High Court has observed in *Husaini Khanum v. Husain Khan*,²³ that

"possession is not referred to in Art. 134, but we are disposed to think that the article is applicable only to cases in which a purchaser, whether his purchase be absolute or merely *sub modo*, must obtain and hold possession for twelve years or upwards, in order that he may have the benefit of the article. If a purchaser is a purchaser from a trustee, the property cannot be followed into his hands, as it may be under S. 10 of the Limitation Act, unless he gave possession. So in the case of a purchase from a mortgagee, the mortgagor has no notice of the transaction unless it be with possession."

In *Naunihal Singh v. A. G. Skinner*,²⁴ Lindsay, J., agreed

"that the suits referred to in the article being suits for possession, it must be assumed that when such a suit is brought the defendant transferee is in possession".

He also thought it

"reasonable to hold that the transfer which he has taken must have been one which placed the transferee in possession and that consequently where the transferee is a mortgagee he must have been in possession of the mortgaged property at the time he made the transfer".

But, he was of opinion that the possession which the transferor had at the time of the transfer need not necessarily have been acquired under the mortgage originally made in his favour.²⁵ The transferee is not required, under the law as it now stands, to show *bona fides*, and the absence of notice of the real owner's claim is no longer necessary to enable a purchaser to claim the protection of the article. Consequently, so long as the possession is there, which is

"the principal factor in determining the belief of the transferee that his transferor is giving him a full proprietary title,"

it should not

"make any difference to the purchaser (now the transferee) whether the possession which his transferor has at the time of the transfer arose directly out of the mortgage or was, prior to the date of the transfer, acquired in some other way".²⁶

A Full Bench of the Madras High Court has held in *Seeti Kutti v. Kunhi Pathuman*,²⁷ that the transaction referred to in Art. 134, must be a

23. (1907) 29 All. 471 (480).

24. (1926) 92 I.C. 63 (68, 69)=1925 All. 707=47 All. 803.

25. *Ibid.*, 92 I.C. 63 (69).

26. *Ibid.* [Kanhaiya Lal, J., however, was of opinion that the transferor-mortgagee must have obtained possession (from the mortgagor) *under the mortgage*. But this opinion is no longer correct in view of *Skinner v. Naunihal*, 51 All. 367=1929 A.L.J. 566=1929 P.C. 158=117 I.C. 22 (P.C.)].

27. (1917) 40 Mad. 1040 (1054) (F.B.).

transfer with possession or followed by possession as a necessary incident or ingredient of it. Wallis, C.J., and Coutts-Trotter, J., were of opinion that the word transfer in Art. 134 could not be read as transfer with possession, that the article applied whether at the time of transfer, possession did or did not pass and that, if possession passed subsequent to the transfer, limitation began to run from the date of transfer and not from the date of possession. The other three Judges took a contrary view. They were of opinion that the article does not apply to cases where there has been a transfer without possession being taken by the transferee. And two of them were of opinion that if possession did subsequently pass then the article would apply, but limitation would run from the date when the transfer was completed by delivery of possession. If a transfer is not accompanied by delivery of possession, Art. 144 may come into operation when possession is obtained afterwards and held adversely for more than twelve years.²⁸ The **Oudh Chief Court** has held

Oudh.

that Art. 134 is not applicable to cases of transfer from a mortgagee where the transferee did not obtain possession from the mortgagee under the transfer. The fact that the mortgagee grants a simple mortgage asserting full proprietary rights does not, therefore, attract the provisions of Art. 134.²⁹ A

Bombay.

class of suits to which Art. 134 in terms relates is a suit to recover possession of immoveable property, conveyed in trust and afterwards purchased from the trustee for a valuable consideration.³⁰ Where trust property is alienated, by the trustee, and the alienees have been in possession by purchase for more than twelve years, the suit as one for the purpose of restoring the property to the trust must fail as barred by Art. 134, Limitation Act.³¹ According to the **Calcutta**

Calcutta.

High Court, a suit to which the article applies must be a suit to recover possession. The plaintiff must be out of possession and the defendant in possession. The transfers chiefly contemplated are apparently transfers for value in excess of the limited powers of the trustee or mortgagee. "The underlying idea" of limitation as a defence, "may be that the creator of the trust or the original mortgagor put the trustee or mortgagee in a position to deal with the property wrongly as

28. *Seeti Kutti v. Kunhi Pathuma*, (1917) 40 Mad. 1040 (1054) (F.B.); also see *Ram Piari v. Budh Sen*, (1920) 43 All. 164 (167)=18 A.L.J. 995.

29. *Achhe Mirza v. Ahmad Shah*, (1926) 97 I.C. 922=1926 Oudh 594=1 Luck. 529.

30. *Dattagiri v. Dattatriya*, (1902) 27 Bom. 363 (369); Reld. on *Nilmony v. Jagabandhu*, (1896) 23 Cal. 536 and *Behari Lal v. Muhammad*, (1898) 20 All. 482 (F.B.); cf. *Tairamiya v. Shibale Sahib*, (1919) 44 Bom. 614.

31. *Sagun Balkrishna v. Kaji Hussien*, (1903) 27 Bom. 500; also see *Ram Chandra v. Mohideen*, (1899) 23 Bom. 614.

well as rightly and that after a limited time neither the *cestui que trust* nor the mortgagor shall be permitted to question those dealings".³²

The second portion of Art. 134 is intended to provide only for cases where the defendant's vendor purports to transfer full ownership when in fact he has only a mortgagee's right to transfer.³³

Execution sale. 2005. In *Subbaiya Pandaram v. Muhammad Mustapha*,³⁴ their Lordships of the Privy Council observed that

"though there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself, but disregarding that article, Art. 144 covers the exact case".

The weight of authority, in India, however, appears to be that Art. 134 does not apply to cases of forced sales in execution of decrees.³⁵ In *Ram*

Piari v. Budh Sen,³⁶ the Allahabad High Court held that Art. 134 was excluded by the fact that the vendors of the defendants had not purchased from the mortgagee. They had acquired their rights by virtue of an involuntary sale, which according to the decisions in *Ahamed Kutti v. Raman Nambudri*,³⁷ *Bhagwan Sahai v. Bhagwan Din*³⁸ and *Sheonath Singh v. Mahipal Singh*,³⁹ is excluded from its operation. The Bombay High

Bombay. Court has held in several cases that, whatever may be the case with a private purchaser, a purchaser at a Court sale takes the estate subject to all existing liens, whether he has notice of them or not. It was observed by Melville, J., in *Sobhag Chand v. Bhai Chand*, that

"A Court sale is only a process by which a Court does for a debtor what he is bound to do for himself, i.e., to sell his property in order to pay his debts. If he did this for himself, he would be bound to protect the rights of prior incumbrancers; and the Court, which acts for him is equally bound to do the same."⁴⁰

32. *Narain Das v. Haji Abdur Rahim*, (1920) 47 Cal. 866 (880).

33. *Charu Chandra Pramanik v. Nahushi*, (1923) 74 I.C. 630=50 Cal. 49 (62); Reld. on *Regu v. Abu Behari*, 21 Mad. 151; *Chandan v. Jhuran*, A.W.N. (1881) 75 (Art. 134 does not refer to a purchase from mortgagee of mortgagee rights).

34. (1923) 46 Mad. 751 (757)=1923 P.C. 175=45 M.L.J. 588=50 I.A. 295 (P.C.); also see *Raja Manindra Narain v. Sarat Chandra*, (1926) 30 C.W.N. 740=95 I.C. 644 (647) and *Ranga Dasan v. Latchuma*, (1924) 48 M.L.J. 114.

35. *Paras Ram v. Lalman*, (1910) 7 I.C. 570 (All.); also see *Gurdial v. Manalal*, (1918) 61 I.C. 627 (All.); *Ishri v. Het Ram*, 1927 All. 619 (620); *Husaini Khanam v. Husaini Khan*, (1907) 29 All. 471; *Abdul Aziz v. Munni Lal*, 1930 All. 417.

36. (1920) 43 All. 164 (168).

37. 25 Mad. 99.

38. (1886) 9 All. 97.

39. (1905) 2 A.L.J. 234; also see *Gurdial v. Mana Lal*, (1918) 61 I.C. 627 (All.) and *Ishri v. Het Ram*, 1927 All. 619 (620).

40. Per Melville, J., in *Sobhag Chand v. Bhai Chand*, (1882) 6 Bom. 193 (206, 207).

He added,

"that, if an execution purchaser were treated as a purchaser for value without notice, a person who had created a mortgage on his estate, and who could not, therefore, sell his estate, as unincumbered, without exposing himself to a prosecution for cheating under the Penal Code, might, by confessing judgment and having his estate sold by the Court, be able to get rid of the mortgage, and obtain the full price of an unincumbered estate".⁴¹

The article does not apply to purchases at auction-sale in execution of the mortgagor's interest.⁴²

Calcutta.

In *Kalidas Mullick v. Kanhyalal*,⁴³
their Lordships of the Privy Council

"intimated in the course of argument that the purchase at the sale in execution of the rights and interests of Ruttonmony could not as between the purchaser and Romasunderi be considered to fall under this article (134)," but that Art. 144 applied. An auction-purchaser acquiring trust property for valuable consideration at a sale in execution of a decree is an *assignee* of the trustee within the meaning of that term as used in S. 10 of the Limitation Act.⁴⁴ In *Charu Chandra Pramanick v. Nahush Chandra*,⁴⁵ Mookerjee, J., held it well settled that the Art. 134 does not apply to forced sales in execution. The article refers to transfers by the trustee or mortgagee or manager though it may not be necessary that it should purport to convey in his character as trustee, mortgagee, or manager.⁴⁶ According to

Madras.

Madras High Court, Art. 134 deals only with absolute transfers of immoveable property, and not with transfers of mortgagee's interests; and a purchaser at a Court auction of property which is subject to a mortgage is only the assignee of the mortgagee and a suit for redemption as against such person is not governed by Art. 134, Limitation Act.⁴⁷ A **Full Bench** of the **Madras High Court** held in *Ahamed Kutti v. Raman Nambudri*,⁴⁸ that where, in execution of a money decree, immoveable property of a judgment-debtor, in which his

41. *Sobhag Chand v. Bhai Chand*, (1882) 6 Bom. 193 (206, 207).

42. *Pandu v. Vithu*, (1894) 19 Bom. 140 (144); Reld. on *Kali Das Mulik v. Kanhyalal*, 11 I.A. 229=11 Cal. 120 (P.C.).

43. 11 Cal. 120 (131)=11 I.A. 229 (P.C.).

44. *Chintamani Mahapatro v. Sarup Sen*, (1888) 15 Cal. 703.

45. (1922) 50 Cal. 49 (63)=1923 Cal. 1=36 C.L.J. 35; Reld. on 25 Mad. 99; 2 A.L.J. 234; 11 Cal. 121 and *Kannuswami v. Muthuswami*, 1917 M.W.N. 5=5 L.W. 250=38 I.C. 194.

46. *Nilmony v. Jagabandhu*, (1896) 23 Cal. 536.

47. *Kannuswami v. Muthuswami*, 1917 M.W.N. 5=5 L.W. 250=38 I.C. 194; also see *Subbaiya Pandaram v. Muhammad Mustapha*, (1917) 40 I.C. 50=32 M.L.J. 85 (An assign for valuable consideration need not have acted in good faith).

48. (1900) 25 Mad. 99 (F.B.); overruling *Muthu v. Kambalinga*, 12 Mad. 316; also see *Thiruvikrama v. Vyapuri*, 1927 Mad. 1028.

real interest is only that of a mortgagee, is attached and brought to sale, the auction-purchaser is not a purchaser from the mortgagee within the meaning of Art. 134, Limitation Act, even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein. Art. 134 only applies to cases in which the mortgagee disposes of the property voluntarily.

Oudh. The Oudh Judicial Commissioner's Court has followed the Madras Full Bench and the Allahabad and Bombay High Court in taking the view that a purchaser at a Court auction-sale is not entitled to the benefit of Art. 134, even though that sale purports to transfer not merely the mortgagee right but full proprietary right. But the Oudh Court holds that a purchaser at such a sale cannot acquire a larger interest than was possessed by the judgment-debtor whose

Sindh. interest he acquires.⁴⁹ Similarly, the Sind Judicial Commissioner's Court takes it as well established, that Art. 134, Limitation Act, in terms applies to property purchased from the mortgagee and not to the rights, title and interest of the mortgagor purchased through Court at the instance of a decree-holder against the mortgagee.⁵⁰

2006. SCOPE AND OBJECT.—(1) It was observed by Richardson, J., in *Narain Das v. Haji Abdur Rahim*,¹ that

"the underlying idea may be that the creator of the trust or the original mortgagor put the trustee or mortgagee in a position to deal with the property wrongly as well as rightly and that after a limited time neither the *cestui que* trust nor the mortgagor shall be permitted to question those dealings The utility of such an article lies in this that it relieves the Courts of the necessity of deciding disputed questions of fact relating to transactions long past and prevents the hard swearing and chicanery to which such disputes are apt to give rise".

Spencer, J., speaking of Art. 134, in *Narayanasami v. Periasami*,² remarks that

"when we see the **varying attitude of the Legislature** in respect of the suit described in Art. 134 (see *Raddhanath Doss v. Gisborne & Co.*, Act of 1859; *Bhagwan Sahai v. Bhagwan Din*, in the Act of 1871, *Muthu v. Kambalinga*) it is clear that the **object of the article** was to cut down the period available to the mortgagor under Art. 148, and to compel him to watch the conduct of the mortgagee and to intervene on a transfer—thus making the transfer a cause of action which otherwise did not exist".

49. *Mohammad Mohsin v. Mohammad Abid*, (1919) 52 I.C. 159=22 O.C. 72.

50. *Mahomed Moosa v. Kazi Fatehullah*, (1924) 79 I.C. 466 (468) (Sind); Reld. on 11 Cal. 121 (131)=11 I.A. 218 (P.C.); 25 Mad. 99=11 M.L.J. 323 (F.B.); 9 All. 97=A.W.N. (1886) 303; A.W.N. (1905) 56=2 A.L.J. 4; cf. 15 Cal. 703.

1. (1920) 47 Cal. 866 (881).

2. (1922) 68 I.C. 734 (740)=44 Mad. 951=41 M.L.J. 163=1921 M.W.N. 465=14 L.W. 116.

(2) The suits contemplated by this article are suits for possession, presumably by a mortgagor, or his representative and against the transferee or his representative. Section 5 of the Act of 1859 in which the provision was first enacted is conclusive of this question, for it says, "*in suits for recovery from the purchaser or any person claiming under him*".³ This article will not apply to a suit for a *merely declaratory* decree not followed by a prayer for possession also.⁴ To such cases Art. 120 only would apply.⁵ A suit for redemption is a suit for possession within the meaning of this article.⁶ Art. 134 can be applicable only when the suit is being brought against the transferee of the mortgagee (who) happens to be in possession.⁷ "Art. 134 is limited to cases where the property mortgaged has been transferred by the mortgagee for a valuable consideration. That article applies only to cases where a transferee for value from a mortgagee, takes that which is *de facto* a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title. That article cannot protect persons who are not transferees from the mortgagee but are transferees from persons other than the mortgagees or their heirs. The mortgagor is ordinarily allowed a period of 60 years to redeem a mortgage by Art. 148 of the First Schedule to the Limitation Act and any person who seeks the protection of Art. 134 must strictly bring his case within that article".⁸ Even if the original trustee or mortgagee transfers the property to a person who enjoys the same for 12 years, and thereafter re-purchases the property from such person a suit against them will not be governed by this article.⁹

2007. In so far as this article refers to trustees, it must be read along with S. 10, which also relates to trustees, and permits *cestui que trust* to follow trust property in the hands of trustees, or their assigns (excepting assigns for valuable consideration). This exception has

3. *Seeti Kutti v. Kunhi Pathuma*, (1915) 40 Mad. 1040 (1061) (*Per Srinivasa Aiyangar, J.*).

4. *S. Raja Chozedhri v. Gour Mohan Das*, (1897) 24 Cal. 418; cf. *Chidambaranatha v. Nallasiva*, (1917) 41 Mad. 124.

5. See notes under Art. 120.

6. *Lakshmidas v. Bodla*, (1927) 102 I.C. 138=1927 All. 807; also see *Seeti Kutti v. Kunhi Pathuma*, (1915) 40 Mad. 1040 (1067) (F.B.).

7. *Chetty Firm v. Mahammad Kassim*, 3 Rang. 367=1925 Rang. 377=90 I.C. 1011; also see *Seeti Kutti v. Kunhi Pathuman*, (1915) 40 Mad. 1040 (1061) (F.B.).

8. *Per Iqbal Ahmad, J.*, in *Munazwar Ali v. Jagmilan Ram*, (1927) 99 I.C. 280=1927 All. 177.

9. *Kalu Deba v. Rup Chand*, (1920) 44 Bom. 848.

obvious reference to the same class of considerations as are given to in Art. 134 in respect of suits for possession.¹⁰ The suit contemplated by this article (in the case of trusts) is one brought by the succeeding trustee or beneficiary for the restoration of the property to the trust.¹¹ Section 5 of Act XIV of 1859 applied only to suits brought by a *cestui que trust* to recover property from the hands of those who had purchased it from a trustee.¹²

2008. APPLICATION OF ART. 134.—Where a mortgagee

Where this article does not apply. in possession of the mortgaged property sells it to a third person as if he was the absolute owner thereof, but the transferee

deals with the mortgagor, acknowledges his title throughout, assumes his own possession to be only that of a mortgagee tenant and pays rent to the mortgagor, he is liable to be ejected at the instance of the mortgagor, and Art. 134 has no application to such a case. A person claiming title from such a transferee stands on no higher footing than the transferee himself.¹³ As against a sub-mortgagee, as such, the article of the Limitation Act which applies is Art. 148, and not Art. 134.¹⁴ Even a purchaser from a sub-mortgagee has been held not protected by this article.¹⁵

Privy Council.

2009. The Privy Council view, in *Skinner v. Nawnihal Singh*,¹⁶ that

“the transfer of property contemplated by Art. 134 is admittedly something other than an express transfer of the original mortgage. The article contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage”.

The article is not, however, limited in its application to cases where the transfer took place while the mortgagee was mortgagee, or at any rate transferred possession which he had obtained as mortgagee.” Their Lordships saw no reason for accepting the view that Art. 134 did not apply,

“where, the mortgagee had apparently ceased to be mortgagee by getting in the equity of redemption, and had obtained possession not under the mort-

10. *Ram Chandra v. Sheikh Moideen*, (1899) 23 Bom. 614 (618); also see *Abhiram Goswami v. Shyama Charan Nandi*, (1909) 36 Cal. 1003 (1014) (P.C.) (*Held*, that the operation of Art. 134 is controlled by S. 10, Limitation Act) and *Ramacharya v. Shrinivasacharya*, (1918) 46 I.C. 19 = 20 Bom. L. R. 441 (S. 10 does not apply to assigns for valuable consideration from express trustee).

11. *Mitra's Limitation*, Vol. II, p. 1585, citing *Bomanji v. Nuserwanji*, (1902) 27 Bom. 100.

12. *Burm Suroop Das v. Khashee Jha*, (1873) 20 W.R. 471.

13. *Veetiparambil Ahammad v. Cheriatti Chennamanglatt*, (1925) 87 I.C. 578 (Mad.).

14. *Ma Myat Gyi v. Ma Ma Nyan*, 1925 Rang. 140 (2) = 2 Rang. 561.

15. *Munawar Ali v. Jagmilan Ram*, (1926) 99 I.C. 280 = 1927 All. 177.

16. (1929) 117 I.C. 22 (28) = 51 All. 367 = 1929 P.C. 158 = 1929 A.L.J. 566 = 56 I.A. 192 (P.C.).

gage, but under the purchase of equity". "It appears to them to be immaterial that the mortgagee should have thought he was absolute owner if in fact he was mortgagee; and immaterial whether he got possession before, under or after the mortgage, if in fact he purported to transfer the property to the transferee".

2010. NATURE OF INTEREST TRANSFERRED.—

The Allahabad High Court has held in *Bhagwan Sahai v. Bhagwan Din*,¹⁷ that Art. 134 refers only to persons purchasing what was a *de facto* mortgage, having reasonable grounds for the belief, and believing that it was an absolute title, not that the interest they were purchasing was merely that of a mortgagee. The Bombay High Court took the same view in *Pandu v. Vithu*,¹⁸ where the term "purchaser" in Act XV of 1877 was understood as meaning a person who purchased that which was *de facto* a mortgage upon the representation made to him and in the belief that it was an absolute title. Similarly, it was held by the Calcutta High Court that the "transfers" chiefly contemplated by this article are apparently transfers for value in excess of the limited powers of the trustee or mortgagee.¹⁹ In order to make this article applicable the transferee should take a transfer of an *absolute*, and not of a restricted title: if the transferee does not profess or intend to take anything more than the qualified interest which the transferor is competent to alienate, there is no occasion for this article to apply.²⁰ According to the Madras High Court, likewise, Art. 134 does not apply to the case of a person who purchases a mortgage as a mortgage, and thus takes an assignment of a mortgage; but where there was a transfer executed by a person who though in fact a mortgagee professed to be dealing with the property as absolute owner, Art. 134 would apply.²¹ This article governs only those cases where the transferee from the mortgagee acquires an absolute title to and interest in the property transferred, and not where the transferee bargained for and believed he was bargaining only for the interests of the mortgagee.²² After all, Art. 134 is only a branch of the law of prescription, and the question to be determined would be, what it is that the purchaser prescribed for. The real test would be, did he ask for and obtain an absolute right in the property, and

17. (1886) 9 All. 97.

18. (1894) 19 Bom. 140.

19. *Narain Das v. Haji Abdul Rahim*, (1920) 46 Cal. 866 (880).

20. *Ramkanai v. Sri Sri Hari Narain*, 2 C.L.J. 546; *Charu Chandra v. Nahush Chandra*, 50 Cal. 49 (62)=1923 Cal. 1=36 C.L.J. 35.

21. *Thamburan v. Ammu*, (1900) 24 Mad. 471 (F.B.) (O.R. *Muthu v. Kambalinga*, 12 Mad. 316).

22. *Muthaya v. Kanthappa*, (1918) 45 I.C. 975=34 M.L.J. 431.

believe himself that he was having an absolute interest.²³ The question whether the transferee from a mortgagee took an absolute interest or only a mortgage interest is a **question of intention**. Both seller and purchaser must have honestly believed that the entire interest of the owner was being transferred by the docu-

Punjab.

ment.²⁴ The **Punjab Chief Court**, held in a case under Act XV of 1877, that the term

“purchaser” in Art. 134 was taken to mean the person who purchases that which *de facto* is a mortgage, upon a representation made to him, and in the full belief, that it was not a mortgage but an absolute

Oudh.

title.²⁵ The **Oudh Chief Court**, is of the same opinion. Art. 134 has no effect where

a mortgagee transfers his rights as such; it has effect only where he purports to transfer proprietary rights.²⁶ The word “*transferred*” in Art. 134 means transfer of absolute title.²⁷ A person who purchases a right which he honestly believes to be full proprietary right and which is so described in the deed of sale, can claim the benefit of Art. 134, even though by the exercise of diligence he might have discovered that his transferor was only a mortgagee. **Mere constructive notice without actual knowledge is not sufficient to deprive the purchaser of the benefit of this article.**²⁸

2011. ILLUSTRATIVE CASES.—

(1) Where the widow of a usufructuary mortgagee in possession made a gift of the mortgaged property to *A. H.*, and the donee mortgaged part of the property, the subject of gift to *P. N.*, purporting to mortgage the full proprietary interest in the property, and *P. N.* took proceedings for foreclosure against *A. H.* as absolute owner, and obtained foreclosure and possession of the property, it was held that *P. N.* acted *bona fide*, believing *A. H.* to be full owner of property, and he was entitled as against the representatives of the original mortgagor to the protection afforded by Art. 134, Limitation Act.²⁹

(2) Where a mortgagee in possession, professing himself to be the full owner, and not merely a mortgagee, mortgaged the property to a third party, whose heirs having brought a suit on their mortgage and obtained a decree, put up the property for sale, and purchased it themselves; and, subsequently they sold by private contract the property which they had so purchased, it was

23. *Muthaya v. Kanthappa*, 45 I.C. 975; Relied on 19 Bom. 140; 38 I.C. 194=5 L.W. 250; 26 I.C. 1=1 L.W. 687 and 40 I.C. 531=40 Mad. 745.

24. *Lakshmanan Iyer v. Sankarapandian Pillai*, (1926) 93 I.C. 276=1926 Mad. 311=51 M.L.J. 451.

25. *Azim v. Mahmud*, 124 P.R. 1883.

26. *Yar Ali Beg v. Danish Ali*, (1916) 32 I.C. 314 (Oudh).

27. *Sri Ram v. Najibullah*, (1926) 97 I.C. 874=29 O.C. 353=3 O.W. N. 674=1926 Oudh 547 (F.B.).

28. *Bijai Partab Singh v. Raghuraj Singh*, (1922) 67 I.C. 572=9 O. L.J. 173=25 O.C. 115; *Mahabir v. Sheoraj*, 9 O.C. 373; *Dalal v. Gur Prasad*, 12 O.C. 84=2 I.C. 250.

29. *Hussaini Khanam v. Husain Khan*, (1907) 29 All. 471.

held that a suit by the representatives of the original mortgagors for redemption was not governed by Art. 134, but Art. 144 applied.³⁰

(3) Article 134 applies where land has been purchased from the ostensible owner, for value, and the right thus acquired becomes unassailable by the mortgagor after 12 years.³¹ Where the defendant mortgagee, sold as owner the land to the second defendant who was a purchaser for value without notice, and gave him possession, in a suit for redemption by the plaintiff, representative of the original mortgagor, it was held that Art. 134, applied to bar the suit.³² But, this article did not apply where the language of the sub-mortgage-deed showed that the transaction was merely a mortgage of the mortgagee interest and not of the entire property in the land.³³

(4) Where the defendant's vendor purported to transfer the *full* ownership when in point of law he had only a mortgagee right to transfer, the case was held governed by Art. 134.³⁴

(5) Where a usufructuary mortgagee who was also entitled to foreclose obtained possession of the property as a mortgagee but the mortgage was never foreclosed, and subsequently the mortgagee executed a sale-deed of the property in favour of a third person, and the deed purported to sell the *Hakkiat*, and the transferee was put in possession as absolute owner of the property, it was held that the mortgagee purported to transfer the absolute ownership of the property, which the transferee believed himself to be purchasing, and Art. 134 was applicable to a suit by heirs of the mortgagor for redemption, making the vendee also a party.³⁵

2012. QUESTION OF GOOD FAITH, AND NOTICE.—

(1) The previous history of this article already dealt with (Ss. 2001, and 2002, *ante*), shows that a *bona fide* purchaser from a trustee was entitled to the benefit of S. 5 of Act XIV of 1859.³⁶ Art. 134, Act IX of 1871, also provided a period of limitation for a *bona fide* purchaser for value.³⁷ The words "*in good faith*" were omitted from Art. 134 of Act XV of 1877, and the object aimed at was "to exclude the possible inference that absence of notice of the limited title of the vendor was necessary to enable the purchaser to avail himself of this article."³⁸ In *Skinner v. Nawnihal Singh*,³⁹ their Lordships of the Privy Council laid down that Art. 134 contemplates a transfer by a mortgagee purporting to transfer a larger

30. *Ram Piari v. Budh Sen*, 43 All. 164 (167).

31. *Baivakhan v. Bhiku*, 9 Bom. 475; Relied in *Vishnu Chintaman v. Balaji*, (1887) 12 Bom. 352 (358).

32. *Keshav Raghunath v. Gafur Khan*, 1922 Bom. 234=46 Bom. 903; cf. *Trairamiya v. Shibel Sahib*, 44 Bom. 614 (Art. 148, applied).

33. *Savalram v. Genu*, (1893) 18 Bom. 387.

34. *Rego v. Abbu Beari*, 21 Mad. 151.

35. *Dal Singh v. Gur Parsad*, (1909) 12 O.C. 84=2 I.C. 250.

36. *Radhanath v. Gisborne*, (1871) 14 M.I.A. 1=15 W.R.P.C. 24; *Juggernath v. Shah Mahomed*, (1874) 2 I.A. 48=23 W.R. 99 (P.C.).

37. *Radhanath Das v. Elliot*, (1870) 6 B.L.R. 530.

38. Dr. Pal's Limitation Act, p. 874; also see *Naunihal Singh v. Skinner*, 51 All. 367=1929 P.C. 158 (P.C.).

39. (1929) 56 I.A. 192=51 All. 367=1929 P.C. 158 (See S. 2009, above).

interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage. In this case, it was observed that it is immaterial that the mortgagee should have thought that he was absolute owner if in fact he was mortgagee: further, that if the transfer was in fact only transfer of the mortgagee's interest this article shall not apply even though the transferee *bona fide* believed that he took transfer of absolute property.⁴⁰ On the other hand, if the transfer was in fact of an absolute interest, by a qualified owner, like a mortgagee, this article will apply even though the transferee finds out that his transferor was only a mortgagee.⁴¹

(2) The **Allahabad High Court**, took the view that, inspite of the omission of the words "*in good faith*", in Art. 134, this article applies only to *bona fide* transferees. In *Bhagwan Sahai v. Bhagwandin*,⁴² it was held that Art. 134 refers only to persons purchasing what was a *de facto* mortgage, having reasonable grounds for the belief, and believing that it was an absolute title, not that the interest they were purchasing was merely that of a mortgagee. Where a person with full knowledge that his vendor's title is merely that of a mortgagee purchases it, according to the *Allahabad High Court*, the transferee is not entitled to the benefit of Art. 134.⁴³ The article is designed for the protection of a transferee who has been led by a mortgagee to believe that he is acquiring not merely the mortgagee rights but a full proprietary title.⁴⁴

(3) The **Bombay High Court**, takes the view that in order to give the purchaser the benefit of Art. 134, the purchase need not be *bona fide* in the sense, of being without "constructive notice" of the restricted nature of the vendor's title.⁴⁵ The change in the language of Act IX of 1908, was a legislative recognition of the soundness of this view.⁴⁶ In *Keshav Raghunath v. Gafur Khan*,⁴⁷ Art. 134 was applied where the purchaser at the time of the purchase believed that his transferor is an absolute owner of the property: But, in *Vishwanath v. Tukaram*,⁴⁸ where the third person purchasing the pro-

40. *Skinner v. Naunihal Singh*, (1929) 56 I.A. 192=51 All. 367=1929 P.C. 158.

41. *Keshav Raghunath v. Gafur Khan*, (1922) 46 Bom. 903.

42. (1886) 9 All. 97; Relied on *Sobhag Chand v. Bhai Chand*, 6 Bom. 193; also see *Abdulla v. Shasul*, 18 A.L.J. 969=58 I.C. 833 and *Ghasiram v. Krishna*, 13 A.L.J. 877=30 I.C. 564.

43. *Drigpal Singh v. Kallu*, (1915) 37 All. 660.

44. *Naunihal Singh v. Skinner*, (1925) 1925 All. 707=47 All. 803; s.c. on appeal (1929) 56 I.A. 192=51 All. 367=1929 P.C. 158.

45. *Pandu v. Vithu*, (1894) 19 Bom. 140.

46. *Bagas Umarji v. Nathabhai*, (1911) 36 Bom. 146.

47. (1922) 46 Bom. 903 (907)=24 Bom.L.R. 319=67 I.C. 308=1922 Bom. 234.

48. (1925) 89 I.C. 189=1925 Bom. 417=27 Bom.L.R. 661; Relied on

perty from the mortgagee had notice of plaintiff's mortgage, the case was held governed by Art. 148, Limitation Act. This ruling by McLeod, C.J., is based on the theory that when the transferee has notice of the transferor's title, he cannot be said to have purchased anything other than that title.

(4) According to the **Madras High Court** knowledge that the title of the transferee is only a limited one cannot by itself disentitle the transferee to the benefits of Art. 134.⁴⁹ The fact of knowledge may, however, be an important piece of evidence in judging of what interest the transferee contracted to take especially where the transferor is a mortgagee.⁵⁰ The question whether the transferee from a mortgagee took an absolute interest, or only an assignment of mortgage rights is a question of intention, to be determined on facts whether both seller and the purchaser honestly believed that the entire interest of the owner was being transferred by the document.¹ However, in *Rukku Shetti v. Ramchandrayya*,² it was observed that the omission of the words "in good faith" which appeared in the corresponding articles of the Limitation Acts of 1859 and 1871 is not without any significance and the onus is not on a purchaser of the full interest from a mortgagee to prove that he acted in good faith before he can plead limitation.

(5) This view was not followed by the **Lahore High Court** in *Mehnga v. Zaman Ali Shah*,³ where, relying upon a former decision of the same High Court in *Wazir Chand v. Nathu Ram*,⁴ it was held that in the case of transfers by mortgagees, Art. 134 only applied when the transferee had acted in "good faith": i.e., that only a transferee with a *bona fide* belief at the time of the conveyance can claim the protection of Art. 134 and that in other cases the suit to redeem against him is governed by Art. 148.

Pandu v. Vithu, (1891) 19 Bom. 140 and *Tairamya v. Shibelsahib*, (1920) 44 Bom. 614.

49. *Balaswamy Ayyar v. Venkataswamy Naicken*, (1916) 40 Mad. 745 (The material point is not what the transferee *knows* but what he *takes*).

50. *Balaswamy Ayyar v. Venkataswamy Naicken*, (1916) 40 Mad. 745 (750); Relied in *Muthaya v. Kanthappa*, 45 I.C. 975.

1. *Lakshmana v. Sankara*, (1926) 93 I.C. 276=1926 Mad. 31=51 M.L.J. 451.

2. 1926 Mad. 81=49 Mad. 29=49 M.L.J. 634=92 I.C. 342; also see *Subbayya v. Md. Mustapha*, 40 I.C. 50=32 M.L.J. 85.

3. 1931 Lah. 464=32 P.L.R. 359=132 I.C. 184 (Sir Shadilal, C.J., and Broadway, J.); *Fazal Din v. Mahomed Hafiz*, (1931) 130 I.C. 780=32 P.L.R. 1917=1931 Lah. 129 (Art. 134 is not restricted in its application to a purchaser in good faith) and *Hargian v. Baldeo*, 127 P.R. 1908 (F.B.).

4. 1924 Lah. 468=80 I.C. 321=6 L.L.J. 151; also see *Sri Ram v. Matwala*, 71 I.C. 577=1923 Lah. 219 and *Suleman v. Essoo*, 91 I.C. 187=1926 Sind 145 (The Sind Court takes same view as Lahore High Court).

(6) The **Calcutta High Court** has taken a different view from the Lahore High Court in *Baikunthath Roy v. Moulvi Ahmedullah*,⁵ holding that the question of notice is immaterial in applying Art. 134. It was observed by Costello, J., that

"if the transferee has merely constructive notice of the defect of the transferor's title he is not precluded from taking shelter behind the provisions of Art. 134. Whether **actual knowledge** on the part of the transferee is immaterial is perhaps a question on which there remains still some doubt".

(7) The **Oudh Chief Court** has held the extreme view that the question whether the transferee had notice that the mortgagee did not possess absolute title or not is now wholly irrelevant under Art. 134.⁶ But, a **Full Bench** has held that when a transfer is made by mortgagee of his rights, to a transferee with notice, there cannot be said to be any transfer by reason of a misrepresentation having the effect of misleading him, and the period of limitation for redemption cannot be curtailed under Art. 134. Vide *Sri Ram v. Najibullah*.⁷

2013. TRANSFER FOR VALUABLE CONSIDERATION.—The **Calcutta High Court** has held in *Baikunthath Roy v. Ahmedulla*,⁸ that the article as it now stands requires for its application that the property in suit must have been transferred by the trustee or mortgagee for a valuable consideration. The twelve years' limitation applies to cases of recovery of possession of property so transferred, and not to a mere vounteer. Suhrawardy, J., was of opinion that Art. 134 applies equally to cases of transfer by a trustee and that by a mortgagee for valuable consideration. Costello, J., observed that the *bona fides* of the transferee is immaterial. As Mukerji, J., held in *Ram Kanai Ghose v. Hari Narayan Singh*,⁹ Art. 134 refers to purchasers from a trustee for valuable consideration and not of purchasers in good faith and for value. The **Bombay High Court** held in *Keshab Raghunath v. Gafur Khan*,¹⁰ that when a mortgagee sells the mortgaged property as an ostensible owner and there is valuable consideration for the

5. 1931 Cal. 113=130 I.C. 275=58 Cal. 234=34 C.W.N. 961; also see *Ramkanai v. Sri Sri Harinarain*, (1905) 2 C.L.J. 546 and *Narain Das v. Haji Abdul Rahim*, (1920) 47 Cal. 866=24 C.W.N. 960 and *Shama Charan v. Abhiram*, 33 Cal. 511 (Notice of *debutter*).

6. *Gonti Misra v. Deota Din Singh*, (1923) 77 I.C. 737=1924 Oudh 44=26 O.C. 197; also see *Raghunandan v. Mahadeo*, 140 I.C. 182=9 O.W.N. 835=1933 Oudh 38.

7. 97 I.C. 874=29 O.C. 353=1926 Oudh 547=1 Luck. 423 (F.B.); Relied on 47 Cal. 866 and 46 Bom. 903; O.R. 1922 Oudh 7=67 I.C. 572; 1924 Oudh 44=77 I.C. 737.

8. 1931 Cal. 113=34 C.W.N. 961=58 Cal. 234=130 I.C. 275.

9. (1905) 2 C.L.J. 546.

10. (1922) 67 I.C. 308=46 Bom. 903=1922 Bom. 234.

sale, the right of the purchaser becomes unassailable by the mortgagor by the lapse of twelve years from the date of purchase under Art. 134, Limitation Act. The consideration need not be adequate, but a mere nominal consideration is not "valuable" consideration within Art. 134, Limitation Act.¹¹ A transfer for valuable consideration is none the less distinguishable from a voluntary transfer, because the consideration failed subsequently.¹² A performance of service may be a valuable consideration for a gift of temple property.¹³

TITLE III: Ss. 2014-2016.

2014. ARTICLE EXPLAINED.—(1) This article contem-

Suit to recover possession.

plates suits to recover possession by a mortgagor, or by the *cestui que trust*, who has a right of entry, within twelve years of the time when the transfer becomes known to the plaintiff. A suit for the dismissal of a trustee, and for the recovery of trust property from the hands of a third party to whom the same has been improperly alienated was held governed by Art. 134, Limitation Act.¹⁴ In the **Madras Full Bench** case of *Seeti Kutti v. Kunhi Pathuma*,¹⁵ Wallis, C.J., observed that

"Art. 134, as is well-known, is founded on Sec. 25 of the Real Property Limitation Act, 1834, which, after providing generally in S. 24 that suits in equity should be barred in the same way as actions at law, went on to provide in S. 25 that when land is vested in a trustee the right of the *cestui que trust* to bring an action for the recovery of the land shall be deemed to have first accrued when the land shall have been conveyed to a purchaser for a valuable consideration, and shall be deemed to have accrued only as against such purchaser and any person claiming through him. This was an exception in favour of the *cestui que trust*, as it prevented time running against him until there had been a conveyance by the trustees to a purchaser for valuable consideration".¹⁶

The transfer contemplated must be a transfer with possession, for if the transferee did not obtain possession in pursuance of the

11. *Subba Rao v. Veeranjaneyaswami*, 1930 Mad. 298=126 I.C. 279 (Rent reserved being eight annas, in respect of property belonging to idol transferred is not valuable consideration); cf. *Nilmony Singh v. Jagabandhu*, (1896) 23 Cal. 536 and *Narsaya v. Venkataramana*, (1912) 16 I.C. 53.

12. *Rajagopalan v. Somasundara*, (1906) 30 M. 316.

13. *Ramacharya v. Srinivasacharya*, (1918) 46 I.C. 19=20 Bom.L.R. 441.

14. *Sajedur Raja Chowdhry v. Gour Mohun*, (1897) 24 Cal. 418; cf. *Budhsingh Dudhuria v. Niradbaran*, (1905) 2 C.L.J. 431 (439); also see and cf. *Budnee Das Mukcem v. Chooni Lal Johurry*, (1906) 33 Cal. 789 (805) (A claim to eject is open to charge of misjoinder).

15. (1915) 40 Mad. 1040=33 M.L.J. 320=1917 M.W.N. 609=22 M.L.T. 236=43 I.C. 31=6 L.W. 464.

16. *Ibid.*, (1915) 40 Mad. 1040, per Wallis, C.J., p. 1047; also see *Chidambaranatha Thambiran v. Nallasiva Mudaliar*, (1917) 41 Mad. 124 (Art. 134 would apply to suit for possession of property transferred by a trustee—the right to sue arises from the transfer, or when possession begins to be adverse).

transfer, Art. 134 would not apply at all.¹⁷ Art. 134, therefore, does not apply to a transfer from the trustee or mortgagee under which possession is not taken by the transferee.¹⁸ *Seshagiri Aiyar, J.*, held, on an analysis of the first clause of Art. 134, that a suit falling under this article (a) must be to recover possession; (b) the properties sought to have been recovered must have been first mortgaged; and (c) the transfer by the mortgagee should have been for valuable consideration, omitting the words relating to conveyance and trust in this analysis. A suit to recover possession would not *prima facie* lie against a transferee who has not obtained possession. The word transfer means transfer with the attributes which that term possesses in col. (1).¹⁹ *Srinivasa Aiyangar, J.*, took the view that the suits contemplated by the article are suits for possession, presumably by a mortgagor, or his representative, and against the transferee or his representative.²⁰

"The article is obviously intended to protect a person in possession for over twelve years, and the article assumes that the plaintiff is in a position to sue for recovery of possession from the transferee on the date of the transfer."²¹ "It was not suggested that suits for recovery of possession in Art. 134 do not include suits to recover possession on payment of whatever may be found due to the mortgagee, *i.e.*, suits for redemption, and no such limitation can be placed on the article."²²

2015. (2) In Act IX of 1871, the words "*conveyed in trust*" were taken as equivalent to "*vested in trust*", as used in S. 10, as thus to include "*devised in trust*".²³ In *Vidya Varuthi v. Balusami*,²⁴ their Lordships of the Privy Council pointed out that a property held for the idol by a *shebait*, or for a dedication by a *mutwalli*, is not "*conveyed*" to the *shebait* or *mutwalli*, and it is not vested in him, whatever powers as manager he may hold under custom or usage. This view was followed in *Abdur Rahim v. Narayana*,²⁵ where it was held that Art. 134 did not apply to a suit to recover wakf property free of any charge upon the interest

17. Per Abdul Rahim, J., *Seeti Kutti v. Kunhi Pathuma*, 40 Mad. 1040 (1054) (F.B.).

18. *Ibid.*

19. Per Seshagiri Ayyar, J., 40 M. 1040 (1058) (F.B.).

20. Per Srinivasa Ayyangar, J., 40 M. 1040 (1061) (F.B.); also p. 1065.

21. 40 Mad. 1040 (1065) (F.B.).

22. 40 Mad. 1040 (1067) (F.B.).

23. *Maniklal v. Manchershah*, (1876) 1 Bom. 269.

24. 1922 P.C. 123=48 I.A. 302=44 Mad. 831 (P.C.).

25. (1922) 50 I.A. 84=50 Cal. 329=1923 P.C. 44=28 C.W.N. 121=38 C.L.J. 242 (P.C.); also see *Diwan Singh v. Shamdas*, 65 I.C. 722=1922 Lah. 271 (Art. 144 applied to a suit to set aside an alienation by a *mahant* of ordinary wakf property gifted for general pious or religious purposes) and *Rama Reddy v. Ranga Dasam*, (1926) 96 I.C. 371=1926 Mad. 769=49 Mad. 543 (Art. 134 not applicable to suit by successor for recovery of possession of property alienated by preceding trustee) and *Ranga v. Latchuma*, 48 M.L.J. 114; *Ram Rup v. Lal Chand*, 1 Pat. 475.

of the settler's family under the deed of wakf. In *Vidya Varuthi's* case it was explained, by Mr. Ameer Ali, in delivering judgment of Judicial Committee, that the idea conveyed by the word "trust" is foreign to the religious conception involved in the word "wakf". He said:

"When once it is declared that a particular property is wakf or any such expression is used as implies wakf the right of the wakf is extinguished and the ownership is transferred to the Almighty." "The manager of the wakf is the mutwalli, the governor, superintendent, or curator." In the case of khankas the head is called a sajjadanashin. "But neither the sajjadanashin nor the mutwalli has any right in the property belonging to the wakf; the property is not vested in him, and he is not a trustee in the technical sense. The wakfnama does not transfer property to trustees."²⁶

The case of an execution sale of trust property is distinguishable. It is not a transfer by the trustee himself for a valuable consideration, and though there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself, Art. 134 being disregarded, Art. 144 covers the exact case.²⁷ The Indian Limitation Amendment Act I of 1929, has now inserted special Arts. 134-A, 134-B and 134-C, providing for similar cases relating to "Hindu, Muhammadan or Buddhist religious or charitable endowments".

The words "*or bequeathed*" were not to be found in Act IX of 1871. They were added to make it clear that property may become vested in trust by means of a testamentary disposition.

In cases of trusts, suits falling under Art. 134, are generally suits by *cestui que trust* against the transferee from a trustee: in which the question of limitation has to be considered in favour of a third party as against the trustee or the *cestui que trust*.

2016. Under the amended Ss. 92 and 95 of the Transfer of Property Act, a redeeming co-mortgagor has got all the rights of a mortgagee. But in *Vasudeva Bhikaji v. Balaji Krishna*,²⁸ a co-mortgagor who had redeemed the whole mortgage, was held not a mortgagee. His transaction did not amount to a mortgage, and he had merely a charge on the property. Similar view was taken with reference to S. 95, Transfer of Property Act, in *Jai Kishan v. Budhanand*,²⁹

26. 1922 P.C. 123=48 I.A. 302=44 Mad. 831 (P.C.); also see *Wahid Ali v. Mahboob Ali*, (1935) 156 I.C. 92=1935 O.W.N. 815=1935 Oudh 425 (Art. 134, is not applicable to Muslim wakfs).

27. *Subbaiyya v. Md. Mustapha*, (1923) 50 I.A. 295=28 C.W.N. 493=40 C.L.J. 20=1923 P.C. 175 (P.C.).

28. (1902) 26 Bom. 500; Followed in *Purna Chandra Pal v. Bhattacharya*, (1918) 46 Cal. 111.

29. (1916) 38 All. 138; also see *Sinnaman v. Sivakami*, 1921 Mad. 326 (1)=41 M.L.J. 501.

where it was held that a transferee from a redeeming co-owner was only a charge holder, and Art. 144, not Art. 134 was applied. A simple mortgage was treated as equivalent to a charge for the purpose of Art. 132, in *Vasudeva Mudaly v. Srinivasa Pillay*,³⁰ but this does not signify that every charge is a mortgage for the purpose of Art. 134, Limitation Act.³¹ A redemption of a mortgage by a person who is alleged to have no real right to do so is also not a "transfer" by the mortgagee under Art. 134.³² **The purchaser of a mortgagee's interest at an auction-sale is a mortgagee for the purposes of Art. 134.** A person who purchases by private treaty from an auction-purchaser of the rights of the original mortgagee is entitled to rely upon Art. 134 of the Limitation Act, 1908, **if he purchases in the bona fide belief that he is purchasing an absolute title.**³³ A purchaser at a Court auction of property which is subject to a mortgage is only the assignee of the mortgagee, and a suit for redemption as against such person is not governed by Art. 134.³⁴ This article must be construed strictly, and can only be made to apply to a case in which there has been a purchase from a person who is actually the mortgagee of the property.³⁵ In order to make this article applicable, **there must be a subsisting mortgage at the time of the transfer** and the facts which amount to a plea of limitation must be specifically alleged.³⁶ A purchaser in execution of a mortgage decree does not become a mortgagee of the property within the meaning of this article.³⁷ Where a mortgagee, under a mortgage by conditional sale foreclosed, and after foreclosure sold the mortgaged property as unincumbered, and subsequently certain puisne mortgagees brought a suit for sale on their mortgage, it was held that Art. 134 had no application to the suit, as the transferee's position was that of the original mortgagor, and not that of mortgagees in the sense of Art. 134 aforesaid.³⁸ Art. 134 does not protect the transferee of a mortgagee by express transfer nor does it protect a person who has taken a transfer only of a mortgage, but has taken it without his knowledge mistakenly supposing that he was getting something better.³⁹

30. (1907) 30 Mad. 426 (P.C.).

31. *Munia Goundan v. Ramasami Chetty*, (1918) 41 Mad. 650.

32. *Shidlingaya v. Rajava*, (1930) 33 Bom.L.R. 603.

33. *Ghasi Ram v. Mt. Kishna*, (1915) 30 I.C. 564 (All.).

34. *Kannusami v. Muthusami*, (1917) 38 I.C. 194=5 L.W. 250.

35. *Mt. Chhoti Begam v. Ram Prasad*, (1917) 39 I.C. 582=20 O.C. 164.

36. *Ibid.*, 39 I.C. 582 (584) (Oudh).

37. *Ibid.*, 39 I.C. 582 (584)=20 O.C. 164.

38. *Munna Lal v. Murnan Lal*, (1914) 36 All. 327 (328).

39. *Skinner v. Naunihal Singh*, (1929) 117 I.C. 22=1929 P.C. 158=51 All. 367=19 A.L.J. 566 (P.C.).

2017. **ONUS PROBANDI.**—As pointed out by their Lordships of the Privy Council in *Radhanath Das v. Gisborne & Co.*,⁴⁰ Art. 134 is of a stringent kind, and as it cuts down the period which a *cestui que trust* or *mortgagor* may have as against the trustee or the mortgagee, it is for the plaintiff to show that he can take advantage of the provisions of this article.⁴¹ A purchaser by private treaty from an auction-purchaser of the rights of a mortgagee is entitled to the protection afforded by Art. 134, if he purchased in the *bona fide* belief that he was purchasing an absolute proprietary title.⁴² A purchaser in Court auction is an “assign for valuable consideration” within the meaning of S. 10, Limitation Act, although he knows he is purchasing trust properties in which the alienor has only a limited interest.⁴³ In cases under Art. 134, seeing that the plaintiff seeks to disturb a possession which has been with the defendant for a considerable period, *prima facie* he must be called upon to prove his case.⁴⁴ But, the transferee for valuable consideration has to show that he is not a transferee of a mere mortgage interest, but of an absolute title.⁴⁵ In the case of a trustee and mortgagee the purchaser may have knowledge that his vendor is only a trustee or mortgagee; but the vendee may purchase the absolute title, and as good faith is not required, he may claim advantage of Art. 134, Limitation Act. It is not for the purchaser who claims the benefit of Art. 134, to prove affirmatively that he was ignorant of the real state of his vendor’s title.⁴⁶

TITLE IV: STARTING POINT OF LIMITATION:

Ss. 2017-2020.

2017. The words originally appearing in col. 3 of Art. 134, *viz.*, “the date of transfer” have been changed by the Amending Act I of 1929, to the words “when the transfer becomes known to the plaintiff”. This amendment was made in order to give effect to the recommendation of the Civil Justice Committee in paragraph 16 of Chapter 41 of their Report. On this point the Select Committee said:

40. 14 M.I.A. 1=15 W.R. 24 (P.C.).

41. *Secti Kutti v. Kunhi Pathuma*, (1917) 40 Mad. 1040 (1057) (Article should be construed liberally in favour of the legal owner, and strictly against the transferee) and *Veerabhadra v. Veerappa*, (1912) 15 I.C. 609 (It is for defendant to prove that he is a transferee, under Art. 134, for valuable consideration, entitled to its benefit).

42. *Abdul Aziz v. Menni Lal*, 1930 All. 417=124 I.C. 408.

43. *Subbaiya Pandaram v. Muhammad Mustapha*, (1917) 40 I.C. 50 (Mad.): s.c. (1923) 46 Mad. 751 (757)=1923 P.C. 175=50 I.A. 295 (P.C.).

44. *Muthaya Shetti v. Kanthappa Shetti*, (1918) 45 I.C. 975=34 M.L.J. 431.

45. *Subbaiya v. Muhammad Mustapha*, (1917) 40 I.C. 50 (Mad.).

46. *Honoman Singh v. Umrao Kuar*, (1925) 95 I.C. 143 (Oudh).

"There can be no doubt that of the three possible starting points, namely, (i) the date of the transfer, (ii) the date of delivery of possession, and (iii) the date proposed by us, the last has the greatest weight of opinion behind it, including that of all the High Courts but one."

Under Art. 134, as it stood before the Amendment, by Act I of 1929, limitation ran only from the date

Law prior to amendment of 1929.

of the transfer by the trustee or mortgagee and not from the preliminary conveyance, bequest, or mortgage.⁴⁷ Art. 134 does not apply except where possession has been enjoyed by the transferee, as it refers to a suit to recover possession: and Art. 134 does not bar the suit unless the purchaser has had possession for the term of twelve years prescribed.⁴⁸ The view was held that Art. 134 afforded protection to a purchaser from a mortgagee in possession of what was represented to him and what he believed to be the absolute interest, and such a purchaser with possession could make the purchase valid as against the true owner, after twelve years' enjoyment.⁴⁹ In the Madras Full Bench case of *Seeti Kutti v. Kunhi Pathuma*,⁵⁰ took the words *date of transfer* in its literal and natural meaning, viz., the date on which the property was transferred by the transferor to the transferee irrespective of the date when possession was made over, as the Legislature had not fixed the date of taking possession under the transfer as the starting point. *Abdur Rahim and Sesha-giri Aiyar, JJ.*, held that Art. 134 would apply only if the transfer was completed with possession, and in their view, the date of transfer meant the date when the transferee had been given possession. *Srinivasa Aiyangar, J.*, was of opinion that unless the transferee had possession on the date of the transfer itself this article would not apply at all, and in other case, Art. 144 would apply.¹ The balance of judicial authority therefore appeared to be in favour of the view that Art. 134 of the Limitation Act cannot be pleaded in defence unless the person pleading it has had twelve years' possession of the property in suit. The **Rangoon High Court** agreed with the view of the majority in the Madras Full Bench which was also the view taken by the High Courts of **Bombay** and **Allahabad**.² The **Calcutta High Court** did not interpret Art. 134 to include within its scope a case where a simple mortgage was executed and the mortgagor continued in possession as before: and

47. *Bai Reva v. Vali Mahomed*, 1922 Bom. 211=46 Bom. 1009=70 I.C. 912=24 Bom. L. R. 720.

48. *Ram Chandra v. Sheikh Mohideen*, (1899) 23 Bom. 614.

49. *Husaini Khanan v. Husain Khan*, 29 All. 471 (479).

50. (1917) 40 Mad. 1040=33 M.L.J. 320 (F.B.).

1. *Sanga Sesha v. Periasami*, (1921) 44 Mad. 951 (Articles beginning from Art. 134 relate to suits for recovery of possession, Art. 144, being the general residuary article).

2. *Chetty Firm v. Muhammad Kassim*, (1925) 3 Rang. 367=1925 Rang. 377=90 I.C. 1011.

Art. 134 was held to refer to a case where the transfer by trustee is accompanied by delivery of possession to the trustee so as to render possible and necessary the institution of a suit for recovery of possession.³ In *Narain Das v. Haji Abdur Rahim*,⁴ there was a conflict of view: and their Lordships of the Privy Council had no occasion to set at rest the dispute. The **Allahabad High Court** held in *Naunihal Singh v. Skinner*,⁵ that Art. 134 relates to suits for possession, and that therefore the transferor or the mortgagee must have been in possession of the property at the time he made the transfer, also that the transfer must be one which places the transferee in possession. Lindsay, J., was of opinion that it was immaterial how and when the transferee obtained his possession. Their Lordships of the Privy Council seemed to agree with this view.⁶ The question did not arise for settlement whether date of transfer, meant the date of the transfer of title, or the date of transfer of possession in pursuance of the transfer. It was held immaterial, according to their Lordships' view, whether the mortgagee got possession before, under or after the mortgage, if in fact he purported to transfer the property to the transferee.⁷ The Amendment by Act I of 1929 was the result of the above conflict of views.

2018. The Amended Cl. (3) now provides that the starting point of limitation is not the date of transfer, of title, under the deed, nor of possession, where the transferee took possession of property subsequently, whether under the deed or independently thereof; but that limitation begins running against the plaintiff from the date "*when transfer becomes known to the plaintiff*".

We have seen in S. 2012, *ante*, that the question whether notice, actual or constructive, on the part of the transferee that the transferor held only mortgagee rights in the property transferred is according to one set of rulings, wholly irrelevant for the purpose of Art. 134 of the Limitation Act.⁸ According to others, absence of *bona fides* as distinguished from actual knowledge of the vendor's title does not prevent the purchaser from claiming the benefit of Art. 134.⁹ It is not incumbent on the purchaser to prove that he pur-

3. *Charu Chandra Pramanik v. Nalush Chandra Kundu*, (1922) 50 Cal. 49 (62); also see *Syed Achhe v. Syed Ahmed*, (1926) 97 I.C. 922.

4. (1920) 47 Cal. 866.

5. (1925) 47 All. 803; s.c. on appeal, (1929) 56 I.A. 192=58 M.L.J. 604 (P.C.).

6. See S. 2004: "Transfer with possession," *ante*.

7. (1929) 56 I.A. 192=58 M.L.J. 604 (P.C.).

8. *Rukku Shetti v. Ramchandrayya*, (1926) 49 Mad. 29=1926 Mad. 81=92 I.C. 342; also see *Subbayya v. Muhammad Mustapha*, 40 I.C. 50=32 M.L.J. 85; *Baikunthanath v. Ahmedullah*, 1931 Cal. 113=130 I.C. 275=58 Cal. 234; *Gomti v. Deota Din*, (1923) 77 I.C. 737=1924 Oudh 44; *Raghunandan v. Mahadeo*, 140 I.C. 182=1933 Oudh 38.

9. *Pandu v. Vithu*, (1894) 19 Bom. 140 (141).

chased in good faith, *i.e.*, without constructive notice of the restricted nature of the vendor's title.¹⁰

2019. In *Raghunandan Misra v. Mahadeo*,¹¹ the **Oudh Chief Court**, has held that in a suit governed by **Onus.** Art. 134, Limitation Act, as it stood before 1929, the *onus* is on the plaintiff to allege and prove that he knew of the transfer only within 12 years of the suit.

2020. The article, as it now stands, is applicable not only to permanent transfers, but to mortgages and leases also.¹² Where a sub-mortgage is made by a mortgagee as if complete owner, the possession by sub-mortgagee for over 12 years protects his title under Art. 134 of the Limitation Act: and the right of sub-mortgagee is to be redeemed.¹³ In *Bagas Umarji v. Nathabhai*,¹⁴ where the plaintiffs sued to redeem a mortgage, effected prior to 1854, and the representatives-in-title of the mortgagee, claiming to be absolutely entitled mortgaged the land with possession to A in 1894, and he sold his rights to defendant 5, it was held that in the suit brought more than 12 years after the alienation to A, it was obligatory on the plaintiffs to redeem defendant 5 before they could recover possession of the property.

"The alteration in the language of the Act was a legislative recognition of the soundness of the view that the article was intended to give protection to all transferees for value including mortgagees."

Similarly, in *Talukdari v. Akuji*,¹⁵ the transferees of the mortgagee were held to be necessary parties, as the mortgagor was endeavouring to get possession of all the suit properties, and the only result of the transferees establishing their claim under Art. 134, would be that the plaintiff in order to get possession of the lands mortgaged to them, would have to pay the amount due on the mortgages executed by the defendants. A purchaser of mortgagee rights has a right to hold the mortgaged property until his debt is paid.¹⁶

"When a mortgagee sells the mortgaged property as an ostensible owner and there is valuable consideration for the sale, the right of the purchaser becomes unassailable by the mortgagor by the lapse of twelve years from the date of the purchase. The mortgagee may be dishonest; the purchaser

10. *Kannusami v. Muthusami*, (1917) 38 I.C. 194 (Mad.).

11. (1932) 140 I.C. 182=9 O.W.N. 835=1933 Oudh 38 (2).

12. *Vide* S. 2003 (2), "Transferred". See *Bagas Umarji v. Nathabhai*, (1911) 36 Bom. 146=12 I.C. 737; *Rameshwar v. Sri Sri Jiu Thakar*, 43 Cal. 34 (43); *Baluswamy v. Venkataswamy*, 40 Mad. 745 (749) and *Ram Kanai v. Hari Narayan*, (1905) 2 C.L.J. 546.

13. *Thamburan v. Ammu*, (1900) 24 Mad. 471 (F.B.).

14. (1911) 36 Bom. 146=12 I.C. 737.

15. 1922 Bom. 350=24 Bom. L. R. 762.

16. *Maluji v. Fakir Chand*, (1896) 22 Bom. 225 (228).

may not make any enquiry as to his vendor's title; the mortgagor may be ignorant of the sale of his property by the mortgagee. These acts no longer affect the rights of the purchaser who has given valuable consideration."¹⁷

Where the defendant has purchased from the mortgagee the whole property and not merely the mortgagee rights, Art. 134 would apply and the purchaser would be entitled to retain the property if no suit was brought to set aside the sale within 12 years of the transfer.¹⁸

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
134-A.—	To set aside a transfer of immoveable property comprised in a Hindu, Muhamman or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	12 years.	When the transfer becomes known to plaintiff.

SYNOPSIS.

- 2021. Legislative changes.
- 2022. Scope of article.
- 2023. Starting point of limitation.

NOTES.

2021. LEGISLATIVE CHANGE.—This article and Art. 48-B, were added by the Indian Limitation Amendment Act I of 1929.

The first Select Committee said in their report as follows:—

"It provides for suits by persons interested in the endowment (who would be called beneficiaries if the endowment were a trust) to set aside alienations of the endowed property made by the manager. (Such suits are generally brought under S. 92, Civil Procedure Code, 1908). In these cases the plaintiff is not entitled to possession and cannot therefore claim to recover the property, but he may sue to have the transfer set aside and for any consequential relief which may be adopted to the circumstances of the case. In this class of cases we propose a new Art. 48-B, for moveable property and Art. 134-A for immoveable property."¹⁹

The object of this article is to give additional protection to the beneficiaries of an endowment in cases where the successors of the alienating manager may fail through neglect or collusion to bring a suit to impeach the alienation (under Art. 134-B). If,

17. *Keshav Raghunath v. Gafur Khan*, 1922 Bom. 234=46 Bom. 903 (908).

18. *Krishnaji Sonji Gawade v. Sadanand Mahadev Thakur*, (1924) 80 I.C. 763=1924 Bom. 417=26 Bom. L. R. 341.

19. Report of the Select Committee, (*Gazette of India*, 1927, Part V, p. 258).

however, the successors of the alienating manager have allowed the suit under Art. 134-B to become barred, a suit brought under Art. 134-A by the beneficiaries to set aside the alienation would be infructuous, by the operation of S. 28 (*read the Minute of Dissent in Gazette of India, 1928, Part V, pp. 89-90*).

2022. SCOPE OF ART. 134-A.—Prior to the Amending Act, I of 1929, suits by beneficiaries to set aside the alienation and for possession to be given to the head of the mutt for the time being, were maintainable, and it was immaterial whether the head of the mutt be a trustee or only a life-tenant. The suit being one for possession, the article applicable was Art. 134 or 144, according as the head of the mutt was a trustee, or only a life-tenant; and the right to sue for possession arose from the date of the alienation or when possession began to be adverse.²⁰ Art. 134, and not Art. 120, was applied to a suit for the dismissal of a trustee and for the recovery of trust property from the hands of a third party to whom the same had been improperly alienated.²¹ In *Periyan Chetti v. Govinda Rao*,²² where the dharmakarta of certain temple property instituted suits for the possession of various plots of land in a village which had been alienated by a permanent cowle dated 1st April, 1865, by the then dharmakarta in favour of dharmakartas of two other independent temples from whom the defendants had obtained transfers of their several plots, and erected houses and other permanent structures, and a plea of title by adverse possession was raised, it was held that

“if the limitation applicable to these suits were to be determined according to the provisions of the Act as they now stand, the decision would be easy enough as the case would be governed by Art. 134-B introduced by Act I of 1929”.

In this case Art. 144 was applied, as the decision must have been on the Act as stood in 1918, up to which date the defendants were allowed to be in possession.

2023. STARTING POINT OF LIMITATION.—The starting point, given in the third column of this article is in line with the starting points under Arts. 48-A and 134, as amended by Act I of 1929. Mitra, in his Limitation Act, observes that

“the Legislature in having a subjective starting point seems to have overlooked the difficulty of different beneficiaries getting knowledge at different dates. Even if a single beneficiary gets knowledge within three or twelve years of suit, he may have the sale or transfer set aside, even if a similar suit by other possible plaintiffs will be barred. Apparently the Legislature has acted on the view that this hardship on the alienee is not a serious one firstly because the alienee can protect himself ordinarily by action under S. 7 of the Charitable and Religious Trusts Act (XIV of 1920), and in any event, the provisions of Art. 134-B and Art. 134-C, read with S. 28, operate to perfect his title at the expiry of twelve years’ period provided

20. *Chidambaranatha Thambiran v. Nallasiva Mudaliar*, (1917) 41 Mad. 124=42 I.C. 366=33 M.L.J. 357 (Art. 120 held not applicable).

21. *Sajedur Raja Chowdhuri v. Gour Mohun Das*, (1897) 24 Cal. 418

22. 1932 Mad. 328 (333)=137 I.C. 487 (490)=62 M.L.J. 496.

thereunder, and the period of limitation under these articles are to be given effect to subject only to the effect of the other articles. In any event it is submitted that where by the operation of S. 28 and Arts. 134-B and 134-C, the manager cannot recover the properties, these articles do not enable the beneficiaries to achieve the object indirectly".²³

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
134-B.—	By the manager of a Hindu, Muhammadan, or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	12 years.	The death, resignation or removal of the transferor.
134-C.—	By the manager of a Hindu, Muhammadan, or Buddhist religious or charitable endowment to recover possession of moveable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	12 years.	The death, resignation or removal of the seller.

SYNOPSIS.

- 2024. Legislative change.
- 2025. Hindu Religious Institutions.
- 2026. Muhammadan Religious Endowments.
- 2027. Alienation of sacred property.
- 2028. Conflict of view prior to Act I of 1929:
—23 Mad. 271 (P.C.).
- 2029. —37 Cal. 885 (P.C.).
- 2030. —44 Mad. 831 (P.C.).
- 2031. —12 Pat. 251 (P.C.).
- 2032. No distinction between cases of permanent lease and sale.
- 2033. Starting point of limitation.

NOTES.

2024. LEGISLATIVE CHANGE.—These two special articles were introduced by the Amending Act I of 1929 to remove a conflict of view as to the applicability of Art. 134 or 144 in case of alienations of the properties of charitable and religious endowments.

23. Mitra's Limitation Act, Vol. II, p. 1594.

2025. HINDU RELIGIOUS INSTITUTIONS.—(1) Hindu Endowments may be divided into Public and Private. **The Religious Institutions** of a public character include the idol, shrine, temple or mutt. The **charitable endowments** embrace institutions like dharamsalas, serais, hospitals, colleges, sadavart and other objects of public utility or benevolence.²⁴ **An endowment** is defined as “the dedication of property by a grant, gift or devise to religious or charitable uses”. This dedication **may be partial**, when there is merely a charge or trust created; **or complete**, when the property is dedicated absolutely and no person has reserved any beneficial interest therein.²⁵

(2) Under the Hindu Law, an idol, as symbolical of certain religious purposes, is capable of being
Idol, a juristic person. **endowed or vested with property. A religious endowment**

“has for its object the establishment, maintenance or worship, of an idol, deity or any other object or purpose subservient to religion”.

Such endowments may be public, or private; created by means of an oral or written dedication of property for a specified use or benefit,²⁶ with or without a trust.²⁷ In the absence of anything appearing to the contrary, the beneficial interest in dedicated property vests in the religious or charitable object, while the trustee or manager is only entitled to its possession and management.²⁸ The image of a deity of the Hindu Pantheon is, as has been aptly called, a juristic entity, and the religious institutions known under different names, are regarded as possessing the same ‘juristic capacity’ and gifts are made to them *eo nomine*. When the gift is directly to an idol or temple, the seisin to complete the gift is necessarily effected by human agency.²⁹

(3) The manager is variously called, *sarbrahkar*, *sh’ebait* or *mahant*. Called by whatever name, he is
The position of the manager. **merely the custodian of the idol or institution.** “In almost every case, he is given the right to a part of the usufruct, the mode of enjoyment, and the amount of the usufruct, depending again on usage and custom. **In no case is the property conveyed to or vested in him nor is he a trustee** in the English sense of the term, although, in view of the obligations and duties vesting on him, he is answerable as a

24. Dr. Gour’s Hindu Code, p. 1167, S. 2362.

25. *Ibid.*, p. 1168.

26. *Per Sale, J.*, in *Bhuggobutty v. Gooroo*, 25 Cal. 112 (127); cf. *Bhupati v. Ramlal*, 37 Cal. 128 (F.B.).

27. Dr. Gour’s Hindu Code, S. 2388, p. 1179.

28. *Ibid.*, p. 1183.

29. Mitra’s Limitation Act, Vol. I, p. 209.

trustee in the general sense for maladministration.”³⁰ The possession and management of the property vested in the idol, is thus entrusted to some person as shebait or manager, with a view to his performing the required services of the idol, “and the preservation of its property at least to as great a degree as the manager of an infant heir”.³¹ The manager is entitled to sue on behalf of the endowment as its guardian or next friend, and he may be sued as such.³² Every such right of suit is vested in the *shebait*, not in the idol, and the plaintiff, if under a disability, is entitled to the benefit of S. 6 of the Limitation Act.³³

(4) As pointed out, by their Lordships of the Privy Council, in *Prosunno Kumari v. Golab Chand*,³⁴ the shebait is a continuing representation of an idol, and judgments against a former *shebait* in the absence of fraud or collusion, are binding on the succeeding shebait. The law, however, does not permit the creation of a perpetual succession of life estates.³⁵ And, it is clear that the endowed property and the office of the manager are both capable of being held adversely to the hereditary manager.³⁶

(5) Hindu temples and mutts are two distinct types of Hindu religious institutions. The origin and legal position of the mutts is explained in *Sammantha v. Sellappa*³⁷ and in *Giyanasambandha v. Kandasami*.³⁸ The Head of the institution for the time being has the property of the mutt vested in him, with large powers of dominion, for the

30. Mitra's Limitation Act, Vol. I, p. 209; citing *Vidyasaruthi v. Baluswami Aiyar*, 48 I.A. 302=44 Mad. 831 (P.C.); also see *Manohar Ganesh v. Lakhmiram Govindram*, 12 Bom. 247.

31. *Prosunno Kumari v. Golabchand*, 2 I.A. 145=14 Beng. L. R. 450 (P.C.); *Shibesworee v. Mothooranath*, 13 M.L.A. 270; *Jagadindranath v. Hemanta Kumari*, 31 I.A. 203=32 Cal. 129 (P.C.); *Pramatha Nath v. Pradyumna*, 52 I.A. 245=52 Cal. 809=49 M.L.J. 30 (P.C.).

32. *Jodhi Ram v. Basdeo*, 33 All. 735 (737) (F.B.); O.R. *Raghunathji v. Shah Lal*, 19 All. 330; also see *Juggodumbā v. Puddomoney*, 15 Beng. L. R. 318; *Babaji Rao v. Laxman Das*, 28 Bom. 215 (223); *Pramada v. Poorna Chandra*, 35 Cal. 691 (698) (Idol not joined as party interested).

33. *Jagadindranath v. Hemanta Kumari*, 31 I.A. 203=32 Cal. 129 (P.C.); also see *Sankaramurthi v. Chidambara*, 17 Mad. 143; cf. *Rama Reddy v. Rangadasan*, 49 Mad. 543 (Idol treated as a perpetual infant, so as to escape the bar of limitation).

34. 2 I.A. 145=14 Beng. L. R. 450 (P.C.).

35. *Juttendro Mohun Tagore v. Gancndro Mohun Tagore*, 1872 I.A. Supp. 47=9 B.L.R. 377.

36. *Gnanasambandha v. Vclu*, 27 I.A. 69=23 Mad. 271 (P.C.); O.R. *Trimbak Bawa v. Narayan Bawa*, 7 Bom. 188.

37. 2 Mad. 175.

38. 10 Mad. 375.

support of the superior and his disciples, and for the performance of religious and other charities in connection therewith according to usage.³⁹ The head of the mutt does not hold the properties constituting its endowments as a trustee or a life-tenant, but subject only to the rules of custom and usages in the particular mutt.⁴⁰ However, it has been observed that "the nature of the ownership is an ownership in trust for the mutt or the institution itself"⁴¹ and the functions of the dharmakarta or the shebait of an idol, and the head of a mutt are distinguishable.⁴² Notwithstanding the difference in their position, the case of temples and mutts is so far alike that the general properties forming the endowments thereof are not "conveyed to or vested in" the shebait, or manager or mahant; nor is he a trustee in the English sense of the term, although in view of the obligations and duties resting on him he is answerable as a trustee in the general sense for maladministration.⁴³

2026. MUHAMMADAN RELIGIOUS ENDOWMENTS.

—(1) A wakf is defined to mean the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman Law as religious, pious or charitable [Wakf Act, S. 2, cl. (1)]. When once it is declared that a property is *wakf*, the ownership is transferred to the Almighty, and the right of the *wakif* is extinguished. As instances of religious, pious or charitable objects, may be cited the celebration of the birth of Ali Murtaza, keeping of Tazias in the month of Muharram, the repairs of Imambaras, and the celebration of the death anniversaries of the settlor and of the members of his family.⁴⁴ The performance of ceremonies known as *kadam sharif*;⁴⁵ burning lamps in a mosque and reading the Koran in public places;⁴⁶ the performance of the annual fateha of the settlor and of the members of his family.⁴⁷ A wakf may be made either verbally or in writing, by an act *inter vivos* or by will. These are now regulated by the Mussalman Wakf Act, VI of 1913, which came

39. *Giyanasambandha v. Kandasami*, 10 Mad. 375.

40. *Kailasam v. Nataraja*, 33 Mad. 263 (F.B.); O.R. *Vidyapurna v. Vidyavidhi*, 27 Mad. 435 (*Per* Subramania Aiyar and Bhashyam Aiyangar, JJ.); s.c. on appeal 48 I.A. 1=44 Mad. 283=39 M.L.J. 98 (P.C.); also see *Greedharee Doss v. Nando Kissore*, 11 M.I.A. 405 (P.C.).

41. *Ram Prakash Das v. Anand Das*, 43 I.A. 73=43 Cal. 707 (P.C.).

42. *Srinivasachariar v. Evalappa Mudaliar*, 49 I.A. 237=45 Mad. 565 (581-582) (P.C.).

43. *Vidyavaruthi v. Balusami Aiyar*, 48 I.A. 302=44 Mad. 831=41 M.L.J. 346 (P.C.).

44. *Bibi Jan v. Kalle Husain*, (1909) 31 All. 136.

45. *Phul Chand v. Akbar Yar Khan*, (1896) 19 All. 211.

46. *Mazhur Husein v. Abdul*, (1911) 33 All. 400.

47. *Luchmiput Singh v. Amir Alum*, (1882) 9 Cal. 176; *Mutu Ramanadhan v. Vava Levvai*, (1917) 44 I.A. 21 (27)=40 Mad. 116 (122) (P.C.).

into force on 7th March, 1913. The manager of the wakf is the mutwalli, the governor, the superintendent, or curator. A khankha is a Mahomedan institution analogous to a mutt.⁴⁸

(2) Subject to the provisions of sub-S. (2), the founder of a wakf may appoint himself or his children

The position of a mutwalli.

and descendants, or any other person, even a female, or a non-Moslem, to be mutwalli of wakf property,⁴⁹ except that a female or a non-Moslem are not competent to perform religious duties, such as the duties of *sajjadanashin*, *muezzin* or *khatib*.⁵⁰ A successor may be appointed under provisions of the deed of wakf, or by the founder of the wakf or his executor, or the Court under certain circumstances,¹ but the office is not hereditary.² Neither the *sajjadanashin* nor the *mutwalli* has any right in the property belonging to the wakf. The property is not vested in him and he is not a trustee in the technical sense.³ A mutwalli has no power, without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof, unless he is expressly empowered by the deed of wakf to do so.⁴ He has only a limited power to grant leases.⁵ He may be removed from the office by the Court on proof of misfeasance or breach of trust.⁶ The wakf property in his custody is not liable to attachment and sale in execution of a personal decree against the mutwalli.⁷

2027. ALIENATION OF SACRED PROPERTY.—

(1) We have noticed, under S. 10 of the Limitation Act, that one of the main essentials of the applicability of S. 10 is that the suit must be against a person in whom "property has become *vested in trust*" for a specific purpose. The decision of their Lordships of the Privy Council in *Vidya Varuthi v. Balusami Aiyar*,^{7-a} makes it absolutely clear that property is not "*vested in trust*," unless the legal ownership is transferred to the trustee. This interpretation, which gave a clue to the meaning and applicability of Art. 134, "has been authoritatively recognised as correct by the recent amendment made by Act I of 1929 introducing the second paragraph of

48. Mulla's Muhammadan Law, S. 161, p. 138.

49. *Ibid.*, S. 164, p. 139.

50. *Ibid.*, p. 140.

1. *Ibid.*, p. 140.

2. *Ibid.*, p. 143.

3. *Vidya-varuthi v. Baluswami Aiyar*, 48 I.A. 302=44 Mad. 831 (P.C.) (*Per* Ameer Ali, J.).

4. Mulla's Muhammadan Law, S. 164, p. 143; also see *Nimai Chand v. Golam Hussein*, (1909) 37 Cal. 179.

5. *Ibid.*, S. 169, p. 143.

6. *Ibid.*, S. 172.

7. *Ibid.*, p. 144.

7-a. 1922 P.C. 123.

the section to change the law as declared in the above Privy Council decision.⁸ The **Calcutta High Court** has held in *Ganga Prosad v. Kuladananda*,⁹ that neither under the Hindu Law nor in the Muhammadan system is any property conveyed to a shebait, or a mutwalli in the case of a dedication. The **Rangoon High Court** takes the word *vest* to imply that the property becomes in law the property of the trustee.¹⁰ As to meaning of “*in trust*” and for a “specific purpose”, see Ss. 359 and 361 (Vol. I, pp. 373 and 374). Section 10 has, therefore, no application to the case of an endowment in which there is a dedication in favour of the deity.¹¹ The Legislature, however, has now added an explanation to S. 10 (*vide* Act I of 1929) to the following effect:—

“For the purpose of this section any property comprised in a Hindu, Mahomedan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of such property shall be deemed to be the trustee thereof.”

The result is, that suits of the kind contemplated by S. 10, *viz.*, suit to recover the property for the trust in question, will not be barred by any length of time, even with respect to the persons in management of the general endowments of Hindu, Mahomedan and Buddhist charitable and religious institutions.

2028. CONFLICT OF VIEW PRIOR TO AMENDING ACT I OF 1929.—It has been noticed above that according to authorities, the *shebait*s of a Hindu temple form a continuing representation of the idol.¹² But, as expounded by the Privy Council in *Juttendro Mohunt Tagore v. Ganendro Mohun Tagore*,¹³ Hindu Law does not permit the creation of a perpetual succession of life-estates, and endowed property is no exception to this rule; and the principle of this decision is applicable to an hereditary office and endowment as well as to other immoveable property.¹⁴

In *Gnanasambanda v. Velu Pandaram*,¹⁵ where the hereditary managers of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution, the first defendant's predecessor, it was held that there not being any custom of the foundation allowing such an assignment, it was beyond their legal

8. Mitra's Limitation Act, Vol. II, p. 810.

9. 1926 Cal. 568=94 I.C. 235=44 C.L.J. 339.

10. *Ma Thein May v. U Po Kim*, (1925) 3 Rang. 206=1925 Rang. 289=86 I.C. 297.

11. See S. 382, Vol. I, p. 397.

12. *Gnanasambandha v. Velu Pandaram*, 27 I.A. 69=23 Mad. 271 (P.C.).

13. L.R. I.A. Supp. 47=9 B.L.R. 377 (P.C.).

14. Mitra's Limitation Act, Vol. I, p. 215.

15. 27 I.A. 69=23 Mad. 271 (P.C.).

competence, conveying no title. The possession delivered to the purchaser was adverse to the vendors; and the twelve years' period having elapsed in the lifetime of the vendor, his son was barred by time from suing to recover the hereditary managership and possession of the lands of the endowment. There was no fresh cause of action commencing from the death of, or removal of, or abandonment of the office by, the immediate predecessor.¹⁶ Where endowed property belonging to an idol is taken possession of adversely, limitation to sue for possession of such property begins to run from the date of possession having been taken and each succeeding manager of the endowed property does not get a fresh start of limitation upon the ground of his not deriving title from any previous manager, as the succeeding *shebait*s form a continuing representation of the idol's property.¹⁷

2029. Similarly, the view was taken by their Lordships of the Privy Council in *Damodar Das v. Lakhan Das*,¹⁸ affirming the decision of the High Court at Calcutta, that the property vested not in the *mahant*, but in the legal entity the idol, the *mahant* being only its representative and manager and that the title of the transferee from the *mahant* became adverse to the right of the idol, and of the senior *chela* as representing that idol, and that the suit brought by the successor of that *chela* was barred by limitation. The **Oudh Chief Court** is also of opinion "that an idol installed in a particular *asthan* is a juridical person capable of holding property and getting it managed through its manager, *shebait*, or *mahant* would represent the idol, or the institution for the time being completely, and possession, if adverse, against the *mahant* for the time being must be deemed to be adverse against the idol or the institution unless the character of the alienation, under which possession was taken could be deemed to enure only for the lifetime of a particular manager, *shebait* or *mahant*."¹⁹

2030. The suit contemplated by Art. 134-B was formerly held to be governed by Art. 134, which originally gave twelve years' period for suits to recover immovable property *transferred* by the trustee for a valuable consideration, the commencing date being the date of transfer. In *Behari Lal v. Muhammad Muttaki*,²⁰ a Full Bench of Allahabad High Court, held that Art. 134 (or Art. 144) applied to

16. See Banerji, J., in *Nilmoney Singh v. Jagabandhu*, 23 Cal. 536 (Alienee's possession *ab initio* adverse).

17. *Abdul Rashid v. Janki Das*, 66 I.C. 941=9 O.L.J. 2; also see *Badri Narayan Singh v. Kailash Gir*, (1926) 93 I.C. 303=5 Pat. 341.

18. 37 I.A. 147=37 Cal. 885=7 I.C. 240=20 M.L.J. 624 (P.C.).

19. *Parkashdas v. Janki Ballabh*, (1925) 95 I.C. 27 (Oudh) (There is no fresh cause of action in favour of succeeding managers).

20. (1898) 20 All. 482.

a case of mortgage of trust property by sajjadanashin. The **Bombay High Court** applied this article in a number of cases to alienations of trust property by Guru of a *mutt*, or the manager of a temple, and a suit for restoring the property to the trust was barred if the alienee had been in possession by purchase for more than twelve years.²¹ In *Narain Das v. Haji Abdur Rahim*,²² the **Calcutta High Court** took the view that a transferee from the manager of an endowment was not affected by the doctrine of notice, and the date of transfer contemplated under Art. 134, was the date on which property or title was transferred and not the date on which transfer was followed by possession.

The decision of the Privy Council in *Vidyavaruthi v. Baluswami*²³ reversed a long course of decisions
 44 Mad. 831 (P.C.). in which Art. 134 was applied by the High Courts at Allahabad, Bombay and Calcutta. Their Lordships of the Privy Council, in applying Art. 144 of the Limitation Act, to the case of a grant of permanent lease, where the lessee was put in possession under the lease, observed that, according to the well-settled law of India, a *mahant* was incompetent to create any interest in respect of the *mutt* property to enure *beyond his life*. The lease, though void as a permanent lease in excess of the powers of the shebait, and a brach of trust, was however regarded as valid for the lifetime of the grantor, and possession under such a lease would begin to be adverse to the institution from the date of death, or removal from office of the manager. In this case the successor of the grantor was held to have created a new tenancy valid for the period of his life or his tenure of office, and so the possession was not held adverse during that period.

2031. In *Ram Charn Das v. Naurangi Lal*, where the *mahant*
 12 Pat. 251 (P.C.). of a *math* executed a permanent lease of certain properties which belonged to the *math*, and subsequently sold them, and his successor sued for recovery of possession of the properties, within twelve years of his death, it was held that the suit was within time under Art. 144 as the possession of the alienees became adverse, within the meaning of Art. 144, only on the death of the *mahant* who alienated the properties. The High Court had held that the Privy Council cases of *Damodar Das v. Lakhan Das*²⁴ and *Gnanasambandha v. Velu*

21. *Dattagiri v. Dattatraya*, (1902) 27 Bom. 363; *Narayan Manjya v. Ganpaya Govind*, (1902) 27 Bom. 373; *Sagun Balkrishna v. Kaji Hussien*, 27 Bom. 500.

22. (1920) 47 I.C. 866=24 C.W.N. 690=58 I.C. 705.

23. 48 I.A. 302=44 Mad. 831=1922 P.C. 123=41 M.L.J. 346 (P.C.); Folld. in *Abdur Rahim v. Narayan Das*, (1922) 50 Cal. 329 (P.C.) (Mortgage of wakf property by mutwalli—Art. 134 not applied); also see *Diwan Singh v. Shamdas*, (1922) 65 I.C. 722 (Lah.) (Art. 144 applied).

24. 37 Cal. 885 (P.C.).

*Pandaram*²⁵ had affirmed the view that in a suit to recover the property of an idol or a *math*, the starting point for the period of limitation was the date of the alienation and not the date on which the successor of the alienor assumed office. They also held that the authority of those cases was in no way affected by the later decision of the Board in *Vidya Varuthi's case*.²⁶ Their Lordships explained that in both the abovementioned cases, there was an assignment or disposition of the *math* and its properties, which was void and would in law pass no title, with the result that the possession of the assignee was perforce adverse from the moment of the attempted assignment.

"*Vidyavaruthi's case*, however, was the case of a disposition by the *mahant* of an item of property appertaining to the *math*, the disposition being in the form of a grant of a permanent lease. The disposition was one not made for necessity and so was beyond the powers of the *mahant* to grant."

The passage in Mr. Ameer Ali's judgment was explained to mean that

"a *mahant* has power (apart from any question of necessity) to create an interest in property appertaining to the *math*, which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of *mahant* of the *math*, with the result that adverse possession of the particular property will only commence when the *mahant* who had disposed of it ceases to be *mahant* by death or otherwise".

Their Lordships saw no reason why there should be any difference in principle between a disposition purporting to be a grant of a permanent lease, and an absolute grant of the property.

"In each case the operation of the purported grant is effective and endures only for the period during which the *mahant* had power to create an interest in the property of the *math*."

The same view is apparent in *Subbaiya Pandaram v. Muhammad Mustapha*,²⁷ referring to a case in *Iszwar Shyam Chan Jiu v. Ram Kanai Ghose*²⁸ and to *Vidya Varuthi's case*²⁹ where the statement by Lord Buckmaster amounts to this,

"that a *mahant* is at liberty to dispose of the property of a *math* during the period of his life and that a grant purporting to be for a longer period is good to the extent of the *mahant's* life interest".³⁰

25. 23 Mad. 271 (P.C.).

26. 1922 P.C. 123.

27. 1923 P.C. 175=50 I.A. 295 (P.C.).

28. 38 Cal. 526 (P.C.).

29. 1922 P.C. 123.

30. *Ram Charan v. Naurangilal*, 12 Pat. 251=142 I.C. 214=1933 P.C. 75 (P.C.).

2032. This pronouncement of their Lordships makes it unnecessary to examine at all closely the

No distinction between cases of permanent lease and sale.

conflict of view between a set of rulings where a distinction has been drawn between the cases of permanent lease and

a sale of the endowed property. In 44 Mad. 831, there was a permanent lease, and not a sale, and the **Calcutta High Court** considered its application to cases of sales doubtful, observing that a case is only an authority for the proposition it decides and not for any proposition that may seem to follow logically from it.³¹ In the case of *Subbaiya Pandaram v. Mahammad Mustapha*,^{31-a} their Lordships took occasion to observe upon the true scope of the rule laid down in *Vidya Varuthi's* case, and it was pointed out that there is little difference in principle between a transfer under an adverse execution and a sale by a trustee, and as it was not a transfer by the trustee himself for a valuable consideration, Art. 134 was disregarded, and Art. 144 held to govern the case. The **Oudh Chief Court** in *Parkashdas v. Janaki Ballabha*,³² while commenting upon *Vidya Varuthi's* case observed that

"this case dealt with an alienation under a permanent lease which under the law could enure only for the grantor's lifetime. It was, therefore, clearly a case in which adverse possession could not commence against a succeeding *mahant* before he had actually succeeded to his office as a *mahant*".

But, the Judges of the **Madras High Court** have not accepted the theory that there is a radical difference between a sale and a permanent lease in this respect. They held that the Privy Council decision in *Vidya Varuthi's* case is applicable to all alienations, and is not confined to leases.³³ In *Govinda Rao v. Chinnathambi*,³⁴ a suit by a trustee of a Hindu temple to set aside a permanent lease of trust property by a preceding trustee was held governed by Art. 144, and the period of limitation would run not from the date of the permanent lease but from the date of the accession of the plaintiff to his office.

In *Shadi v. Badur Rahman*,³⁵ where one of the *mujawars* of a *khankah*, effected a mortgage with possession of a site belonging to the religious institution and plaintiff, another *mujawar* of the institution, brought a suit for joint possession of the property,

31. *Raja Manindra Nath Roy v. Executors*, 1926 Cal. 913=30 C.W.N. 740.

31-a. 1923 P.C. 175.

32. 95 I.C. 27=1926 Oudh 444=3 O.W.N. 1 (Supp.).

33. *Arumugam Pillai v. Khazi Moideen*, 144 I.C. 541=1933 Mad. 533=64 M.L.J. 706; also see *Lakshmi Narayana v. Rajamma*, 95 I.C. 1002=1925 Mad. 796=21 L.W. 256; also see S. 2003, ante.

34. (1925) 91 I.C. 377=49 M.L.J. 640=1926 Mad. 193=1925 M.W. N. 871; also see *Mahomed v. Ganapathi*, 13 Mad. 277 (280) and *Muthusamier v. Sree Sree Methanithi Swamiyar*, (1913) 38 Mad. 356 (Lease in perpetuity of mutt properties in excess of powers of manager).

35. 1 Lah. 66 (68).

alleging that the site was a part of the trust property, and that the trustee had no authority to alienate it, it was held that a suit brought by the successor of a trustee against the alienee for value to recover the property improperly alienated, for and on behalf of the trust, that is to say, for restoring it to the trust, is governed by Art. 134, and the *terminus a quo* is not the date when the successor succeeds to the office, but the date of alienation. In the Full Bench case of *Hargiandev v. Baldeo Das*,³⁶ the **Punjab Chief Court** had applied Art. 134 to a suit by successor of a mahant in charge of dharmshala property to recover shrine property *sold* for value. Clark, C.J., considered the result of this decision not satisfactory, and highly prejudicial to charitable endowments.

"It will often happen that a suit to contest an alienation will be barred by limitation before it can be brought. Practically a mahant's successor is the only person likely to challenge his alienations, and all alienations made by mahant will become unchallengeable if the mahant survives the alienation for twelve years."

This view was dissented from, by the **Judicial Commissioner, North-West Frontier Province** (Pipon, J.C.), in the case of *Ghulam Haider v. Manager, Committee Samadh Baba Phula Singh*,³⁷ relying on the Privy Council pronouncement in *Vidya Varuthi's* case that the word "trustee" in Art. 134, as in S. 10, Limitation Act, is used in its restricted and technical sense. This is also the view held by the **Patna High Court** in *Badri Narayan Singh v. Kailash Gir*,³⁸ where it was held that in a suit to set aside an alienation made by a predeceased mahant, the successor mahant cannot get a fresh start for the purpose of limitation from the date of his succession as mahant. The possession of the transferee becomes adverse from date of transfer. The cause of action in any event accrues on the death of the vendor and not on the date of the succession of the successor mahant. In the **Privy Council** case of *Lal Chand v. Ramrup*,³⁹ Art. 144 was applied giving the date of alienor's death as the starting point of limitation.

2033. STARTING POINT OF LIMITATION.—The Legislature now makes the time run not from the date of transfer, nor from the date of plaintiff's succession to office, but from the death, resignation or removal of the transferor.⁴⁰

Articles 134-B and 134-C, will govern suits instituted after 1st January, 1929, though the transfers in question are of an earlier date; but, this Act cannot revive right to sue barred prior to 1st January, 1929, by the combined effect of S. 28 with Arts. 134 or 144.

36. 127 P.R. 1908=23 P.W.R. 1908 (F.B.).

37. (1923) 73 I.C. 711 (Peshawar) (*Per* Pipon, J.C.).

38. (1926) 5 Pat. 341=93 I.C. 303=1926 Pat. 239=7 P.L.T. 453.

39. 5 Pat. 312=7 P.L.T. 163=93 I.C. 280=1926 P.C. 9.

40. See Second Report of the Select Committee (*Gazette of India*, 1928, Part V, p. 87).

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
135.	Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged.	12 years.	When the mortgagor's right to possession determines.

SYNOPSIS.

Title I: Previous History.

2034. Corresponding provisions.

Title II: Scope and application.

2035. Suit by a mortgagee.

2036. Suit against mortgagor or stranger.

2037. Application of Art. 135.

2038. Article inapplicable to simple mortgages.

Title III: Starting point of limitation.

2039. Law under previous Acts.

2040. Law under present Act.

2041. Illustrative cases.

NOTES.

2034. CORRESPONDING PROVISIONS.—(1) Under Act XIV of 1859. Act XIV of 1859, there was no corresponding provision to suits of this nature, which were accordingly governed by the general residuary clause in S. 1, cl. (12) of that Act. The period of limitation would begin to run from the time when the mortgagee was entitled to possession and the possession of the defendant became adverse.⁴¹ A mortgage in English form between Hindus of lands in the mofussil, was always treated by the Courts as a mortgage by conditional sale. In *Khelat Chunder Ghose v. Tara Charan*,⁴² it was held that

“the mortgagee was entitled to possession before foreclosure immediately default was made, and he would hold possession subject to his own right to foreclose and the mortgagor's right to redeem. His right to sue for possession did not depend upon his obtaining a decree for foreclosure. The defendant might have been sued for possession immediately default was made”.

A mortgagee by conditional sale had a right of entry immediately after default, and the Regulations did not debar him from the stipulated possession. Limitation, accordingly, was held to run from the date of such default, and no new cause of action arose upon foreclosure.⁴³ In *Mankee Koer v. Sheikh Munnoo*,⁴⁴ it was

41. *Huro Chunder v. Gundadhur*, (1866) 6 W.R. 183.

42. 6 W.R. 269 (270); s.c. on appeal 14 M.I.A. 144=8 B.L.R. 104.

43. *Dino Nath v. Nursingh Pershad*, (1874) 14 B.L.R. 87=22 W.R. 90; also see *Anundomoyee v. Dhirendro*, (1871) 14 M.I.A. 101=16 W.R. 19 (P.C.); *Brojonath v. Khelat Chandra*, (1871) 14 M.I.A. 144 [On appeal from (1866) 6 W.R. 269].

decided that where the mortgagor was shown to have paid interest after the date of default, it was held that his possession being thus shown to have been permissive, might be sued more than twelve years after the date of default. Thus,

“under Act XIV of 1859, a mortgagee was ordinarily bound to bring his suit within twelve years from the date of default, and was barred unless it could be *shown* (or might properly be inferred) that the mortgagor or the person in possession held by permission of the mortgagee after default.”⁴⁵

(2) Under Act IX of 1871, time would begin to run “when the mortgagee is first entitled to possession”.

Act IX of 1871.

Accordingly, in a suit for foreclosure, limitation ran against the mortgagee, not from the accruing of any cause of action, but from the time when he was first entitled to possession. And, in the case of *Lal Mohun v. Prosunno Chunder*,⁴⁶ it was decided that whether the possession of the mortgagor was permissive or adverse, was immaterial, and that the mortgagee having failed to bring his suit within twelve years from the date of default lost his remedy.

(3) Under Act XV of 1877, a new clause 147 was inserted,

Act XV of 1877.

by which a suit by a mortgagee for foreclosure or sale, could be brought within sixty years from the time when the money secured by the mortgage became due. But a suit for foreclosure could not be brought in the mofussil, being prohibited by the nature of the agreement, and by the terms of Regulation XVII of 1806. Under the contract a mortgagee was originally the absolute owner from the date of default. But by Regulation XVII of 1806 it was a condition precedent to his becoming an absolute owner that foreclosure proceedings should be taken in District Judge's office.⁴⁷ As Art. 147 of the Limitation Act could not apply to any mortgage by conditional sale executed between Hindus and in respect of properties situated in the mofussil, the law of limitation for a conditional sale was that given in cl. 135, corresponding to cl. 132 of Act IX of 1871, namely, twelve years from the time when the mortgagor's right to possession determines.

(4) Art. 135 of the present Act is

Act IX of 1908.

the same as Art. 135, Sch. II, Act XV of 1877.

TITLE II: SCOPE AND APPLICATION.

2035. SUIT BY A MORTGAGEE.—(1) We have noticed above that under the Limitation Act, 1859 (as under the English Real Property Limitation Act, 1833), there was no special provision

44. 14 B.L.R. 315.

45. *Shurnomoyee Dasi v. Srinath Das*, (1885) 12 Cal. 614 (619).

46. (1875) 24 W.R. 433.

47. *Shurnomoyee Dasi v. Srinath Das*, (1885) 12 Cal. 614 (620).

for suits by mortgagees; but as regards suits to recover the mortgaged property they clearly came within the terms of S. 1, cl. (12), which allowed twelve years from the date of cause of action for suits to recover immoveable property or any interest therein not otherwise provided for.⁴⁸ Even suits by a mortgagee to enforce his rights by sale were held to come within this section.⁴⁹

(2) Under the Limitation Act of 1871, a mortgagee who had taken foreclosure proceedings, might bring a suit for possession at any time within 12 years from the expiration of the year of grace. But, it could not be said that after taking such proceedings he was only entitled to the time allowed by Art. 135 of the Limitation Act *as mortgagee*. The very fact of his taking foreclosure proceedings changed his interest as mortgagee to that of *absolute owner*, and a suit brought within 12 years from the date of such change of character was held no longer bound by that article.⁵⁰ By Art. 145 he would be entitled to sue within 12 years after possession became adverse against him, *i.e.*, directly the foreclosure proceedings became complete. Before the year of grace expired, he was entitled to take possession *as mortgagee*, the possession of the mortgagor was not adverse to him.¹ The right to possession was complete when the mortgagor's right of redemption was gone at the expiration of year of grace.² The effect of a mortgagee purchasing the mortgaged property with the consent of the mortgagor, under the power of sale contained in the mortgage-deed, is to vest the ownership of, and the beneficial right to, the property for the first time in himself, who had been previously a mere incumbrancer.³ There can be no two things more distinct or opposite than possession as mortgagee, and possession as owner of the estate.⁴

2036. SUIT AGAINST MORTGAGOR OR STRANGER.—In the Madras Full Bench case of *Vyapuri v. Sonamma*,⁵ Subrahmanya Aiyar, J., pointed out that under Act XIV of 1859, Cl. (12) of S. 1, applied whether the suit was against the mortgagor, or persons claiming under him or against a trespasser in posses-

48. *Vyapuri v. Sonamma*, 39 Mad. 811 (848) (F.B.).

49. *Chetti Goundan v. Sundaram Pillai*, (1884) 2 M.H.C.R. 51; also see *Surwan Hossein v. Shahzadah Golam Mahomed*, (1868) 9 W.R. 170 and *Juneshwar Das v. Mahabeer Singh*, (1876) 1 Cal. 163=3 I.A. 1 (P.C.).

50. *Ghinaram Dobey v. Ram Monaruth*, (1880) 7 C.L.R. 580=6 Cal. 566 note.

1. *Ibid.*

2. *Forbes v. Ameerunnissa Begum*, 10 M.I.A. 350 (351).

3. *Purmanand Das v. Jamna Bai*, (1885) 10 Bom. 49 (56).

4. *Ibid.*

5. (1914) 38 Mad. 811 (829).

sion. When the Act of 1859 was repealed, and the Act of 1871 passed, special articles were enacted, *viz.*, Art. 132 in respect of suits to enforce payment of money charged on land, and Art. 149 in respect of suits in the Chartered High Courts to recover possession of the mortgaged property from the mortgagor, and Article 135 for similar suits in mofussil Courts; but the words "*from the mortgagor*" are omitted. It was held in *Shurnamoyee v. Srinath Das*,⁶ that after foreclosure proceedings under the Regulation XVII of 1806 were complete, the mortgagee became absolute owner by virtue of the contract and he sued for possession as owner of the property. In cases of conditional sale governed by Cl. (135), twelve years were given from the time when the mortgagor's right to possession determined, *viz.*, on the date of default. And it made no difference what the possession was. **"The suit was barred against the mortgagor himself or anybody else."** Their Lordships of the Privy Council, on appeal, held in *Shrinath Das v. Khottur Mohun Singh*,⁷ that a mortgage by conditional sale, before the operation of the Transfer of Property Act, 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee, whose suit for possession, unless brought within 12 years from the date "when the mortgagor's right to possession determined" was barred by Art. 135, Limitation Act. This was so held in a **suit by the transferee of mortgagee against the mortgagors and the purchasers** for possession of the mortgaged land.

The Oudh Judicial Commissioner's Court has held in *Gokul Prasad v. Sukru*,⁸ that a suit by a subsequent mortgagee to recover possession of the mortgaged property from a person deriving title from the mortgagor under a prior mortgage is governed by Art. 135 of Sch. I, to the Limitation Act. It repudiated the contention that Art. 135 only applies where the suit is filed against the mortgagor and not against a person deriving title from the mortgagor under a prior mortgage.

6. (1885) 12 Cal. 614 (620); *Reld. on Lal Mohun v. Prosunno Chunder* 24 W.R. 433 and *Modun Mohun v. Ashad Ally*, 10 Cal. 68=13 C.L.R. 53.

7. 16 Cal. 693=16 I.A. 85 (P.C.); also see *Anundomoyee v. Chunder Mookerjee*, (1871) 14 M.I.A. 101 (P.C.) (Act XIV of 1859, S. 1, cl. 12, application of—Sale in execution of decree—Suit against auction-purchaser for possession, by parties claiming under decree for sale in foreclosure suit).

8. (1924) 81 I.C. 581=11 O.L.J. 269; cf. *Channan v. Mela Ram*, 117 P.R. 1919=50 I.C. 762 (In a suit by mortgagee against auction-purchaser of mortgaged property in execution of decree, Art. 142 was applied by the Punjab Chief Court, not following the view that Art. 135 seems to be applicable to a suit against the mortgagor or *any one else*).

"The mortgage in favour of the plaintiff's predecessor gave the mortgagee a right to immediate possession of the property. The property being in possession of the person deriving title from the mortgagor it was the duty of the latter to recover possession from the person in possession by paying off the earlier mortgage and to deliver possession to the plaintiff's predecessor in accordance with the terms of the covenant entered into between them. [S. 68 (c).] The fact that the property was in the possession of another does not, therefore, render Art. 135 in any way inapplicable."

2037. APPLICATION OF ART. 135.—The nature of the suit falling under this article is one for possession by the mortgagee as mortgagee.⁹ It applies to usufructuary mortgages, also to English mortgages and to mortgages by conditional sale, if the mortgagee is entitled to take possession before foreclosure.¹⁰ **Where a mortgagee has obtained possession** under an usufructuary mortgage after the determination of the mortgagor's right to possession, **but has subsequently lost possession**, a suit by the mortgagee to recover possession of the mortgaged property from the mortgagor **is not governed by Art. 135** of the Act. In such a case Art. 142, or 144, as the case may be, would apply.¹¹ A mortgagee who was put into possession from the first, and is entitled under the deed to hold possession, is in no worse position than a mortgagee who is only entitled to possession on default of payment by the mortgagor of the mortgage-debt.¹² It was held in the case of *Khelut Chunder v. Tara Churn*,¹³ that a mortgagee under a deed of conditional sale, who is entitled to possession on default of payment of the mortgage-debt, can maintain a **suit for possession without asking for foreclosure**; and that the right which he has to possession is not affected by the right which he has to foreclose. He has the double right. Art. 135 is inapplicable where the mortgagee does not become entitled to possession after foreclosure proceedings under the Regulation, the same having been found to be invalid, and where the mortgage-deed does not contain any provision as to the mortgagee taking possession.¹⁴ A suit by mortgagee for possession of land mortgaged to him by a registered-deed which provided that the mortgagee was to hold possession of and cultivate the land paying the Government revenue, and which also contained a recital that possession *had in fact been given* though it

9. *Burmamoyee v. Dinobundhoo*, (1880) 6 Cal. 564; *Ratandas v. Guran*, (1918) 45 I.C. 563=79 P.R. 1918.

10. *Shiblal v. Gunga*, (1884) 6 All. 551 (559).

11. *Anjuman Islamia v. Hisamal*, 22 I.C. 65=9 N.L.R. 179; Reld. on *Aman Ali v. Azgar Ali*, 27 Cal. 185.

12. *Aman Ali v. Azgar Ali*, 27 Cal. 185.

13. (1866) 6 W.R. 269; see same case on appeal *Brojonath v. Khelut Chunder*, 14 M.I.A. 144=8 B.L.R. 104; cf. *Hub Ali v. Wazirulnissa*, (1906) 33 I.A. 107=28 All. 496 (P.C.) (*Held*, that a mortgagee by conditional sale cannot assert a right to get possession even after default by the mortgagor without taking legal proceeding to foreclose).

14. *Nilcomal Pramanick v. Kamini Koomar*, (1891) 20 Cal. 269.

was never in fact given, was held to be governed by Art. 135, and not by Art. 113, because it was not a suit to compel the owner of land to convey a right of possession, as that had already been done, but to obtain possession of the land the right to which had previously been conveyed by the registered deed.¹⁵ A suit by mortgagee claiming possession under a stipulation in the mortgage-deed, that on default of payment of mortgage money by a certain date the mortgagee shall get possession, was not one for specific performance of the agreement (Art. 113), but came within the purview of Art. 135 of the Limitation Act, as a suit by a mortgagee for possession of immoveable property mortgaged.¹⁶

2038. A Full Bench of the Madras High Court has held in *Vyapuri v. Sonamma*,¹⁷ that the possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is not adverse to the simple mortgagee. The legislature in 1871, specially enacted Art. 132, for all suits by simple mortgagee to enforce the payment of money charged by sale of the property mortgaged instead of leaving the same suits to be governed by that article, and others by Art. 145.¹⁸ In *Vasudeva Mudaliar v. Srinivasa Pillai*,¹⁹ suits by a simple mortgagee instituted against the mortgagors or persons claiming under them to enforce the charge by sale of the mortgaged property, were held governed by Art. 132 of the Limitation Act. Adverse possession against the mortgagor is not *per se* adverse also against the mortgagee in the case of a simple mortgage.²⁰ Adverse possession affects the interest which the person, who was entitled to immediate possession, had at that time.²¹

15. *Ramchand v. Gyan Chand*, 134 P.R. 1883; also see *Ramchand v. Behari*, (1910) 7 I.C. 646 (All.) (Held, that where a mortgage-deed contained a recital that the mortgagors had received the mortgage-money and put the mortgagee in possession of the property mortgaged, but possession had not been given, and the mortgagee sued for possession, Art. 135 and not Art. 113, applied).

16. *Kanhayalal v. Mohun*, 96 P.R. 1890.

17. (1914) 39 Mad. 811=29 M.L.J. 645 (F.B.); Followed *Parthasarathy v. Lakshmana*, (1912) 35 Mad. 231=21 M.L.J. 467 (Possession adverse to the mortgagor is not adverse to and does not affect the right of a simple mortgagee not entitled to possession when the adverse possession commenced, when such mortgage was granted prior to the commencement of such possession); also see *Sundaram Iyer v. Thiyagaraja Pillai*, 1923 Mad. 160 (2)=50 M.L.J. 183=99 I.C. 831 (Adverse possession against the mortgagor, would not operate to prejudice the mortgagee's right to recover the land).

18. *Ibid.*, (1914) 39 Mad. 811.

19. (1907) 30 Mad. 426 (433) (P.C.).

20. *Priya Sakhi Debi v. Manbodh Bibi*, (1916) 44 Cal. 425.

21. *Ibid.*, 44 Cal. 425 (433)—Per Sanderson, C.J.

"The simple mortgagee is not competent to institute a suit for possession of the property, because admittedly he is not entitled to possession either under the statute or under the contract. Section 28 of the Limitation Act clearly contemplates that the person whose right is extinguished by lapse of time is a person entitled to institute a suit for possession of the property."²²

The **Madras Full Bench** decision has been followed by the **Bombay High Court** in *Raghunath Vithal v. Madhow Rovlal*,²³ where it was held that

on partition the sons took a vested remainder in the land which they were competent to dispose of even before they were entitled to possession, and that the mortgage executed by the son being a simple mortgage, the mortgagee was not affected by possession being taken from the father. The **Allahabad High Court**

takes the same view. A simple mortgage being not merely a security for a debt but a transfer of an interest in the property mortgaged, a trespasser who ousts the mortgagor and holds the property adversely to him may by prescription become the owner of the limited estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee and cannot in any way affect the right of the mortgagee to bring the property to sale.²⁴ A suit for sale on a mortgage can always be brought under Art. 132, against all persons in possession, whose possession is subsequent to the date of the mortgage, provided that a suit is brought within

12 years from the time at which the money became due.²⁵ The **Patna High Court** is of the same opinion. When *after* a simple mortgage has been granted, a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against the mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land.²⁶ A person who acquires title by adverse possession against a mortgagor after the execution of the mortgage is bound by the mortgage and a decree obtained on the mortgage would give the mortgagee a valid title as against such person.²⁷ Thus, it may now be taken as well settled that in the case of a simple mortgagee, who has no immediate right of possession, Art. 135 could have no application, and a simple mortgagee's right

22. *Priya Sakhi Debi v. Manbodh Bibi*, 44 Cal. 425—Per Mookerjee, J.

23. (1923) 76 I.C. 217=1923 Bom. 415=25 Bom.L.R. 456.

24. *Nandan Singh v. Jhumman*, (1912) 34 All. 640 (645).

25. *Raj Nath v. Narain Das*, (1914) 36 All. 567 (572) (F.B.).

26. *Kunj Lall v. Kanhai Mahto*, 68 I.C. 641=1923 Pat. 305.

27. *Mohan Bhakat v. Jagdayan Pande*, (1930) 121 I.C. 471=1929 Pat. 577.

under Art. 132, to bring the mortgaged property to sale cannot be affected prejudicially by an adverse possession against the mortgagor commencing *after* the hypothecation, which adverse possession can extinguish only the mortgagor's equity of redemption. However, if adverse possession had commenced to operate against the mortgagor *before* the creation of the mortgage itself, such adverse possession would be taken to be against the property, that is, against both the interests of the mortgagor and mortgagee.²⁸ The Privy Council decision in *Karan Singh v. Bakar Ali Khan*,²⁹ supports the above principle. This was a suit by a mortgagee on a simple mortgage against the defendant, brought within twelve years from the time when the possession of the defendant, or of some person through whom he claimed, became adverse to the plaintiff. But, the defendant wanted to tack on the previous possession of the Collector, who presumably took possession for the purpose of protecting the Government revenue, and whose duty was to pay the surplus collection to the real owner. It was held by their Lordships that the plaintiff's bonds were *prior* to the decision of arbitration under which Collector had paid over the money to one of the rival claimants, and

"although the Collector gave up possession of the estate and paid over the surplus proceeds to Karan Singh; that did not show that he was holding for Karan Singh. The defendant does not claim through the Collector, and he cannot add to his possession from the year 1863, the possession of the Collector from 1861 to 1863".³⁰

A hypothecation right is liable to be affected not only by lapse of time as between creditor and debtor, but also by possession of the hypothecated property for the requisite period by a third person on a claim inconsistent with the rights of both the creditor and debtor.³¹ In *Nallamuttu Pillai v. Betha Naicken*,^{31-a} the adverse possession had begun to run against the mortgagor *before* the mortgage was granted, and such possession was treated as adverse to both mortgagor and mortgagee. This was distinguished in *Parthasarathy v. Lakshmana*,³² where it was pointed out, with reference to the **Privy Council** decision in *Karan Singh v. Bakar Ali Khan*,³³ that it was found necessary to consider the question of tacking, for "had the Collector's possession which began before the mortgage been adverse to the mortgagor's and had the defendant claimed through the Collector then, the mortgagee's suit would have been barred as in *Nallamuthu Pillai v. Betha Naicken*".

28. *Nallamuthu Pillai v. Betha Naicken*, (1899) 23 Mad. 37; *Ram Lall v. Masum Ali*, (1902) 25 All. 35; *Kunj Lal v. Kanhai Mahta*, (1923) 68 I.C. 641=1923 Pat. 305.

29. (1882) 9 I.A. 99=5 All. 1 (P.C.).

30. *Ibid.*, 5 All. 1 (7) (P.C.).

31. *Nallamuthu Pillai v. Betha Naicken*, (1899) 23 Mad. 37.

31-a. *Ibid.*

32. (1910) 35 Mad. 231 (235).

33. (1883) 5 All. 1 (P.C.).

TITLE III: STARTING POINT OF LIMITATION.

2039. **LAW UNDER PREVIOUS ACTS.**—(1) We have noticed already in Ss. 2034 and 2035, *ante*, that under Act XIV of 1859, the period of limitation was computed from the time when the mortgagee's "cause of action" accrued, *viz.*, from the date when the defendant's possession became adverse to the plaintiff mortgagee.³⁴ In the case of a mortgage in an English form, providing for a right of entry to the mortgagee on default of payment of mortgage-money, the cause of action would accrue as soon as the default was made.³⁵ Thereafter, if the defendant had been in possession as absolute owner, without notice of mortgage, for more than twelve years, a suit by the mortgagee would be barred: but not so, if the defendant claiming under the mortgagor, only advanced a title to redeem the mortgage.³⁶ There was no time limit for foreclosure proceedings against the mortgagor under Regulation XVII of 1806,³⁷ and, there was no bar for taking such proceedings against persons claiming only the equity of redemption under the mortgage.³⁸

(2) Under the Acts IX of 1871, and XV of 1877, there was no question of adverse possession of defendant against the plaintiff mortgagee bringing a suit to obtain possession as a mortgagee.³⁹ The commencement of limitation under Act IX of 1871, was from the time "*when the mortgagee was first entitled to possession*". Under Act XV of 1877, the starting point was the same as under the present Act, "*when the mortgagor's right to possession determines*". This alteration in language was upon the basis of Art. 135 being limited to suits for possession by mortgagee as mortgagee, and not as absolute owner after completion of foreclosure proceedings.⁴⁰ But, it has been observed that this change in phraseology in the Act of 1877 has not made any real difference in the starting point.⁴¹ And in *Ghanaya v. Pandit Chhajju Ram*,⁴² the Punjab Chief Court followed the Privy Council ruling in *Narain Singh v.*

34. *Huro Chunder v. Gunda Dhar*, (1866) 6 W.R. 183; *Khelat Chunder v. Tara Charan*, 6 W.R. 269; s.c., on appeal, 14 M.I.A. 144 (P.C.).

35. *Khelat Chunder v. Tara Charan*, *supra*.

36. *Amundomoyee Dasi v. Dhonendra*, (1871) 14 M.I.A. 101 (Purchaser at auction-sale claiming absolute title).

37. *Prannath v. Ram Rutton*, (1859) 7 M.I.A. 323=4 W.R. 7 (P.C.); *Mt. Munkee Koer v. Sheikh Munnoo*, (1874) 22 W.R. 543.

38. *Dinonath v. Nur Singh*, (1874) 22 W.R. 90 (94); also see *Buldeev v. Golab*, (1867) Agra 102 (F.B.).

39. *Shurnomoyi v. Srinath Das*, (1885) 12 Cal. 614, s.c. on appeal (1889) 16 I.A. 85=16 Cal. 693 (P.C.).

40. *Ghinaram Dobey v. Ram Monaruth*, (1880) 7 C.L.R. 580=6 Cal. 566 note.

41. *Bindha v. Mul Raj*, (1918) 48 I.C. 916 (917).

42. 38 P.R. 1894.

Shimbhoo Singh,⁴³ and laid down that the limitation against a puisne mortgagee does not begin to run until the redemption of the first mortgage and that he is entitled to bring his suit for possession within twelve years from the date of redemption.

Under present Act.

2040. Under the present Art. 135,

"time begins to run from the day when the mortgagor's right to possession determines, and this clearly means when his right to possession, according to the terms of the mortgage-deed, determines".⁴⁴ "The cause of action in a suit contemplated by the article is the failure of the mortgagee to get possession when he was first entitled to get possession. The article cannot apply when the mortgagee has got possession after the mortgagor's right to possession determined".⁴⁵

In a case of a mortgage by way of conditional sale where, under the terms of the mortgage-deed, the mortgagee is entitled to possession of the mortgaged property without first taking out foreclosure proceedings, the right to possession of the mortgagor determines on the date of default; but where under the deed, the mortgagee as such has no right to possession, the right to possession of the mortgagor does not determine and his possession does not become adverse until the foreclosure proceedings have been perfected and the year of grace has expired.⁴⁶

In a usufructuary mortgage, where the mortgagee is entitled to possession immediately, but the mortgagor is in possession at the time of mortgage, and has not delivered possession to the mortgagee, time begins to run under Art. 135 on the very day of the execution of the mortgage.⁴⁷ Where the limitation has begun to run against the mortgagee, the mere fact that possession of the mortgaged property was subsequently taken by the prior mortgagee does not stop it from running.⁴⁸ It must be noticed that the words used in the 3rd column are "when the mortgagor's right to possession determines" and not "when the mortgagor's possession determines". Nor would the time cease running owing to the subsequent

43. 1 All. 325=4 I.A. 15 (P.C.).

44. *Anjuman Islamia v. Hissa Mal*, (1914) 22 I.C. 65 (Nag.).

45. *Ibid.*, 22 I.C. 65=9 N.L.R. 179; also see *Aman Ali v. Asgar Ali*, (1899) 27 Cal. 185 (Art. 135, not applicable where mortgagee put in possession was wrongly dispossessed, and sues to recover possession of the property); cf. *Burmamoyee v. Dinobandho Ghose*, (1880) 6 Cal. 564 (*Held*, that in a suit for possession by mortgagee, after foreclosure, Art. 145 applied giving 12 years from the date of the expiry of year of grace).

46. *Ratan Das v. Mt. Guran*, (1918) 45 I.C. 563=79 P.R. 1918.

47. Lightwood, pp. 85, 86; Banning, 3rd Edn., p. 161; Mitra's Limitation Act, Vol. II, p. 1606; also see *Hikmatullah Khan v. Imam Ali*, (1890) 12 All. 203 (*Held*, that cause of action was the mortgagor's non-delivery of possession of mortgaged property) and *Achhar Mal v. Hukman*, 28 P.R. 1897 (Plaintiff-mortgagee's cause of action accrued on the first failure by defendant-mortgagor to pay interest, and not from date of the last default).

48. *Hukum Chand v. Shahabdin*, (1923) 4 Lah. 90=71 I.C. 495=1924 Lah. 40.

submersion of the land under water. Where after the date of the mortgage, the land becomes submerged, and is taken possession of by the mortgagor on its re-appearance, the mortgagor will be deemed to have remained in constructive possession thereof during the period of submersion, and time will be deemed to have continued to run against the mortgagee during the period of submersion.⁴⁹ Under Art. 135, it is immaterial whether possession of the property mortgaged is held at the time of the mortgage by the mortgagor or by a prior mortgagee, and, as between the mortgagor and the mortgagee entitled to possession, the former's right to possession ceases when he makes a fresh mortgage.⁵⁰ For the purpose of Art. 135 the mortgagor must either have actual possession or an unconditional right to recover possession from somebody who has in fact got it and unless and until he has that right time does not start to run. In a case where possession is outstanding in a prior mortgagee at the date of a subsequent mortgage time begins to run against the subsequent mortgagee from the date when possession is recovered by the mortgagor from the prior mortgagee and not from the date of his mortgage.¹ If subsequent to the mortgage, the parties mutually agree by a *valid* contract to extend the time, limitation under Art. 135 would reckon only when such extended time runs out.² When a mortgage is created with possession, *i.e.*, when the mortgagee is to have possession from the beginning, and the mortgage-deed recites that possession has been given to the mortgagee, in such a case, if no possession has *in fact* been given as recited, the mortgagee's suit to recover possession is within Art. 135 and time begins to run from the date of mortgage. Art. 113 cannot apply where the right to possession has been already conveyed by the mortgage deed.³ Where a time or condition is fixed when the mortgagee is to take possession, Art. 135 would apply, and limitation would start running

49. *Barkat v. Relu Mal*, (1926) 92 I.C. 178=7 L.L.J. 509=1925 Lah. 627; also see *Mt. Husaini v. Ram Charan*, (1916) 32 I.C. 341 (The non-payment of a portion of consideration money, does not affect the validity of the security, or transfer to the extent of money paid, but affects the plaintiff's right to obtain possession).

50. *Mt. Husaini v. Ram Charan*, (1916) 32 I.C. 341=18 O.C. 280; also see and cf. *Indar Singh v. Basanta*, (1921) 63 I.C. 679 (Lah.) (A puisne mortgagee is not bound to file a suit for possession within 12 years of the date of his mortgage, when the property is not in the possession of the mortgagor, but is in the possession of a third party or a prior mortgagee).

1. *Ganpat Bhujang v. Hanamgowda*, 57 Bom. 593=1933 Bom. 439=35 Bom.L.R. 956.

2. Starling, p. 375; Rustomji, p. 686.

3. *Ramchand v. Gyan Chand*, 134 P.R. 1883; *Kanhyalal v. Mohan*, 96 P.R. 1890; *Ram Chand v. Behari*, (1910) 7 I.C. 646 (All.); also see and cf. *Bein Madho v. Bir Balsingh*, 46 I.C. 813 (Oudh) (Recital not amounting to an acknowledgment of the right of the mortgagee to obtain possession of the mortgaged property).

from the date when the mortgagor can demand possession as per terms of the mortgage-deed.⁴

2041. ILLUSTRATIVE CASES.—

(1) Where a mortgage-deed contained a clause to the effect that the mortgage-money would be paid by annual instalments, and that on the happening of a default in the payment of any instalment the mortgagee would be entitled to take possession of the property; and no instalment was paid, and the mortgagee sued for possession of the mortgaged property more than twelve years after the date of the first default, it was held that the suit was barred by time under Art. 135.⁵

Mortgage—Default in payment by instalments —Suits for possession.

(2) Where the defendant executed a deed of possessory mortgage in favour of plaintiff in 1894; and out of the mortgage-money a sum of Rs. 500 was left with the mortgagee to pay to a prior mortgagee without possession, which he failed to pay, and the prior mortgagee obtained a decree for possession in 1903, and in 1917 defendant paid off the prior mortgagee and took possession of the land, and in 1918 plaintiff brought a suit for possession as mortgagee on payment of Rs. 500; it was held that the suit was barred under Art. 135, Limitation Act, the starting point being the date of the execution of the plaintiff's mortgage.⁶

Mortgage with possession—Prior mortgagee obtaining decree for possession—Starting point.

(3) Where a mortgage-deed provided that interest would be paid every six months, and that in default of such payment the mortgagee had certain options, including a right to take possession of the mortgaged property, it was held that the mortgagee's right to possession of the property could not be deemed to have determined within the meaning of Art. 135, so long as he had given no intimation of any intention to adopt the remedy given.⁷

Mortgagee's option to obtain possession.

(4) Where the terms of the mortgage-deed provided that the mortgagor will give the mortgagee possession on failure to pay a certain number of instalments, it was held that Art. 135, applied, and the suit for possession should have been filed within 12 years of default, i.e., expiry of the period for payment of the six unpaid instalments.⁸ In *Modun Mohun v. Ashad Ali*,⁹ it was held

Mortgage payable by instalments — Default clause.

4. *Ram Dazear v. Bhirgu Rai*, (1912) 15 I.C. 240=10 A.L.J. 538; *Bansgopal v. Sheo Ram Singh*, (1915) 38 All. 97.

5. *Ishar Das v. Shahabuddin*, (1921) 63 I.C. 579 (Lah.); also see *Ghanaye v. Chajju Ram*, (1894) 38 P.R. 1894; and *Indar Singh v. Basanta*, (1921) 63 I.C. 679 (Puisne mortgagee entitled to possession, but property in possession, of the prior mortgagee,—time would start against puisne mortgagee from redemption of first mortgage).

6. *Hukum Chand v. Shahabdin*, (1923) 71 I.C. 495=1924 Lah. 40=4 Lah. 90.

7. *Basant Singh v. Rampal Singh*, (1919) 51 I.C. 985=6 O.L.J. 248; cf. *Atra Ram v. Shadi Khan*, (1930) 121 I.C. 190=1930 Lah. 327; also see *Anantram v. Inayat Ali Khan* (1920) 2 L.L.J. 549 (Mortgage providing for mortgagee taking possession—Default of payment of interest by the mortgagor—Limitation would start from default in payment of interest).

8. *Bishanlal v. Khushali*, 91 P.R. 1908=4 I.C. 921.

9. (1883) 10 Cal. 68 (72); also see *Kanhyalal v. Mohan*, 96 P.R. 1890

that under a mortgage-deed, which by its express terms allows the mortgagee a right to take possession upon default by the mortgagor in payment of the mortgage-money, the mortgagee, as absolute owner of the property, has 12 years from the time at which his right to possession commences, in which he may bring his suit for possession.

(5) Where by a mortgage-deed of 1877, *P* was to be put in immediate possession of certain land as mortgagee, and, in

Mortgage by conditional sale—Suit for proprietary possession by mortgagee, after foreclosure.

default of redemption within three years, the mortgage was to become a sale, and plaintiff never received possession as mortgagee, but in 1899 he got notice of foreclosure issued under the Regulation, and in 1892 sued for proprietary possession of the mortgaged land, it was held that the suit was within time under Art. 135, as the right to hold possession as mortgagee till foreclosure, could be waived without relinquishing the right to foreclose, within 12 years of the date fixed for payment; and, that after foreclosure, the mortgagee had a right to sue as owner for proprietary possession, and under Art. 135, he had 12 years within which to institute his suit, running from the date of the expiry of year of grace when the mortgagor's right to possession of the character sought for in the suit first determined.¹⁰ Similarly, where plaintiffs, heirs of a mortgagee by conditional sale, sued for possession of the property mortgaged, as owners, on the expiry of year of grace after the completion of foreclosure proceedings, it was held that the suit not having been filed within 12 years of the date fixed for re-payment of the mortgage-money was barred by limitation, whether Art. 135, or Art. 144 be applicable.¹¹

(6) Where a mortgage-deed provided that the mortgagor should retain possession of the property mortgaged, and should pay a fixed sum to the mortgagee per harvest: and it was further stipulated that if any default in payment of the annual interest should occur, the mortgagee would be at liberty either to recover interest independently or to add it to the principal sum and obtain possession of the land by suit: and no interest had been paid; it was held that the mortgagor's right to possession determined on the date of first default in payment of interest and the mere fact that the mortgagee might have applied but did not apply for the personal remedy against the mortgagor was not an impediment either to the starting or to the running of time against him.¹²

(7) Where a mortgage-deed contained a forfeiture clause whereby the mortgagees might obtain possession of the land in default of payment of the first or later instalments, it was held that the payment of interest could not possibly be construed as an acknowledgment of the mortgagee's right to en-

(Suit for possession by mortgagee on default of payment of mortgage-money governed by Art. 135.

10. *Bhandari v. Mt. Jasodhan*, 90 P.R. 1895 (F.B.); Relied on 10 Cal. 88; 12 Cal. 614 and 16 Cal. 693 (P.C.); Cf. *Manan v. Ishri Pershad*, 35 P.R. 1899; also see *Tek-Chand v. Sahal Singh*, 65 P.R. 1906 (Suit for possession as owner, after expiry of year of grace) and *Nandlal v. Goujar*, 94 P.R. 1912 (Suit for possession as owner—Foreclosure proceedings not taken within 12 years of date agreed for re-payment).

11. *Manan v. Ishri Pershad*, 35 P.R. 1899.

12. *Atra Ram v. Shadi Khan*, (1930) 121 I.C. 190=1930 Lah. 327; Relied on 28 P.R. 1897 and 63 I.C. 579; cf. *Basant Singh v. Rampal Singh*, (1919) 51 I.C. 985=6 O.L.J. 248.

force their right to possession under the default clause, and that he had a right to secure possession as soon as the first default occurred. The fact that any subsequent default also gave him a right of possession was not sufficient to prevent time from running against him.¹³

(8) Where the mortgage-deed provided that on default of payment of mortgage-money within the time fixed, the mortgagee would be entitled to possession, but the mortgagee took out foreclosure proceedings *within* 12 years of default, and then having acquired title as absolute owner on the expiry of year of grace, brought a suit for possession as owner, he had a fresh period of twelve years, under Art. 144, after the expiry of year of grace.¹⁴

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
136.	By a purchaser at a private sale for possession of immoveable property sold when the vendor was out of possession at the date of the sale.	12 years.	When the vendor is first entitled to possession.

SYNOPSIS.

- 2042. Corresponding provisions.
- 2043. **Scope and applicability.**
- 2044. Suit against third party in possession.
- 2045-2047. **Article explained.**
- 2045. "Vendor" of private sale.
- 2046. "Sale".
- 2047. "Out of possession."
- 2048. **Starting point of limitation.**

NOTES.

2042. CORRESPONDING PROVISIONS.—This article is same as Art. 136 of Sch. II, Act XV of 1877, and corresponds to Art. 136 of Sch. II of Act IX of 1871. There was no specific article corresponding to this in Act XIV of 1859, and suits of this nature were governed by S. 1, Cl. (12) of that Act. A purchaser at a private sale could not count limitation from the date of his purchase, but from the date of accrual of the original vendor's title.¹⁵

2043. SCOPE, AND APPLICATION.—Suits for possession of immoveable property by a purchaser, at a private sale, is covered by Art. 136, when the vendor was out of possession at the

13. *Jaimal v. Ran Rattan*, 1934 Lah. 993=156 I.C. 42; Relied on 1930 Lah. 327; cf. 1919 Oudh 217.

14. *Ghinaram v. Ram Monarath*, 7 C.L.R. 580; *Burmamoyce v. Dinobundhoo*, 6 Cal. 564; *Ratan Das v. Guran*, 79 P.R. 1918=45 I.C. 563; *Tek Chand v. Sohel Singh*, 65 P.R. 1906; *Bhandari v. Jasodhan*, 90 P.R. 1895 (F.B.), *supra*.

15. *Bhikaree Pandah v. Ajoodhya Pershad*, 3 W.R. 176.

date of sale: but, if the vendor was in possession, then Art. 144 would govern the suit.¹⁶

This article is to be distinguished from Arts. 137 and 138, which deal with purchasers at a sale in execution of a decree. Art. 137 applies, when the judgment-debtor was out of possession; and Art. 138, governs when the judgment-debtor was in possession.

In *Gopal v. Krishna Rao*,¹⁷ Ranade, J., has explained the application of Arts. 136 to 138, thus:—
Articles 136-138.

“Articles 136, 137, 138 obviously refer to cases where no possession, formal or actual, had been obtained through the Court. Article 136 applies to a private purchaser from a person not in possession. Article 137 applies to an auction-purchaser of the rights of a person not in possession, while Art. 138 applies when the auction-purchase is made of the rights of a judgment-debtor who is in possession at the date of the sale. None of these articles contemplate the case of an auction-purchaser or his assign who has obtained formal possession, and is disturbed by the judgment-debtor or his heirs who continue in actual possession, *as was the case in the present dispute*. In such a case all the Courts agree in holding that Art. 138 does not apply, but Art. 144, applies.”¹⁸

2044. Article 136, like Art. 137, contemplates a suit by a purchaser against a third party in possession.¹⁹ In the case of *Ram Prosad Janna v. Lakhi Narain*,²⁰ a vendor who was at the time out of possession of certain immoveable property sold a portion of it, and after that sale the vendor recovered possession. The purchaser within 12 years after the vendor had recovered possession, but more than 12 years after the vendor had been originally dispossessed instituted a suit to obtain possession of the property covered by the sale-deed. It was held that Art. 136 did not apply, but that the case fell within the purview of Art. 144. Similarly in *Lakshman Vinayak v. Bisan Singh*,²¹ a Bench of the **Bombay High Court** held that Arts. 136 and 137 applied to suits brought by purchasers against third persons in possession of lands, in whose favour limitation runs against the purchaser in the same way as it would against the owner with whose right the purchaser is clothed. In *Ramlakhan Rai v. Gajadhar Rai*,²² where the plaintiffs acquired

16. See S. 2045, below.

17. (1900) 25 Bom. 275 (280).

18. *Ibid.*

19. *Rajah Enayat Hossain v. Girdhareclal*, 12 M.I.A. 366=11 W.R. P.C. 29=2 B.L.R.P.C. 75 (*Held*, that no distinction was to be made “in favour of a person claiming under an execution sale, as contradistinguished from the representatives of any person claiming under an ordinary assignment or conveyance”).

20. (1885) 12 Cal. 197.

21. (1890) 15 Bom. 261 (264).

22. (1910) 33 All. 224 (227, 228)=7 A.L.J. 1184=8 I.C. 1095; s.c. 5 I.C. 273.

the property claimed by them under an auction-purchase, followed by a delivery of formal possession, but at that time the judgment-debtor was dead and his legal representatives were out of possession and a trespasser was in possession; and later, the defendants obtained actual possession of the property by virtue of a decree against the trespasser, it was held by the **Allahabad High Court**, that Art. 137

“only applies to a suit **against a third party** and not to a suit against the judgment-debtor or his representative. This is manifest from the language of the third column of the schedule”.

In this case Art. 144 was applied, as it was not a case of dispossession under Art. 142, Limitation Act. Where a

Subsequent recovery of possession by vendor.

defendant vendor is in possession at the date of sale, his adverse possession would count from the time of the sale: but, until a defendant has possession, he cannot have adverse possession; and, consequently if the defendant was out of possession at the time of the sale, and subsequently obtained possession, it can only have been adverse from the time when he entered on the property.²³

2045. ARTICLE EXPLAINED.—The case of a purchaser

“Vendor” of private sale.

at a sale in execution of a decree is provided for in Arts. 137 and 138; and the latter article applies to the case of a person claiming through the auction-purchaser and not merely the auction-purchaser alone. Therefore, it follows from the scheme of Cls. (136), (137) and (138), that the expression “vendor” in Art. 136, means a vendor other than the auction-purchaser mentioned in Art. 138. This has been so held in *Sati Prasad Sen v. Jogesh Chandra Sen*,²⁴ by a Full Bench of the **Calcutta High Court** and the **Madras High Court** has similarly held in *Arumugha v. Chokalingam*,²⁵ that Art. 136 would not apply to a suit by a purchaser at a private sale from an execution-purchaser. Where there have been transfers by successive vendors, who have all been out of possession, Art. 136, may well be construed so as to include in the term “vendor”, the *first* in the series of vendors who was entitled to sue for possession.²⁶

23. *Sayad Nyamtula v. Nana*, (1888) 13 Bom. 424 (428); Relied on 12 Cal. 197 and 2 All. 718; also see *Anand Coomari v. Ali Jamin*, 11 Cal. 229 (A vendor remaining in possession after the execution of a conveyance by him is in adverse possession to the purchaser) and *Velayutha Chetty v. Govindaswamy*, (1907) 30 Mad. 524 (An unpaid vendor has a non-possessory lien: he cannot retain possession of the property sold against vendee).

24. (1904) 31 Cal. 681=8 C.W.N. 476 (F.B.); [O.R. *Mohima Chunder Bhattacharjee v. Nobin Chunder Roy*, (1895) 23 Cal. 49].

25. (1892) 15 Mad. 331; Followed in *Pullayya v. Ramayya*, (1894) 18 Mad. 144.

26. *Abbas Dhali v. Masabdi Karikar*, (1914) 24 I.C. 216 (Cal.).

2046. The word "*sale*" in this article does not include a transfer by way of a usufructuary mortgage, or lease. The transfer intended is that of ownership, and the word "*sale*" is to be taken in the sense in which it is used in the Indian Contract Act, S. 77, or the Transfer of Property Act, S. 54.²⁷ A suit by a purchaser of equity of redemption, for possession of immoveable property, is governed by this article, and the period begins to run from the date of redemption by the vendor-mortgagor, that being the date on which the vendor became entitled to possession.²⁸ Where a decree directed that *A* should obtain possession of the house in suit from *B*, if he paid *B* a certain sum, and subsequently *A* sold such interests as he had in the house to *C*, and after that *C* brought a suit against *B*, who was never paid, it was held that the decree did not create a mortgage or a charge and that the suit was governed by Art. 136, and not by Art. 144 or 148.²⁹

2047. The expression "*out of possession*" as used in this article implies that some other person is in possession adversely to the vendor, some person holding in a character incompatible with the idea, that the ownership remains vested in the vendor.³⁰ The possession contemplated in the article includes not merely actual possession but also such possession as a member of a joint family is presumed to have in the family property until excluded therefrom.³¹

"Article 136 is intended to apply to cases in which a vendor is at the time of sale not entitled to possession of property sold, and consequently the institution of a suit for possession has to be deferred till the right of any third person to its possession has determined."³²

If, in the case of a sale out and out the vendor remains in possession, that possession is adverse to the purchaser,³³ or, if he was out of possession at the time of sale, and subsequently obtained posses-

27. *Madugala Latchiah v. Pally Mukkalinga*, (1907) 30 Mad. 393 (396) [*Held*, that in Art. 44, as in some other articles (excepting Arts. 10 and 136) the term "*sale*" is not confined to an assignment of absolute ownership only].

28. *Badri Mal v. Gopal*, 130 P.R. 1906.

29. *Raghunath Prasad v. Mt. Ketki*, (1916) 32 I.C. 353 (Oudh).

30. *Ganpat Rao Bhonsle v. Ganpat Row Gopal Ghatatey*, 2 N.L.R. 32.

31. *Chintamani Pramanik v. Hridaynath Kamila*, (1919) 51 I.C. 123=29 C.L.J. 241 (Possession contemplated by the article includes constructive possession) and *Bhogaballi v. Bhogaballi*, (1911) 9 M.L.T. 397.

32. Per Best, J., in *Arumuga v. Chockalingam*, (1892) 15 Mad. 331 (332); also see *Gadadhur Roy v. Hare Krishan Sarkar*, (1904) 8 C.W.N. 535.

33. *Anand Coomari v. Ali Jamin*, (1885) 11 Cal. 229 (231); Relied on: *Tew v. Jones*, 13 M. and W. 12.

sion, it can only have been adverse from the time when he entered on property.³⁴ In a suit brought by a

Sale by dispossessed owner—*Onus probandi*.

vendee to recover possession of immovable property which was not in the possession of his vendor at the time of the sale, the defence having raised the point of adverse possession for more than twelve years, it was held that the onus lay upon the plaintiff to show that his claim was not barred by the defendant's adverse possession by proving that his vendor had been in possession within twelve years before the date of sale under Art. 142, Limitation Act.³⁵ And, when in such a case the property sold was a share in a house belonging to two separated brothers, it was held that the possession of one of the brothers could not be taken to be on behalf of the absent brother.³⁶

But, where the defendant was in possession of the property as a co-owner with the plaintiff's vendor, the plaintiff is not bound to prove actual possession of his vendor within twelve

Possession of co-owners.

years of the suit. The word "possession" in Art. 136 includes such possession as a member of a joint Hindu family is presumed to have in the family property until excluded therefrom. To a suit by a purchaser of property from a member of a joint Hindu family, who is alleged to have been out of possession at the time of sale, Art. 136, and *not* Art. 127 of the Limitation Act, applies.³⁷ If a property belonging to two tenants-in-common is in the possession of one of them, it does not follow that he is holding adversely to the other tenant-in-common, and that the latter is "out of possession," unless there is evidence of ouster.³⁸ The rule that the possession of a co-sharer enures for the benefit of all the co-sharers applies not merely in favour of those who were co-tenants when the original entry was made but extends to all who afterwards acquire undivided interests in the property.³⁹ Where a judgment-debtor's share in certain property was sold and the auction-purchaser instituted a suit for joint possession against the judgment-debtor's co-sharers after the expiry of twelve years from the date on which

34. *Sayyad Nyamtullah v. Nana*, (1888) 13 Bom. 424 (428).

35. *Kashinath Sitaram v. Shridhar Mahadev*, (1891) 16 Bom. 343; Followed in *Deba v. Rohtagi Mal*, (1903) 28 All. 479 (*Onus* on plaintiff to prove a subsisting title not barred by time); also see *Dokarij Oddar v. Nilmani Kunda*, (1917) 42 I.C. 709=26 C.L.J. 339=22 C.W.N. 319 (*Onus* on auction-purchaser to prove subsisting title).

36. *Deba v. Rohtagi Mal*, (1903) 28 All. 479.

37. *Bhogavalli Venkayya v. Bhogavalli Ramakrishnamma*, (1911) 9 I.C. 495=9 M.L.T. 397; also see *Chintamani v. Hridaynath*, (1919) 51 I.C. 123=29 C.L.J. 241.

38. *Shivalingappa v. Satyava*, (1921) 64 I.C. 552=23 Bom.L.R. 967=1921 Bom. 77.

39. *Biswanath Chakravarti v. Rahija Khatun*, (1929) 117 I.C. 593=1929 Cal. 250=56 Cal. 616=33 C.W.N. 46.

he was obstructed by the defendants; it was held that the suit was not barred by limitation.⁴⁰

2048. STARTING POINT OF LIMITATION.—In *Par-tap Chand v. Saiyida Bibi*,⁴¹ the Allahabad High Court, in explaining the meaning of the phrase “when the plaintiff’s vendor was *first* entitled to possession,” observed,

“that the words in the third column relate to the **beginning of the dispossession** referred to in the first column of the article, and that the meaning of the article is that if supposing no sale had taken place, the vendor’s title would have been alive at the time, the vendee’s suit is brought, such suit is not barred: but that, on the other hand, when the vendor has been for twelve years out of possession at the date of the vendee’s suit, such a suit would be too late. When the purchaser succeeds in showing that the exclusion of his vendor from possession took place within 12 years of the institution of the suit, he succeeds in showing that his suit is within time”.

A cause of action is not prolonged by mere transfer. Where there have been transfers by successive vendors, who have all been out of possession, Art. 136 would include in the term “vendor” the first in the series of vendors who was entitled to sue for possession.⁴² Consequently, in such cases, the purchaser cannot count his limitation from the date of his purchase, and limitation would start running from the date of the accrual of the vendor’s right to sue,⁴³ for a vendor cannot confer upon the transferee a better title than he himself possesses,⁴⁴ and in suits by purchasers under Arts. 136 and 137, Limitation runs against the purchaser in the same way as it would against the original owner out of possession.⁴⁵ This article applies to cases in which a time has arrived when the plaintiff can assert that his vendor has become entitled to possession, and where an order under S. 335, Civil Procedure Code, 1882, had been passed against the vendor, plaintiff is not entitled to possession so long as the order operates. In such a case plaintiff cannot evade the obstacle of Art. 11-A, by having recourse to Art. 136, Limitation Act.⁴⁶ Where a reversioner, who had never been in possession, sold the property to plaintiff, the purchaser would be first entitled

40. *Biswanath Chakrawarti v. Rahija Khatun*, 117 I.C. 593 (595).

41. (1901) 23 All. 442 (445); Compare *Boondi Roy v. Bunshee Thakoor*, (1875) 24 W.R. 64 and *Rudrakanta v. Nobokishore Sarma*, (1883) 9 Cal. 663; *Mahadev Ram v. Bibi Chinnaji*, (1902) 26 Bom. 730 (Where the vendor’s title is alive because of the privileged position of the vendor; the benefit of the special period, or of the extension of time, cannot be availed of by the vendee).

42. *Abbas Dhali v. Masabi Karikar*, (1914) 24 I.C. 216 (Cal.).

43. *Bhikaree Pandah v. Ajoodhya Prasad*, (1865) 3 W.R. 176.

44. *Abbas Dhali v. Masabi*, (1924) 24 I.C. 216 (Cal.).

45. *Lakshman Vinayak v. Bisansing*, (1890) 15 Bom. 261 (264); cf. *Lakshman v. Moru*, (1892) 16 Bom. 722 (726) (Where the defendant’s own possession covered a period of more than 12 years).

46. *Mahadev v. Babi*, 26 Bom. 730 (735).

to possession on the death of the widow.⁴⁷ If, however, the reversioner came into possession on the death of the widow, and was then dispossessed, the starting point would be the date of the dispossession and not the date of widow's death.⁴⁸

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
137.	Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of sale.	12 years.	When the judgment-debtor is first entitled to possession.

SYNOPSIS.

- 2049. Corresponding provisions.
- 2050-2052. **Scope and application.**
- 2050. Suit against third persons.
- 2051. Symbolical possession of auction-purchaser.
- 2052. Mortgage-decrees.
- 2053. Illustrative cases.

NOTES.

2049. CORRESPONDING PROVISIONS.—This article is the same as Art. 137 of Sch. II of Act XV of 1877: and corresponds to Art. 137, Sch. II, Act IX of 1871, where the words “execution-debtor” were used instead of the words “judgment-debtor”. There was no corresponding article in Act XIV of 1859, and suits of this nature were governed by the general cl. 12 of S. 1 of that Act.

Their Lordships of the Privy Council held in the case of *Rajah Enayet Hossein v. Girdharee Lal*,⁴⁹ that there is no distinction to be made, in favour of a person claiming under an execution-sale, as contra-distinguished from the representatives of any person claiming under an ordinary assignment or conveyance.

2050. SCOPE AND APPLICATION.—(1) *See* note under Art. 136. The **Bombay High Court** has held that Arts. 136 and 137 of Limitation Act, apply to suits brought by purchasers against third persons in possession of the land in whose favour limitation runs against purchaser, in the same way as it would against the owner with whose rights the purchaser is

47. *Gadadhar Roy v. Harekrishna Sarkar*, (1904) 8 C.W.N. 535 (538).

48. *Partap Chand v. Saiyida Bibi*, (1901) 23 All. 442.

49. (1866) 11 W.R. 29 (P.C.).

clothed.⁵⁰ Suhrawardy, J., has observed in *Janendra Mohan Dutt v. Umesh Chandra Guha*,¹ that

"Reading Arts. 136 and 137 together it is clear that the latter article is intended to make the law uniform in cases of private and Court sales and the two articles in conjunction lay down that where the purchaser of an immoveable property at a private sale in execution of a decree sues for possession of the property of which the vendor or judgment-debtor was out of possession at the time of the sale, he the purchaser is not entitled to get a fresh start of limitation from the date of his purchase, but the time is to be calculated as running against him from the date of dispossession of the vendor or judgment-debtor as if there was no sale".

In *Ram Prosad v. Lakhi Narain*,² it was held by the **Calcutta High Court** that Art. 144 applied to a suit against the vendor who had subsequently obtained possession after the sale. This view was followed by the **Allahabad High Court** in *Ram Lakhan Rai v. Gajadhar*,³ where plaintiffs purchased property at an execution sale in November, 1891, and formal possession was given to purchasers in November, 1892. But, in 1897, other persons, also trespassers, obtained possession of the property, against and not through the persons originally in possession. Subsequently, in 1908, plaintiffs sued the second set of trespassers for possession, and it was held that Art. 144 applied, and the suit was not time-barred.

2051. (2) Art. 137, Limitation Act, provides that a suit by a purchaser at a sale in execution of a decree for possession of immoveable property, when the judgment-debtor was out of possession at the date of the sale, must be

(ii) Symbolical possession of auction-purchaser.

instituted within twelve years from the date when the judgment-debtor is first entitled to possession.⁴ Where notwithstanding the delivery of symbolical possession to auction-purchaser, the original owners continued in possession, and they were in possession even when symbolical possession was delivered to the predecessor of the plaintiff, it was held that this delivery of possession was operative as against the then judgment-debtor, but was wholly ineffectual to affect the title or interrupt the actual possession of the original owners.⁵ The plaintiff was subsequently bound to sue within twelve years from the date when his judgment-debtor was first entitled to possession, *i.e.*, within twelve years from the date when symbolical possession was delivered to the decree-holder as against the original owners.

50. *Lakshman Vinayak v. Bisan Singh*, (1890) 15 Bom. 261 (264); cf. *Lakshman v. Moru*, 16 Bom. 722 (728).

1. *Janendra Mohan v. Umesh Chandra*, (1922) 26 C.W.N. 985=1922 Cal. 544.

2. (1885) 12 Cal. 197.

3. *Ram Lakhan v. Gajadhar*, (1910) 33 All. 224=7 A.L.J. 1184; s.c., 5 I.C. 273.

4. *Ram Sumnun Prosad v. Genda Lal*, (1915) 29 I.C. 841=22 C.L.J. 574.

5. *Ibid.*, 29 I.C. 841 (Cal.).

2052. Art. 137 does not apply to purchasers at sale held in execution of mortgage-decrees. The

(iii) Sale under mortgage-decrees.

Full Bench of Madras High Court held in *Vyapuri v. Sonamma*,⁶ that the mortgage being simple, a trespasser's adverse possession which commences after the date of hypothecation, is not a bar to the mortgagee's right to recover the land. A simple mortgagee is not entitled to the possession of the property, and the trespasser's possession which is adverse to the mortgagor cannot affect the rights of the simple mortgagee, as it would be unreasonable to hold that the mortgagee's rights are extinguished by the extinction of the mortgagor's title by twelve years' adverse possession before the mortgagee is in a position to protect his rights. The **Calcutta High Court** has considered this question in *Priya Sakhi Debi v. Manbodh Babi*,⁷ where Sanderson, C.J., and Mookerjee, J., have adopted the view enunciated in the Madras Full Bench decision. As Sanderson, C.J., says

"Adverse possession implies that the person against whom adverse possession is exercised is a person who is entitled to demand possession at the moment adverse possession begins".⁸

Although the rights of the mortgagee are not extinguished by any adverse possession against his mortgagor, time against the purchaser under Art. 137 is to be computed from the date the judgment-debtor is first entitled to possession; that is, a purchaser will be precisely under the same disability as the mortgagor.⁹ This leads to the conclusion that under Art. 137, the sale contemplated must be taken to be the sale of the interest possessed by the judgment-debtor referred to in the article. The purchaser at a sale held in execution of a mortgage-decree does not obtain merely the interest of the judgment-debtor; but something more, though it may not be necessary to define the exact nature of the interest acquired by him. A reasonable construction of Art. 137, therefore is, that it does not apply to purchasers at sales held in execution of mortgage-decrees.¹⁰ The underlying principle in such cases is that the purchaser gets whatever rights the mortgagor had as on the date of the mortgage unlike in the case of an auction-purchaser at a sale held in execution of a mere money decree though in some cases it has been stated that the purchaser in execution of a mortgage decree acquires both the rights of the mortgagor and the mortgagee.¹¹

6. (1916) 39 Mad. 811 (F.B.).

7. (1917) 44 Cal. 425.

8. *Ibid.*, 44 Cal. 425 (433).

9. *Sundaram Iyer v. Thiyagaraja Pillai*, (1923) 1923 Mad. 160 (162) = 50 M.L.J. 183.

10. *Ibid.*, 1923 Mad. 160 (162).

11. Mitra's Limitation Act, Vol. II, p. 1615; citing *Maganlal v. Shankra Girdhar*, (1897) 22 Bom. 945; *Ma Kin Kyan v. R. C. Dey*, (1926) 4 Rang. 96 (98) and *Ma Gun v. Mg. Lu Gale*, (1924) 85 I.C. 223 (Rang.).

2053. ILLUSTRATIVE CASES.—

(1) Where three undivided brothers, (*B*, *R* and *A*), mortgaged part of their joint property in 1870, and the rest in 1874; and, in 1874, *B*'s share in both plots was sold in execution of a decree against him, and was purchased by the plaintiff: but in 1877 *B* and his two brothers sold plot (1) to the defendants Nos. 3-6, who at once paid off the mortgage of 1870, and took possession; and in 1877, the three brothers paid off the mortgage of 1874 of plot (2) and in the same month mortgaged that plot to the defendants with possession: and in 1880, the plaintiff sued for possession of *B*'s share by partition and redemption if necessary, it was held that the suit was barred by Art. 137 of the Limitation Act. *B* became entitled to possession of his share of plot (1) in 1877 when the mortgage of 1870 was paid off by the defendants, and their possession had been since then adverse to the plaintiff. As to plot (2), *B* had become entitled to possession of his share therein in 1877, when the mortgage of 1874 was redeemed.¹²

(2) Where *A*, executed a conveyance of certain land to *B*, in 1867: and though it was registered, *B* never entered into possession of the land, and in 1874, *C* purchased this land at a sale in execution of a decree which he had obtained against *B*; but *C*, did not enter into possession of the land, and in 1879, brought a suit for recovery thereof against *A*, who had all along remained in possession; it was held that the suit was barred by limitation under Arts. 136 and 137 of the Limitation Act.¹³

(3) Where on a partition of joint family property between a Hindu father and his sons, certain property was allotted to father without power of alienation with remainder to sons, but a decree was passed against him depriving him of the land, and one of the sons mortgaged his share in lifetime of father; it was held that the sons were competent to dispose of the time of father, it was held that the sons were competent to dispose of the property: and the simple mortgage executed by the son was not affected by possession being taken against the father.¹⁴

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
138.	Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was in possession at the date of the sale.	12 years.	The date when the sale becomes absolute.

SYNOPSIS.

- 2054. Corresponding provisions.
- 2055. Legislative changes.
- 2056. Scope and application.
- 2057. Remedy by application—Art. 180.
- 2058-2065. Effect of symbolical possession.
- 2058. General.
- 2059. Allahabad view.
- 2060. Bombay view.

12. *Ganesh Mahadeo v. Ramchandra*, (1895) 20 Bom. 557.

13. *Anand Coomari v. Ali Jamin*, (1885) 11 Cal. 229.

14. *Raghunath v. Madhav Rowlal*, (1923) 76 I.C. 217=23 Bom.L.R. 456=1923 Bom. 415.

- 2061. Calcutta view.
- 2062. Madras view.
- 2063. Patna view.
- 2064. Lahore view.
- 2065. Oudh view.

NOTES.

2054. **CORRESPONDING PROVISIONS.**—Under Act XIV of 1859, the general provision in S. 1, cl. 12, governed such suits. The starting point of limitation was from the date of sale.¹⁵

Under Act IX of 1871, the corresponding Art. 138 applied to a “purchaser of land at a sale in execution of a decree, for possession of the purchased land, when he never has had possession”—Twelve years—“the date of sale”. In Art. 139 of that Act, provision was made for like suits when the purchaser had possession but was afterwards dispossessed.

Under Act XV of 1877, Art. 138, the period was twelve years from the date of sale, in a suit

“by a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of sale”.

Under the present Act, IX of 1908, the *terminus a quo*, has been altered from the “date of sale,” to “*the date when the sale becomes absolute*”.

2055. **LEGISLATIVE CHANGES.**—It would be noticed that in Art. 138 of the Act of 1871, the words in the first column were “when he never has possession”: instead of the words “when the judgment-debtor was in possession at the date of the sale,” which appeared in Act XV of 1877, and are to be found in the present Act. In the Acts of 1871 and 1877, the corresponding provision referred to “land” and the starting point of limitation in both these Acts was “the date of the sale”. The present Act has amended the *terminus a quo*, and has made the article more comprehensive by applying it to sales in execution of a decree of immoveable properties. The words “the date of sale” in Act XV of 1877, were interpreted to mean the date on which the properties were put up for execution sale, and knocked down to the highest bidder, and not the date of the sale confirmation by Court.¹⁶ The present provision in third column is in accordance with the provisions in Civil Procedure Code, S. 65 and O. 21, R. 94, which vests the property in purchaser on sale becoming absolute.¹⁷

15. *Kalee Das Neoghee v. Hurqanath Roy Chowdhury*, (1864) W.R. 279.

16. *Kesri Sahay v. Giani Roy*, (1902) 29 Cal. 626 (631); *Venkatalingam v. Veerasami*, (1893) 17 Mad. 89=3 M.L.J. 267.

17. *Seeti Kutti v. Kunhi Pathuma*, (1917) 40 Mad. 1040 (1063)=33 M.L.J. 320 (F.B.).

2056. SCOPE AND APPLICATION.—While Art. 137 applies to an auction-purchaser of the rights of a person not in possession, against third persons in possession of the land in whose favour limitation runs against the purchaser,¹⁸ Art. 138 applies to a like suit when auction-purchase is made of the rights of a judgment-debtor who is in possession at the date of the sale. It applies to suits brought against the judgment-debtor or persons who have derived title from him¹⁹; but, it cannot be applied to a suit brought against a defendant who has not acquired a title from the judgment-debtor.²⁰ This article does not apply to a suit brought by one auction-purchaser against another auction-purchaser of the same property.²¹ Art. 144 would be applied to suits where defendant was adversely in possession to the plaintiff auction-purchaser who had obtained only symbolical possession after the Court sale.²² Art. 142 or 144 would apply where the defendant bases his claim on title and possession as a trespasser, relying upon possession *adverse* to the judgment-debtor.²³ Arts. 136, 137 and 138 refer to cases where no possession, formal or actual, has been obtained through the Court: and Art. 138 applies when the actual purchase is made of the rights of a judgment-debtor, who is in possession at the date of the sale.²⁴ Art. 138 does not apply except when the defendant is the judgment-debtor, or a person claiming through the judgment-debtor.²⁵ Art. 144 of the Schedule applies to a suit for partition between tenants-in-common, although a tenant has acquired his rights by purchase at a Court-auction.²⁶ This Art. 138 does not apply where the defendant is a co-tenant of the judgment-debtor, because such co-tenant does not claim through the judgment-debtor.²⁷ Art. 138 has no application to a suit for possession of

18. *Lakshman Vinayak v. Bisan Singh*, (1890) 15 Bom. 261 (264).

19. *Khiroda Kanta Roy v. Krishna Das Laha*, (1910) 6 I.C. 467=12 C.L.J. 378; Relied on *Raghunath v. Bhagat Syed Samad Shah*, 7 C.L.J. 560=12 C.W.N. 617.

20. *Ibid.*, 6 I.C. 467 (471); Relied on 16 Bom. 722; 18 Bom. 37 and 25 Bom. 275.

21. *Bhagwant v. Bholi*, 35 All. 432=18 I.C. 465 (Reversing 10 A.L.J. 13=15 I.C. 10); also see *Ram Prasad v. Bindeswari*, 11 Pat. 165=1932 Pat. 145 (146) (Art. 144 applied).

22. *Lakshman v. Moru*, (1892) 16 Bom. 722; *Namdev v. Ramchandra*, 18 Bom. 37; *Gopal v. Krishna Rao*, (1900) 25 Bom. 275.

23. *Bhikhad Bhunjan v. Upendra*, 4 P.L.J. 463 (471); *Janakinath v. Baikuntha*, 1922 Cal. 176=70 I.C. 602=36 C.L.J. 140=27 C.W.N. 259.

24. *Gopal v. Krishna Rao*, (1900) 25 Bom. 275.

25. *Hassan Ammal Bibi v. Ismail Moideen*, (1915) 29 I.C. 976=28 M.L.J. 642; Relied on *Khirada Kanta Roy v. Krishnadas Laha*, 6 I.C. 467=12 C.L.J. 378; *Bhagwant Singh v. Bholi Singh*, 35 All. 432=18 I.C. 465=11 A.L.J. 642; also see *Ram Lakhan Rai v. Gajadhar Rai*, (1910) 33 All. 224.

26. *Hassan Ammal v. Ismail Moideen*, (1915) 29 I.C. 976.

27. *Biswanath v. Rabija*, 56 Cal. 616=117 I.C. 593=1929 Cal. 250.

immovable property by a purchaser at a sale in execution of a decree where the defendant was no party to the suit in which the decree was passed or to the proceedings in execution of the decree in that suit.²⁸

This article will apply equally to a suit by an assignee from the auction-purchaser, against the judgment-debtor, or any person deriving title from the judgment-debtor,²⁹ *e.g.*, the article has been applied to a suit brought by the son or the assignee of an auction-purchaser at an execution sale.³⁰ Where an auction-purchaser or his assignee has obtained possession through the Court, but is disturbed subsequently by the judgment-debtor, or his heirs, the case is one of dispossession governed by Art. 142 of the Limitation Act, but does not fall under Art. 138.³¹

2057. REMEDY BY APPLICATION.—Under the provisions of the Civil Procedure Code, 1908, where a sale of immovable property has become absolute, the auction-purchaser shall be granted a sale-certificate (O. 21, R. 94). The title of the Court auction-purchaser becomes complete on the confirmation of sale under R. 92, and under S. 65, the property vests in the purchaser from the date of sale.³² The purchaser's title becomes complete on the issue of the certificate and he is entitled to apply for possession of the property.³³ An application for delivery of possession of property in occupancy of judgment-debtor, or of some person on his behalf, or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property can be made under O. 21, R. 95, Civil Procedure Code; similarly, if the property sold is in the occupation of a tenant or other person entitled to occupy the same, an application may be made for delivery of property under O. 21, R. 96, Civil Procedure Code. The

28. *Janaki Nath Saha v. Baikuntha Nath*, (1922) 70 I.C. 602=36 C. L.J. 140.

29. *Arumugha v. Chokalingam*, (1892) 15 Mad. 331 and *Pullayya v. Ramayya*, (1894) 18 Mad. 144.

30. *Govind v. Gangaji*, (1898) 23 Bom. 246 and *Sati Prasad v. Jogesh Chandra*, (1904) 31 Cal. 681 (F.B.); *O.R. Mohima Chander v. Nobin Chander*, 23 Cal. 49.

31. *Gopal v. Krishna*, (1900) 25 Bom. 275 (280); *Agar Chand v. Rakhma Hanmant*, (1888) 12 Bom. 678.

32. *Jagannath v. Baldeo*, (1883) 5 All. 305=1883 A.W.N. 48; *Doorga Narain v. Baney Madhub*, (1881) 7 Cal. 199 (207) and *Ajudhia Pershad v. Chandan*, 9 P.R. 1903=36 P.L.R. 1903.

33. *Kashinath Trimbak v. Duming Zuran*, (1893) 17 Bom. 228 (229); *Cooverji v. Dewsey*, (1893) 17 Bom. 718 (721); *Amir Kazim v. Darbari Mal*, (1902) 24 All. 475 (476)=1902 A.W.N. 145 and *Abdulla Abdul Gany v. Chatterji*, 1932 Rang. 11 (12)=9 Rang. 565=135 I.C. 863.

period of limitation for an application for delivery of possession by a purchaser of immoveable property at a sale in execution of a decree is provided for by Art. 180—Three years from the date when the sale has become absolute. The right of an auction-purchaser to sue or to apply under the Code depends upon the construction to be placed on S. 47 of the Civil Procedure Code. In this connection some difference is made in the case of a *stranger* purchaser, and where the auction-purchaser is the decree-holder himself. When the purchaser is a *stranger*, he is not bound to apply under O. 21, Rr. 95 and 96, and may institute a separate suit for possession of the property within 12 years from the date aforesaid, *i.e.*, when the sale becomes absolute.³⁴ The remedy by way of application under Civil Procedure Code, and by way of suit are concurrent; and the remedy by suit under Art. 138, may be adopted without making an application in the first instance,³⁵ or after the remedy by application is barred,³⁶ or has been unsuccessful.³⁷ Where the decree-holder is the auction-purchaser, according to one set of authorities, his remedy for recovery of possession from the judgment-debtor is only by way of an application under O. 21, R. 95, Civil Procedure Code. His position is that of a party to suit, and a separate suit would be barred.³⁸ According to another view, the purchaser has an additional remedy by way of suit, and that upon the decree being realised, the decree is fully executed, discharged and satisfied, and no question relating to the execution, etc., remains to be considered. According to this view, whether or not the auction-purchaser obtains possession of the property sold, is wholly immaterial for the purposes of the decree.³⁹ The **Allahabad High Court** takes the view

34. *Uma Sankar v. Kalka Prasad*, (1884) 6 All. 75 (77)=1883 A.W.N. 212; *Lakshmi Narayana v. Ulagammal*, (1915) 26 I.C. 528=28 M.L.J. 256; also see *Kishore Mohun Roy v. Chundernath*, (1887) 14 Cal. 644.

35. *Hassan Ammal Bibi v. Ismail Moideen*, (1915) 29 I.C. 976 (979)=28 M.L.J. 642 (648)=1915 M.W.N. 414; cf. *Veyindramathu v. Maya Nandan*, (1920) 43 Mad. 107 (F.B.) (*Held*, that even a stranger purchaser cannot proceed by a separate suit. His only remedy is to proceed under O. 21, R. 95, Civil Procedure Code).

36. *Harkah Sona v. Gopi Kishen*, 1926 All. 120 (121)=89 I.C. 124; *Sheo Narain v. Noor Muhammad*, (1907) 29 All. 463 (466)=1907 A.W.N. 131=4 A.L.J. 434; *Seru v. Bhagoban*, 9 Cal. 602.

37. *Ishwar Pershad v. Jai Narayan*, (1886) 12 Cal. 169 (173).

38. See Chitale's Civil Procedure Code, 1st Edn., Part II, p. 448; *Kailash v. Gopal*, (1926) 95 I.C. 494=1926 Cal. 798=53 Cal. 781 (F.B.); *Ram Narain v. Bandi*, 31 Cal. 737; *Madhusudan v. Gobinda*, 27 Cal. 34; *Veyandramathu v. Maya Nandan*, 43 Mad. 107 (F.B.); *Kannam v. Arvula Haji*, 50 Mad. 403=99 I.C. 677=1927 Mad. 288=52 M.L.J. 1; *Sandhu v. Hussain*, 28 Mad. 87; *Kattayat v. Raman*, 26 Mad. 740.

39. *Sridhar v. Jageshwar*, 47 I.C. 844=4 P.L.J. 716 (730, 733); *Tribeni v. Ram Assay*, 10 Pat. 670=133 I.C. 337=1931 Pat. 241 (F.B.); *Ram Prasad v. Bindeswari*, 11 Pat. 165=1932 Pat. 145=13 P.L.T. 121; *Hargovind v. Budar*, 48 Bom. 550=83 I.C. 932=1929 Bom. 429 (F.B.); cf. *Narottam Das v. Thakur Sukhraj*, (1928) 3 Luck. 719; but see *Martin*

that the two remedies are concurrent, and that the decree-holder purchaser may proceed either by an application or by a suit; and the remedy by suit is open even where the application for delivery of possession was barred.⁴⁰ According to this view the decree-holder purchaser stands on the same footing as a stranger purchaser. The **Punjab Chief Court** takes the same view,⁴¹ but, the **Lahore High Court** has held recently that an order on application by decree-holder auction-purchaser for issue of certificate is on a dispute falling under S. 47, Civil Procedure Code: and there is a bar of separate suit.⁴²

2058. EFFECT OF SYMBOLICAL POSSESSION.—

This article contemplates suits for possession by an auction-purchaser in a case when he has not taken possession under his purchase. If, after having obtained possession, either actual or symbolical, he is disturbed in possession, this article will not govern the suit. The delivery of possession under O. 21, Rr. 36, and 96 is spoken of as formal or symbolical possession. According to **Allahabad (S. 2059)** and **Bombay Full Bench view, (S. 2060)** such possession is of no avail, where actual possession can and should have been delivered according to law. But this view is not shared by **Calcutta (S. 2061)** and **Madras High Courts (S. 2062)**. The **Patna High Court** follows the **Calcutta view (S. 2063)**.

2059. The **Allahabad High Court** held in *Mangli Prasad v. Debi Din*,⁴³ that if possession was delivered to the auction-purchaser through the Court in the manner required by the Code of Civil Procedure, that delivery of possession gave to the auction-purchaser, as against the judgment-debtor whose rights were purchased by him, a conclusive title, and must, as observed by the **Calcutta High Court** in the case of *Juggobundhu Mukerji v. Ram Chunder Bysack*,⁴⁴ be deemed to be equivalent to actual possession. On the date of delivery of possession the auction-purchaser must be held to have obtained actual possession as against the judgment-debtor, and it is only during the period following that date that the possession of the judgment-debtor, if he continued in possession could be regarded as adverse.⁴⁵ This view is supported

v. Hasham, 126 I.C. 209=8 Rang. 162=1930 Rang. 61; *Chote Lal v. Sarwan*, 140 I.C. 683=1932 Nag. 140=28 N.L.R. 250.

40. *Bhagwati v. Banwari*, 31 All. 82 (F.B.) and *Sheo Narain v. Nur Muhammad*, 29 All. 463; also see *Bai Mani v. Ranchod*, (1922) 72 I.C. 256 (Bom.).

41. *Chotha Ram v. Karman*, 8 P.R. 1918=44 I.C. 169 (F.B.); *Brijlal v. Durga*, (1919) 56 I.C. 254=1 Lah. 134.

42. *Gurdit Singh v. Kanshi Ram*, 1935 Lah. 144 (2)=153 I.C. 85=37 P.L.R. 116.

43. (1897) 19 All. 499 (501).

44. (1880) 5 Cal. 584.

45. *Mangli Prasad v. Debi Din*, (1897) 19 All. 499 (501).

by the **Full Bench** ruling of the **Calcutta High Court** in the case of *Jaggabundhu Mitter v. Purnanund Gossami*,⁴⁶ in which it was held that limitation should be computed in a suit for possession against the judgment-debtor from the date of delivery of formal possession where the judgment-debtor has been in possession, the delivery of possession under the Civil Procedure Code, would according to the above view amount to an ouster of the judgment-debtor and an entry into possession by the purchaser. If subsequent to this delivery of possession the judgment-debtor remained in possession, his possession would be adverse possession from that date against the purchaser; but in the case of a third person who had already purchased the property and obtained actual possession, delivery of possession as against judgment-debtor alone, cannot amount to an ouster of the person in possession. The possession of such third person commenced on the date on which he obtained possession, and from that date must be regarded as adverse to the debtor, or to the auction-purchaser.⁴⁷ Where formal possession had been given under a final foreclosure decree, but the mortgagor had continued in actual possession, the **Allahabad High Court** held that the remedy was by suit, to which the limitation under Art. 138 was applicable.⁴⁸ Section 244, Civil Procedure Code, 1882 (S. 47, present Code) had no application, inasmuch as the proceedings in execution ended with the delivery of formal possession.⁴⁹ O. 21, R. 95, provides for *actual* possession being given where the nature of the property permits actual possession to be given, and O. 21, R. 96, provides for the *formal* delivery of possession where the nature of property does not permit of *actual* possession being given, but according to Allahabad view, the legal effect of *formal* possession must be the same as the *actual* possession in the rule immediately preceding. This view has been taken consistently by that Court in a number of cases.⁵⁰ A Full Bench of the Allahabad High Court, has held in *Jang Bahadur Singh v. Hanwant Singh*,¹ that if, upon an execution sale, possession has been delivered to the auction-purchaser in accordance with the provisions of the Code of Civil Procedure, either actual or formal possession, having regard to the nature of property and the mode in which possession ought in law to have been delivered, the auction-purchaser gets a fresh start for the computation of limitation. But, where such possession has not

46. 16 Cal. 530 (F.B.); O.R. *Krishna Lal Dutt v. Radha Krishna Surkhel*, 10 Cal. 402.

47. *Narain Das v. Lalta Prasad*, (1899) 21 All. 269 (271).

48. *Jagannath v. Milap Chand*, (1906) 28 All. 722.

49. *Ibid.*, 28 All. 722 (723).

50. *Rajendra Kishore Singh v. Bhagwan Singh*, (1917) 39 All. 460; *Reld. Mangli Prasad v. Debi Din*, (1897) 19 All. 499; *Narain Das v. Lalta Prasad*, (1898) 21 All. 269; *Jagannath v. Milap Chand*, (1906) 28 All. 722; *Rahim Baksh v. Muhammad Hafiz*, (1909) 10 I.C. 319.

1. (1921) 43 All. 520 (523, 524).

been delivered, the mere fact of formal delivery of possession is not available to him for saving the operation of limitation.

2060. The Full Bench decision of the **Bombay High Court** in *Mahadev Sakharam Parkar v. Janu Namji Halle*,² supports the view above enunciated by the **Allahabad High Court**.³ This Full Bench decision overrules the previous decisions where it was held that there would be no difference between symbolical or actual possession, where the contest is between the auction-purchaser or his assign who had obtained formal possession and the judgment-debtor or persons claiming under him, and that such formal possession would give a new start as against them to the auction-purchaser, and that Art. 138 would not apply to such a case.⁴ The **Privy Council** decision in *Thakur Sri Radhakrishna v. Ram Bahadur*,⁵ is not inconsistent with the Allahabad and Bombay Full Bench decisions above mentioned.

"The property in the case which was before their Lordships of the Privy Council was land in the occupation of tenants and possession had been delivered in accordance with the provisions of the law relating to delivery of possession in respect of such land. Their Lordships held that such possession gave, as between the parties to the proceedings relating to delivery of possession, a new start for the computation of limitation."⁶

2061. The **Calcutta High Court** held in the Full Bench case of *Juggobandhu Mukerjee v. Ramchunder Bysack*,⁷ that delivery of possession by going through the process prescribed by the Code of Civil Procedure being the only way in which the decree of Court awarding possession to the plaintiff can be enforced, must as against the judgment-debtor, be deemed equivalent to actual possession. As against third parties such symbolical possession is of no avail, because they are not parties to the proceedings. This decision was approved of by their Lordships of the Privy Council in *Thakur Sri Radhakrishna v. Ram Bahadur*,⁸ which resembled the Calcutta

2. (1912) 36 Bom. 373 (F.B.).

3. *Jang Bahadur Singh v. Hanwant Singh*, (1921) 43 All. 520 (523).

4. *Gopal v. Krishna Rao*, (1900) 25 Bom. 275 (279); also see *Lakshman v. Moru*, (1892) 16 Bom. 722 and *Mahadeo v. Parashram*, (1900) 25 Bom. 358; cf. 36 Bom. 373 (F.B.).

5. (1917) 43 I.C. 268=34 M.L.J. 97=22 C.W.N. 330=1917 P.C. 197 (2) (P.C.).

6. *Jang Bahadur Singh v. Hanwant Singh*, (1921) 43 All. 520 (523) (F.B.); cf. *Mahadevappa v. Bhima Doddappa*, (1921) 46 Bom. 710=66 I.C. 320 (Where MacLeod, C.J., thought that the Privy Council decision has doubted the correctness of the Bombay decision in *Mahadev v. Janu*). But see *Shridhar v. Ganpati*, (1918) 43 Bom. 559 and *Raghunath v. Kondiba*, (1926) 46 Bom. 932=1922 Bom. 2=68 I.C. 91 (Where the Bombay Full Bench decision has been followed).

7. (1880) 5 Cal. 584 (F.B.).

8. (1917) 43 I.C. 268=34 M.L.J. 97 (P.C.).

Full Bench case in that the only possession that could be given in a case relating to Zamindari property which was in the possession of tenants, was by delivery of formal or symbolical possession. In *Hari Mohan Shaha v. Baburali*,⁹ where the auction-purchaser who had obtained symbolical possession, against the judgment-debtor, sued for possession of land within 12 years from the date of the auction-purchase, it was held that Art. 144, Limitation Act, applied to the case, and that the suit was not barred by limitation. The authority of *Krishna Lall Dutt v. Radhakrishna Surkhel*,¹⁰ was considered not binding as that case had been reversed by the decision in the case of *Juggobundhu Mitter v. Purnanund Gossami*,¹¹ and the latter case was certainly consistent with the principle of the Calcutta cases of *Juggobundhu Mukerjee v. Ram Chunder Bysack*,¹² *Lokessar Koer v. Purgun Roy*¹³; *Shama Charan Chatterji v. Madhab Chandra Mookerji*¹⁴; and the Madras decision in *Sevi v. Muttusami*.¹⁵ According to this view no distinction is to be made between cases in which symbolical possession had been taken by the decree-holder of property of which the judgment-debtor was in actual possession, or where the property being in possession of the tenants or otherwise incapable of actual possession being given, only formal or symbolical possession could be delivered. In the Privy Council case of *Thakur Sri Radhakrishna v. Ram Bahadur*,¹⁶ the **Bombay Full Bench** decision in *Mahadev v. Janu*,¹⁷ was referred to in argument as holding that symbolical possession is not equivalent to real possession under the Civil Procedure Code, except where the Code expressly or by implication provides that it shall have that effect. But Lord Dunedin is reported to have observed that "that was the case of a judgment-debtor". In *Janaki Nath Saha v. Baikunta Nath*,¹⁸ the **Calcutta High Court** refused to draw the distinction as regards the right of the purchaser at a sale in execution of immoveable property in certain circumstances to actual possession and in other circumstances to formal or symbolical possession. It was held accordingly, that as against a defendant

9. (1897) 24 Cal. 715 (Maclean, C.J. and Banerji, J.); Folld. in *Bhulu Beg v. Jatindranath*, (1922) 27 C.W.N. 24; *Kulada Prasad v. Khudiram*, (1922) 27 C.W.N. 673=70 I.C. 18; also see *Pratap Udai Nath v. Sunderbans*, (1922) 71 I.C. 999 (1005).

10. 10 Cal. 402.

11. 16 Cal. 530.

12. 5 Cal. 584 (F.B.).

13. 7 Cal. 418.

14. 11 Cal. 93.

15. 10 Mad. 53.

16. (1918) 43 I.C. 268=1917 P.C. 197 (2)=27 C.L.J. 191=22 C.W.N. 330 (P.C.).

17. 36 Bom. 373 (F.B.).

18. 1922 Cal. 176=36 C.L.J. 140=27 C.W.N. 259 (Art. 142 applied).

claiming through the mortgagor, who is to be taken as actually or constructively a party to the decree in execution of which the land was sold, the plaintiff is entitled to treat the delivery of symbolical possession as equivalent to the delivery of actual possession.

2062. In *Govind v. Venkata*,¹⁹ the Madras High Court has followed the view of the Calcutta High Court in *Hari Mohan v. Baburali*.²⁰

Madras. Again, in *Venkatakrishna Row v. Venkappa*,²¹ it was observed that if the judgment-debtor be the party in possession, formal or symbolical possession in the presence of the decree-holder or purchaser or their agent, is effective delivery by the officer of the Court, which is acknowledged by a receipt attested by witnesses, and is equivalent to putting the decree-holder or purchaser in actual possession of the land.

"If, however, the judgment-debtor be not the party in possession, but a third party is in possession, a delivery thus made in the absence of the third party and not *hostilely* to him cannot by *itself* affect his possession, nor amount to an ouster or dispossession of him, and his possession will continue uninterrupted . . . but it is operative as an ouster or dispossession of him and placing of the decree-holder or purchaser in actual possession, if such delivery takes place in the presence of and adversely to the claim of such third party."²²

Thus, symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given. But as regards persons not so parties, only actual dispossession can interrupt their adverse possession.²³ This coincides with the Calcutta view that delivery of symbolical possession does not in any way affect the possession of or give start to a fresh period of limitation against persons who are not parties to the suit or execution proceedings.²⁴ But, in *Govindasami Pillai v. Petha Perumal Chetty*,²⁵ it was held that symbolical possession is given only in cases where the property in actual possession is entitled to remain in such possession as in cases of delivery under O. 21, R. 96, Civil Procedure Code, and should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery, i.e., where he gets no possession at all. This veers round to the

19. (1907) 17 M.L.J. 598.

20. (1897) 24 Cal. 715.

21. (1903) 27 Mad. 262 (269, 270).

22. *Ibid.*, 27 Mad. 262 (270).

23. *Per* Odgers, J., in *Ranganatha Aiyar v. Srinivasa Aiyangar*, (1925) 90 I.C. 1037=1926 Mad. 42=49 M.L.J. 656.

24. *Jobeda Khatun v. Tulsi Charan Das*, (1923) 77 I.C. 564 (566)=1923 Cal. 82=36 C.L.J. 472; *Folld.* 5 Cal. 584 (F.B.) and 16 Cal. 530 (F.B.); also see *Radha Krishna v. Ram Bahadur*, 43 I.C. 268=34 M.L.J. 97 (P.C.).

25. (1918) 44 I.C. 839 (Mad.).

Allahabad²⁶ and **Bombay**²⁷ view, that if a person is entitled to actual possession, his taking symbolical possession would be of no avail and the possession of the judgment-debtor would continue, and if the decree-holder does not get actual possession within the time allowed by law, his right would be barred. This view had been followed by Deva Doss, J., in *Kamayya v. Bhimarasetti*,²⁸ but that decision has been subsequently reversed by a Bench in *Kamayya v. Mahalakshmi*.²⁹

2063. The Patna High Court³⁰ has adopted the view taken by the Calcutta High Court in *Hari Mohun Shaha v. Baburali*.^{30-a}

2064. In *Sardar Khan v. Abdulla Khan*,³¹ the **Lahore High Court** has followed the view taken in **Allahabad** and **Bombay** Full Bench cases: but in a later case of *Harbhagwan v. Taja*,³² the opposite view has been held, pointing out that a mere irregularity in proceedings under O. 21, R. 35 or 36 would not be a fatal defect, if the person concerned is a party to the proceedings and if there is a substantial compliance with the provisions of the law.

2065. In *Gulab Khan v. Ataullah*,³³ the Oudh Chief Court has taken a view inclined towards the **Bombay Full Bench** view in the case of *Mahadev v. Janu*,³⁴ but it was held that each case must be decided upon the sort of possession which the property in question is capable of being effectively given. Accordingly, where an unspecified share in property in the possession of the judgment-debtor was sold in execution, the only sort of possession which could be delivered to the auction-purchaser was constructive possession under O. 21, R. 95, Civil Procedure Code, and such possession when granted would be a valid and effective delivery of possession sufficient to give to the auction-purchaser a fresh start for limitation.³⁵ Similarly, in *Ataullah Khan v. Mt.*

26. *Jang Bahadur Singh v. Hanwant Singh*, (1921) 43 All. 520=63 I.C. 212=19 A.L.J. 469.

27. *Mahadeo Sukha Ram v. Janu Namji*, (1912) 36 Bom. 373 (F.B.).

28. (1924) 49 M.L.J. 303=1925 Mad. 1140=86 I.C. 439.

29. (1927) 53 M.L.J. 339=105 I.C. 249.

30. *Pratap Udai Nath v. Sunderbans*, (1922) 71 I.C. 999 (1005)=1923 Pat. 76.

30-a. (1897) 24 Cal. 715.

31. (1922) 71 I.C. 885=1924 Lah. 301; Folld. 43 All. 520 (F.B.) and 36 Bom. 373 (F.B.).

32. (1925) 89 I.C. 596=1926 Lah. 35; also see *Jauri Lal v. Beman*, (1920) 68 I.C. 182=2 L.L.J. 563.

33. 1928 Oudh 251=3 Luck. 506=110 I.C. 70=5 O.W.N. 372.

34. *Ibid.*, 3 Luck. 506 (Art. 142 applied).

35. *Ataullah Khan v. Mt. Hansraj Kunwar*, 1928 Oudh 391; Folld. 1928 Oudh 251=3 Luck. 506 (F.B.); Dist. *Mahesh Baksh Singh v. Manohar Lal*, (1915) 18 O.C. 369=33 I.C. 657.

Hansraj Kunwar, it was held that although formal delivery of possession under O. 21, R. 95, Civil Procedure Code, may have the effect of actual possession as against the judgment-debtor himself, such formal delivery of possession cannot take effect as actual possession as against a purchaser of the rights of the judgment-debtor who has previously obtained actual possession.³⁶

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
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139.	By a landlord to recover possession from a tenant.	12 years.	When the tenancy is determined.
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SYNOPSIS.

- 2066. Corresponding provisions.
- 2067-2068. **Scope and application.**
- 2067. Tenancy by sufferance.
- 2068. Terminable tenancy.
- 2069-2074. **Landlord and tenant.**
- 2069. Privy Council rulings.
- 2070. Determination of tenancy.
- 2071. Adverse possession.
- 2072. Non-payment of rent.
- 2073. *Onus probandi*.
- 2074. Permissive occupation.

NOTES.

2066. CORRESPONDING PROVISIONS.—This article is same as Art. 139 of Sch. II, Act XV of 1877, and Act IX of 1871. The general provision in cl. 12 of S. 1, applied to suits of this character under Act XIV of 1859. In *Davis v. Abdool Hamed*,³⁷ held in a case under Act XIV of 1859, that a landlord's cause of action to recover possession from a tenant or any one claiming under the tenant only accrues from the time when he determines the tenancy, and there can be no limitation or adverse possession as against the landlord so long as the tenancy continues.

2067. SCOPE AND APPLICATION.—Art. 139 deals with those cases where there has been the relationship of landlord and tenant.³⁸

"The description of the suit to which that article applies is one by a landlord to recover possession from a tenant: that cannot mean a suit in which the relationship of landlord is one that still subsists; for the time from which the period of limitation begins to run is 'when the tenancy is determined', and this necessarily implies that the suit must be brought after the relationship of landlord and tenant has ceased."³⁹

36. *Ataullah Khan v. Mt. Hansraj Kunwar*, 1928 Oudh 391.

37. (1867) 8 W.R. 55.

38. *Chandri v. Daji Bhan*, (1900) 24 Bom. 504 (507).

39. *Per Jenkins, C.J., in Chandri v. Daji Bhan*, (1900) 24 Bom. 504 (507).

Accordingly, where on the determination of the original term of lease the tenants holding over without paying rent or the landlords otherwise assenting to his continuing in possession, become tenants at sufferance, there is no such relationship.

Tenancy by sufferance.

"A tenant by sufferance is only in by the laches of the owner, so that there is no privity between them."⁴⁰

And,

"the possession of such a person holding over is wrongful".⁴¹

and, in the absence of any evidence from which a fresh tenancy can be inferred in the strict sense of the term, under Art. 139,

"time begins to run against the landlord when the period of fixed lease expires".⁴²

Reliance was placed for this view on *Kantheppa Reddi v. Seshappa*,⁴³ where it was remarked that time could not begin to run from some indeterminate date after that period. Where a tenant holds over after the expiration of his lease without further agreement, such holding over, though by English law styled a tenancy by sufferance is wrongful. Slight evidence, however, will suffice to change his position to that of a tenant-at-will.⁴⁴ The **Allahabad High Court** has held in *Onkar Prasad v. Dhani Ram*,⁴⁵ that where a tenant holds over after the expiry of the terms of his tenancy, he holds as a tenant at sufferance and time will not begin to run against the landlord under Art. 139, until the tenancy at sufferance thus coming into existence terminates. But see *Gopinath Maharaj v. Moti*,⁴⁶ where the **Nagpur Judicial Commissioner's Court** has held that limitation begins to run against the landlord from the date when by efflux of time the tenancy comes to an end. Their Lordships of the **Privy Council** also have virtually affirmed the correctness of the view in *Chandri v. Daji Bhau*.^{46-a} See *Bhagwan Ramanuj v. Ramkrishna Bose*.⁴⁷

The fiction of a tenancy by sufferance, which is said to arise under the English law, on a tenant's holding over has no place in

40. Per Jenkins, C.J., in *Chandri v. Daji Bhau*, 24 Bom. 504 (508); also see *Hari Gir v. Kumar Kamakhya Narain Singh*, 1924 Pat. 572=3 Pat. 534.

41. *Ibid.*, Per Candy, J., 24 Bom. 504 (509).

42. *Ibid.*, 24 Bom. 504 (509).

43. (1897) 22 Bom. 893.

44. *Kantheppa Reddi v. Sheshappa*, (1897) 22 Bom. 893.

45. (1930) 122 I.C. 865=1930 All. 177=1930 A.L.J. 594.

46. (1934) 148 I.C. 561=1934 Nag. 67=30 N.L.R. 155; Reld. on *Chandri v. Daji Bhau*, 24 Bom. 504; *Pusama! v. Makdum Baksh*, 3 I.C. 566=31 All. 514=6 A.L.J. 584; *Bisheshwar Nath v. Kundan*, 75 I.C. 454=44 All. 583=20 A.L.J. 593=1922 All. 318 and *Purushotum v. Vishnu*, 105 I.C. 859=29 Bom. L. R. 332.

46-a. 24 Bom. 504.

47. (1922) 74 I.C. 561=26 C.W.N. 722=1922 P.C. 184 (P.C.).

the Indian law after the enactment of the Transfer of Property

S. 116, Transfer of Property Act. ⁴⁸ Under S. 116 of the Transfer of Property Act, which points the rule which

is *prima facie* applicable even in cases not coming under the Act, where a lessee holds over and the lessor or his representative accepts rents or otherwise assents to the tenant continuing in possession, the lease is, in the absence of a contract to the contrary, renewed from year to year, or month to month as the case may be.⁴⁹ But while at common law the lessor could, by his assent, convert a tenant by sufferance into a tenant in the true sense of the term, he could not, by his mere assent, convert the representatives of a tenant by sufferance, who are mere trespassers into tenants without their own consent.⁵⁰ The Madras High Court considered the statement made *obiter* in *Adimulam v. Pir Ravuthan*,¹ that

"if a tenant by sufferance dies and his representative enters and holds on he holds as trespasser,"

is in accordance with all the authorities on the subject.² But compare *Subramati Ramiah v. Gundala Ramanni*,³ where it was held that a suit against the representatives of a tenant after the determination of the tenancy to recover the property leased is governed by Art. 139 and not Art. 144. The Nagpur Court takes the common view that "whatever possessory rights a tenant by sufferance may have against a rank trespasser, it cannot be claimed that the tenancy-at-sufferance is heritable."⁴ In *Ram Rachhya Singh v. Kamakhya Narain Singh*,⁵ the Patna High Court has held that where after the expiry of an *Istamrari mokarrari* lease the assignee of the lessee continues in possession of the demised lands, the receipt of rent from him by the landlord will not necessarily indicate that the landlord recognised the interest of a permanent tenure in the tenant, nor will it show that that the tenant accepted the position of a yearly tenant. Such a person who continues in possession of

48. *Govindaswamy Pillai v. Ramaswamy Aiyar*, (1916) 34 I.C. 6=3 L.W. 408=30 M.L.J. 492; also see *Madar Sahib v. Kader Moideen*, (1916) 33 I.C. 705=39 Mad. 54 (56).

49. *Vadapalli Narasimham v. Dronam Raju*, (1907) 31 Mad. 163 (166)=18 M.L.J. 26.

50. *Ibid.*, 31 Mad. 163 (166).

1. 8 Mad. 424 (427).

2. (1907) 31 Mad. 163 (167); *Reld.* on 22 Bom. 893; 24 Bom. 504 and *Seshamma v. Chickaya*, 25 Mad. 507 (511).

3. (1910) 33 Mad. 260=4 I.C. 1080=19 M.L.J. 732; *Folld.* in *Sudalai Muthu v. Sappani*, (1925) 86 I.C. 938=1925 Mad. 446.

4. *Gopinath Maharaj v. Moti Chirva*, 30 N.L.R. 155=1934 Nag. 67; also see *Hari Gir v. Kumar*, 1924 Pat. 572=3 Pat. 534 (Suit against heirs of grantees held barred after twelve years' uninterrupted possession without payment of rent).

5. (1924) 84 I.C. 586=4 Pat. 139=1925 Pat. 216=6 P.L.T. 12.

the property by the *laches* of the landlord is, strictly speaking, not a tenant at all, and his possession is not rightful. In such a case the right to eject the person who thus continues in possession commences from the death of the original lessee and limitation for a suit to eject him commences from that time. A yearly tenancy under S. 116 of the Transfer of Property Act is only created by law in favour of the original lessee. The representatives or assignees of a tenant for life will not become tenants from year to year without the forms laid down in S. 107 of the Transfer of Property Act, that is, they can become tenants only by means of a registered document.⁶

2068. (2) But, Art. 139 can only apply where the tenancy is

(ii) Terminable ten- proved to have determined, and can have
ancy. no application to a case where it is not
terminable.⁷ The article, therefore, does

not apply to cases in which the plaintiff seeks to recover a tenure permanent in its nature, and not determinable by notice from the plaintiff.⁸ In *Judoonath Ghose v. Schoene Kilburn & Co.*,⁹ it was held that a tenure under a *dur-maurusi mokurari* lease of land, which is not let for agricultural purposes, cannot be put an end to by a mere relinquishment on the part of the lessee, although after notice to the landlord, so long as the parties stand in the relationship of landlord and tenant, there is no possibility of adverse possession, and limitation does not begin to run in favour of the tenant and against the landlord. See *Secretary of State v. Krishnamoni Gupta*.¹⁰ After the determination of the tenancy, the character of the possession changes, and the present article contemplates a case where the lease has expired, or the tenancy at will is determinable by notice.¹¹ Article 139 is

Art. 144.

the only article dealing expressly with the case of a landlord *as such*. If the case does not fall within that article, then it must fall under Art. 144, when the period of limitation begins to run from the time when the possession of the defendant becomes adverse to the plaintiff, or any person through whom the plaintiff claims.¹² However, one who holds possession on be-

6. *Ram Rachhya Singh v. Kamakhya Narain Singh*, (1924) 84 I.C. 586 (594).

7. *Thakore Fatesinhji v. Bamnaji Dalal*, (1903) 27 Bom. 515 (544); also see *Chaturi Singh v. Makund Lall*, (1881) 7 Cal. 710 (712) (Art. 139 refers to tenancies in which leases have expired and so have terminated).

8. *Modho Kooery v. Tekait Ram*, (1882) 9 Cal. 411; s.c., 12 Cal. 484 (P.C.).

9. (1883) 9 Cal. 671 (679).

10. (1902) 29 I.A. 104 (P.C.).

11. *Modho Kooery v. Tekait Ram*, 9 Cal. 411 (417); s.c., 12 Cal. 484 (P.C.).

12. *Krishna Govind Dhur v. Hari Churn Dhur*, (1882) 9 Cal. 367 (370).

half of another does not by mere denial of that other's title make his possession adverse, so as to give himself the benefit of the Statute of Limitation.¹³ Where the *putni* and *darputni* came to an end not by reason of any sale for arrears of rent but by voluntary relinquishment by the *putnidar* and the *darputnidar* in favour of the Zemindar, the article applicable was Art. 144, and the period of limitation was twelve years running from the date when the possession of the defendants became adverse to the plaintiffs.¹⁴

2069. **LANDLORD AND TENANT.**—In *Kumar Gopika*

Privy Council.
1929 P.C. 99.

Raman v. Atal Singh,¹⁵ where the plaint was quite inconsistent with the view that there was any subsisting relation of land-

lord and tenant between the plaintiffs and the defendants in that suit; and the defendants had repudiated any tenancy under the plaintiffs; and, the decree of Court for possession with past and future mesne profits, subject to defendants' right as *jotedars* did not establish the relationship of landlord and tenant between the parties, it was held, by their Lordships of the Privy Council, that Art. 139 did not apply to a suit in ejectment of defendants by plaintiffs. The High Court decision was affirmed, where it was held that the statute runs against the landlord only when the relationship of landlord and tenant is determined, and the landlord is entitled to take possession. This principle is also applicable to cases where the tenants claim not an absolute title in themselves but only an

1928 P.C. 146.

interest higher than that to which they are entitled.¹⁶ Similarly, in *Kumar Kamakhya*

v. Ram Raksha, where certain villages were leased by plaintiff's predecessors to defendant's predecessors on "*Mukarrari Istemrari*" at an annual rental; and the assignee of the original lessee remained in possession of the village paying rent to the mortgagee of the lessor, but no rent was paid to the original lessor or his successors; although the assignee from lessee was willing to pay rent to the plaintiff's predecessor in title provided that his name was entered as the holder of the *mokurraridari* interest, it was held that the payment of the rent to the mortgagee was not sufficient to create a tenancy between a mortgagor and the assignee, and after the termination of the lease for lives, there was no recognition by the plain-

13. *Bejoy Chunder Banerjee v. Kally Prossonno Mookerjee*, (1878) 4 Cal. 327 (329).

14. *Gobinda Nath v. Surja Kanta*, (1899) 26 Cal. 460 (463).

15. 1929 P.C. 99=114 I.C. 561=56 I.A. 119=56 Cal. 1003 (P.C.); Affirmed, 1926 Cal. 193=85 I.C. 678.

16. Per B. B. Ghose, J., in 85 I.C. 678 (688); also see *Maharani Beni Pershad Koeri v. Dudhnath Roy*, (1899) 26 I.A. 216 (224) (P.C.) (Where it was held that "a mere notice by a person holding for his life that he claimed to be holding on a perpetual or hereditary tenure would not make his possession adverse within the meaning of the Limitation Act so as to bar a suit for possession on the expiration of the life tenancy").

tiff or his predecessor in title, so as to constitute the defendants or their predecessors in title, tenants. That the plaintiff failed to prove that the relationship of landlord and tenant was in existence within 12 years prior to the institution of the suit, and that, therefore, the plaintiff's suit for possession was barred by the Limitation Act.¹⁷

A defendant's plea of adverse possession is obviously inconsistent with the application of Art. 139, which
 1934 P.C. 77. relates to the case of a landlord suing to recover possession from a tenant. In *Mt. Allah Rakhi v. Shah Mohammad*,¹⁸ the defendants who were left into possession of the suit lands belonging to a Muhammadan shrine in consideration of their services as *mujawars* were dismissed, but continued in possession for over 12 years, and in a suit brought prior to 1st January, 1929, when the provisions of the Limitation Amendment Act of 1929 were made applicable, the defendants pleaded adverse possession, it was held that the case was governed by Art. 144, and there being no doubt that the title to the lands was in the plaintiffs, the *onus* was on the defendants to prove the adverse possession

relied upon. Where after the expiry of
 1935 P.C. 59. the period fixed in a lease the tenant continues in possession as tenant on same terms expressed in the lease, he cannot claim adverse possession, and there is no period of time from which it can be said that the statute runs so as to debar the lessors from their remedy for the recovery of the property.¹⁹

2070. DETERMINATION OF TENANCY.—(1) A lease

(i) **Tenant or lessee.** is not defined in the Limitation Act, but it has been defined in S. 105 of the Transfer of Property Act: *also see* Registration Act, S. 2, Cl. (7) and Stamp Act, S. 2, Cl. (16). The essence of a lease is the transfer of a right to enjoy the property, *exclusively*, for a fixed period. As Woodfall says, in his work on Landlord and Tenant, 22nd Edn., p. 49:

"A lease is a contract for the exclusive possession of lands or tenements for some certain number of years or other determinate period".

17. 1928 P.C. 146=55 I.A. 212=109 I.C. 663=7 Pat. 649=55 M.L.J. 882 (P.C.); Affirmed 1925 Pat. 357=86 I.C. 387 (*Held*, that S. 116 of the Transfer of Property Act, does not contemplate the position of the heirs or assignees of the original lessees. It contemplates the position of the lessee himself, after the determination of the lease; further: that there can be no relationship of landlord and tenant between the parties where one party is claiming a permanent right and the other is not willing to accept the claim alleging that the other party has no right whatsoever to remain in possession).

18. 1934 P.C. 77=56 All. 111=61 I.A. 50=147 I.C. 887=66 M.L.J. 431 (P.C.).

19. *Chandrika Prasada v. B. B. & C. I. Ry. Co.*, 1935 A.W.R. 459=154 I.C. 945=1935 P.C. 59=68 M.L.J. 552 (P.C.).

If the possession is, however, not of that character, the transaction whatever else it may be, is not a lease.²⁰ A Licensee is not a tenant, to evict whom this article could apply.²¹ Where the plaintiffs who were *mirasidars* of a village permitted the defendants to occupy their land on the condition that they do blacksmith's work for the plaintiffs, it was held that on ceasing to do work they were liable to eviction without notice. It was not the case of a tenant, but the case of a licensee.²² Tenancy is created where there is an agreement to pay rent.²³

"The difference between a lease and a license is that in the case of a license there is no interest in immoveable property transferred to the licensee; while in the case of a lease there is a transfer or carving out of the interest in favour of the person in whose favour the lease is granted. One chief consideration is whether there is any right of exclusive possession given".²⁴

The distinction between a license and a lease was explained by a Full Bench of the Calcutta High Court in the case of *Secretary of State v. Karunakanta Chowdhry*.²⁵ That distinction is, that in the case of a license, there is no transfer of interest in land, whereas in the case of a lease, there is a transfer of such interest.²⁶

2071. A tenant who holds over cannot set up an adverse title to the landlord; but under Art. 139, the landlord or his transferee, to whom the landlord cannot convey a better title than he himself has, must sue for ejectment of the tenant holding over, within 12 years after the determination of the tenancy.^{26-a} As long as the tenant is in possession he cannot deny that it was from the lessor that he got the land. Where, however, a tenant holds on after the expiry of the lease, time begins to run against the landlord from the date of the expiry of the lease under Art. 139 of Limitation Act, and after the expiry of 12 years the title of the landlord must cease by application of S. 28 of the Limitation Act, with the cessation of the right to recover the land his right to the property is also extinguished. Art. 144 has nothing to do

20. *Seeni Chettiar v. Santhanathan*, (1896) 20 Mad. 58 (64) (F.B.); Per Subramanya Ayyar, J.

21. *Athakutti v. Govinda*, (1892) 16 Mad. 97.

22. *Ibid.*

23. *Abdulla Razutan v. Subbarayyar*, 2 Mad. 346; *Subba v. Nagappa*, 12 Mad. 353.

24. Per Kumaraswami Sastri, J., in *Acting Secretary, Board of Revenue v. The Agent, S. I. Ry. Coy.*, 1925 Mad. 434=48 M.L.J. 161=86 I.C. 688=48 Mad. 368; also see *Mahipal Singh v. Lalji Singh*, (1912) 16 I.C. 705=17 C.W.N. 166.

25. 35 Cal. 82 (99)=11 C.W.N. 1053=6 C.L.J. 342 (F.B.); Followed in 16 I.C. 705, *supra*.

26. *Ibid.*

26-a. *Debi Prasad v. Mt. Gujar*, 1922 All. 423=20 A.L.J. 696=68 I.C. 750.

with such a case.²⁷ Whether the plaintiff sues the defendant as a tenant or trespasser, the defendant by admitting tenancy precludes himself from pleading adverse possession or limitation.²⁸ The possession of a tenant not being adverse to the title of the landlord, limitation cannot be applied in a suit by the latter against the former,²⁹ even if plaintiff has not had *khas* possession for 12 years.³⁰ A suit for ejectment by a landlord cannot succeed against a defendant who is admitted to have held the land as tenant, unless the tenancy is shown to have ceased by expiry of lease, or by service of notice.³¹ A tenant is estopped from contesting the title of his landlord during the continuance of the tenancy, but where there is a particular term fixed by a rent-deed and after the expiry of that term the tenant continues to hold the leased premises without payment of any rent, he does so in the capacity of a tenant by sufferance (*See S. 2067, ante*) and his position is practically that of a trespasser. In such a case time begins to run against the landlord from the date on which the term fixed by the rent-deed expires and a suit for ejectment instituted more than 12 years after such date would be barred under Art. 139, Limitation Act.³² Where the defendants came into possession of the lands as tenants from year to year and not as permanent tenants, the defendants could not be held to have, by adverse possession extending over a period of 12 years, acquired, under the combined operation of Art. 144, and S. 28 of the Limitation Act, the limited right of permanent occupancy subject to the payment of a fixed rent.³³ The legal position was thus stated:—

“A person who lawfully came into possession of land as tenant from year to year or for a term of years, or as mortgagee, cannot by setting up, during the continuance of such relation, any title adverse to that of the landlord or mortgagor, as the case may be, inconsistent with the real legal relation between them,—and that that however notoriously and to the knowledge of the other party, acquire by the operation of the law of limitation, title as owner or any other title inconsistent with that under which he was let into possession. . . . , and in the case of a lease, the landlord's title can be extinguished only at the expiration of the period prescribed by

27. *Dalmir Singh v. Joti Prasad*, (1925) 85 I.C. 550=1925 All. 698; also see *Ambalam v. Peria Karuppan*, 1935 Mad. 377=157 I.C. 569=41 L.W. 398 (The property becomes vested in the defendant under S. 28, and his right to recover arrear of rent is also extinguished) and *Pusa Mal v. Mahdum Baksh*, (1909) 31 All. 514 (Time against landlord, under Art. 139 begins to run on the expiry of term of lease).

28. *Watson & Co. v. Ranee Shurut Soondaree*, (1867) 7 W.R. 395.

29. *Shristeedhur v. Kalikant*, (1864) 1 W.R. 171.

30. *Doolee Chund v. Beharee Singh*, (1875) 24 W.R. 113.

31. *Narain Mundul v. Bhookto Mahato*, (1876) 25 W.R. 56.

32. *Iaitqad Ali v. Muhd. Baksh*, (1927) 102 I.C. 231=1927 All. 821; Relied on *Bisheshwar Nath v. Kundan*, 75 I.C. 454=20 A.L.J. 593=44 All. 583=1922 All. 318 and *Pusa Mal v. Mahdum Baksh*, 3 I.C. 566=6 A.L.J. 584=31 All. 514.

33. *Seshamma Shettati v. Chickaya Hegada*, (1902) 25 Mad. 507.

Art. 139 of the Limitation Act, and under the latter article such period will commence to run only when the tenancy is determined."³⁴

Where on the expiration of his lease a tenant for a term of years remained in possession of the demised premises but ceased to pay rent to the landlord, and more than 12 years after the expiry of the lease the landlord brought a suit to eject his former tenant, it was held that the suit was governed by Art. 139, Limitation Act, and was barred by limitation.³⁵

It should be noticed that the starting point under Art. 139, is the date when the tenancy is determined, and the question does not turn upon the adverse possession of the tenant, as in cases under Art. 144, Limitation Act.³⁶ The question in cases under Art. 139 is whether the lease has been put an end to within 12 years of suit, and not whether there has been adverse possession.³⁷ There is no such thing as tenancy by sufferance in this country, and the result is that a tenant holding over after the expiry of the lease must be held to be trespassers.³⁸ Where in a suit to recover possession of certain property it appeared that the defendant's ancestor had a lease of the property in suit, which expired more than 12 years before the date of the suit and that no fresh agreement was entered into between the parties; it was held that the suit was barred under Art. 139 of the Limitation Act: The title to property also was lost under S. 28 of the Limitation Act, and did not remain vested in the plaintiff when the remedy was barred.³⁹

2072. Payment of rent proves the relation of landlord and tenant, and where that exists, no question of Non-payment of rent. limitation can arise.⁴⁰ So long as the relation of landlord and tenant exists, *e.g.*, by a renewal of lease, the mere omission by the tenant to pay his rent does not constitute an adverse possession so as to make limitation applicable.⁴¹ Mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased.⁴² The non-

34. *Seshamma v. Chickaya*, (1902) 25 Mad. 507 (511).

35. *Bisheshwar Nath v. Kundan*, (1922) 44 All. 583; Followed *Chandri v. Daji Bhau*, 24 Bom. 504.

36. *Madan Mohan v. Kumar Rameswar*, (1907) 7 C.L.J. 615.

37. *Lakhamgowda v. Jambhu*, 1935 Bom. 382=37 Bom.L.R. 593=159 I.C. 378.

38. *Reajuddin v. Abdul Jobbar*, (1922) 69 I.C. 504=1924 Cal. 445; also see *Chandri v. Daji Bhau*, 24 Bom. 504=2 Bom.L.R. 491.

39. *Bhagwan Ramanuja v. Ramkrishna Bose*, (1923) 74 I.C. 561=26 C.W.N. 722.

40. *Rajkishore v. Grijakant*, (1876) 25 W.R. 66.

41. *Troylokhyia v. Mohima Chander*, (1867) 7 W.R. 400; also see *Rungolal v. Abdool Guffoor*, (1878) 4 Cal. 314.

42. *Premasukhdas v. Bhupia*, (1871) 2 All. 517 (F.B.); *Tota v. Sakotia*, 18 P.R. 1888; *Rungolal v. Abdool Guffoor*, (1878) 4 Cal. 314;

payment of rent for a term of twelve years and more does not relieve an occupancy-ryot from the status of a tenant so as to give him a title to the land. Where the right to take rent is admitted by the ryot, failure to pay rent becomes a recurring cause of action, and no question of limitation can arise.⁴³ This article applies only where tenancy is determined, and there is no question of limitation where the tenancy is renewed, on the expiry of the original period, on terms of tenancy from year to year.⁴⁴

2073. If once the relation of landlord and tenant is established,

Onus probandi.

it is for defendants to establish its determination by affirmative proof over and above the mere failure to pay rent.⁴⁵ In *Umar Baksh v. Baldeo Singh*,⁴⁶ it was held that where no rent had been paid for over 25 years and the tenant had denied on oath that the lease was intended to be operated, and the plaintiff had made no serious attempt either to recover the property or to oust the defendant, the defendant's possession was treated as adverse. Where the plaintiff sued the defendant, alleging that defendant was a tenant since about eleven years before suit, and the defendant denied the tenancy, and pleaded adverse possession, it was held that the plaintiff having failed to prove the allegation of tenancy set up by him, the *onus* lay on the plaintiff to prove that he had possession within 12 years.⁴⁷ If the defendant admits the plaintiff's ownership up to a certain year, it lies upon him to show when the alleged adverse possession under Art. 144 commenced; or under Art. 139, when the tenancy terminated.⁴⁸

2074. In case of permissive occupation under an agreement

Permissive occupation.

to occupy for a term, the tenancy terminates on the expiration of the term, and not earlier.⁴⁹ A suit for the recovery of immoveable property against a person who had originally been in mere permissive occupation or possession is governed by Art. 144, and in such a case the owner of the property who has accorded the

Dadoba v. Krishna, (1879) 7 Bom. 34; *Tatia v. Sadashiv*, (1882) 7 Bom. 40; cf. *Umar Baksh v. Baldev Singh*, 97 P.R. 1915 (Non-payment of rent combined with other circumstances); also see *Prosonna Kumar v. Sri Kantha*, (1912) 40 Cal. 173 (180); *Reajuddi v. Chand*, (1916) 35 I.C. 28=24 C. L.J. 453; *Narsingha Row v. Rangaswami*, 35 I.C. 871 (2)=4 L.W. 397.

43. *Paresh Narain v. Kassi Chander*, (1878) 4 Cal. 661.

44. *Tekait Har Narain v. Darshan Deo*, (1919) 3 Pat. 403; *Ram Chandra v. Bhi Khambar*, (1910) 37 Cal. 674=6 I.C. 339.

45. *Prem Sukh Das v. Bhupia*, (1871) 2 All. 517 (F.B.); *Tiruchurna v. Sanguvien*, 3 Mad. 118.

46. 97 P.R. 1915.

47. *Haji Khan v. Baldeo Das*, (1901) 24 All. 90 (93).

48. *Talshibhai v. Ranchhod*, (1902) 26 Bom. 442.

49. *Shivendrappa v. Ballappa*, (1898) 23 Bom. 283.

permissive occupation cannot be said to have discontinued possession within the meaning of Art. 142, Limitation Act.⁵⁰ Every permissive occupation is not a tenancy within the meaning of Art. 139.¹ Where the plaintiff came into Court alleging that the defendant had, about 8 years previously, hired a house from him at a monthly rent, but latterly had failed to pay the rent, and the plaintiff having given notice to quit claimed possession; and the defendant denied tenancy, and asserted adverse possession, but the Court found that the defendant's occupation was permissive as a friend, held that the plaintiff was entitled to a decree for possession notwithstanding that his case had been that the defendant was his tenant.²

Article. Description of Suit. Period of Limitation. Time from which period begins to run.

140. By a remainderman, a 12 years. When his estate reversioner (other than falls into a landlord) or a devisee, for possession of immoveable property.

SYNOPSIS.

- 2075. Corresponding provisions.
- 2076. English Law.
- 2077-86. **Scope and application.**
- 2077. Remainder and reversioner defined.
- 2078. Application to vested remainders.
- 2079. Not applicable to Hindu Law reversioners.
- 2080. "Reversioner other than a landlord."
- 2081. Adopted son.
- 2082. Collateral heirs in Punjab.
- 2083. Devised property.
- 2084. Possessory title.
- 2085. Executors and beneficiaries under Will.
- 2086. Grantees for life.
- 2087. **Starting point of limitation.**
- 2087. Falling into possession.

NOTES.

2075. CORRESPONDING PROVISIONS.—This article is the same as Art. 140 of Sch. II, Act XV of 1877; and, corresponds to Art. 141, Sch. II, Act IX of 1871. Under Act XIV of 1859, suits of this character were governed by S. 1, cl. 12, under which time commenced to run from the date when cause of action arose.

2076. ENGLISH LAW.—The Real Property Limitation Act, 1833 (3 & 4 Will. IV, c. 27) provided for a period of twenty years for suits concerning an estate or in interest in reversion or remainder, and time began to run from the accrual of the right of entry. This period was reduced to twelve years under the Real

50. *Gobind Lall Seal v. Debendranath*, (1880) 6 Cal. 311=7 C.L.R. 181.

1. *Gobindlal v. Debendronath*, (1880) 5 Cal. 679=5 C.L.R. 527.

2. *Abdul Ghani v. Mt. Babni*, (1902) 25 All. 256 (F.B.).

Property Limitation Act, 1874 (37 & 38 Vict., c. 57), S. 1. This period was liable to be reduced to six years if the owner of the *particular* estate was out of possession at the time when his interest determined. Under S. 3 of this Act, a future estate may fall into possession by the determination of the particular estate by forfeiture or breach of condition.

2077. SCOPE AND APPLICATION.—The present article is confined to suits “by a remainderman, a reversioner (other than a landlord), or a devisee”, for possession of immoveable property.

The words “**remainderman, reversioner, or devisee,**” are used here in the technical sense of English Real Property Law.³ Under English common law adverse possession for any length of time against a tenant for life is ineffectual, as against the reversioner or remainderman, whose right to sue for possession *first* accrues on the death of the tenant for life.⁴

“An estate in *Remainder* is that expectant portion, or ulterior estate, which on the creation of a particular estate, is at the same time, conveyed away, by the owner, to another who is to enjoy it immediately after the determination of such particular estate. A remainder **does not, like reversion, arise by operation of law, but it is always created by act of parties** (Wharton and Stephen) on the determination of a particular estate for life or years, there may be several consecutive remainders for life or years, or one remainder in fee. An estate in *reversion* is where any estate is derived by grant, or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived. On the determination of the estate so derived by grant or otherwise, that is, on the determination of the particular estate, the possession returns or reverts to the original owner, who is for this reason called the reversioner. A reversioner is the donor or his representative to whom the remainder of an estate reverts, such remainder not having been disposed of by the donor”.⁵

A reversion arises where the grantor grants a particular estate to a person and does not dispose of the remainder. That which is not disposed of, resides in the grantor and is called a reversion. It is the interest in land undisposed of which reverts to the grantor after the exhaustion of the particular estate.⁶ Where a complete estate is devised, the life estate to the widow, and the remainder to the son to be adopted, the two together made up the estate in fee simple

3. *Kesho Pershad v. Madho Pershad*, 3 Pat. 880 (897)=83 I.C. 812 (820)=1924 Pat. 721; also see *Jayawant Jivwanrao v. Ramchandra*, (1915) 40 Bom. 259.

4. Mitra's Limitation Act, Vol. II, p. 1643.

5. Mitra's Limitation Act, Vol. II, p. 1643, citing *Sreeramulu v. Kristamma*, (1902) 26 Mad. 143 (147)=12 M.L.J. 197 and *Maharaja Kesho Pershad Singh v. Madho Pershad Singh*, (1924) 3 Pat. 880 (897).

6. *Maharaj Kesho Pershad v. Madho Pershad*, 3 Pat. 880 (897)=1924 Pat. 721=83 I. C. 812 (820); also see *Roda v. Harnam*, 18 P. R. 1895 (F. B.) (Reversion means that portion left of an estate after a grant of a particular portion of it, short of the whole estate, has been made by the owner to another person: and not merely the person entitled to succession).

which was completely disposed of, and as was pointed out by Selborne, L.C., in *Attorney-General of Ontario v. A. F. Mercer*,^{6-a}

Reversioner distinguished from a 'possibility of reverter'.

"there cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee simple".⁷ If the fee simple granted is "conditional" or "determinable", what is left in the grantor is, not a reversion, but "a possibility of reverter".^{7-a}

The case of a possibility of reverter is clearly not comprehended within the terms of Art. 140.⁸

Remainder defined.

A remainder is defined in Brown's Law Dictionary,

"to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man who is seised of lands in fee simple grants them to *A* for twenty years, and after the determination of that term, to *B* and his heirs for ever; in this the estate of *A* (that is, the interest which *A* has in the land for twenty years) is termed an estate for years; and the estate of *B* (that is, the interest which *B* has in the lands after the end of 20 years) is termed a remainder".

A remainder is defined by Lord Coke to be

"a remnant of an estate in lands or tenements, expectant on a *particular* estate created together with the same at one time".⁹

Williams in his "Principles of the Law of Real Property" explains a remainder and a reversion in the following terms:—

"If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interests; for in each case his grantee has a less estate than himself: Accordingly, on the expiration of the term of years or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee revert to himself or his heirs, and he or his heir will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the particular estate, being only a part, or *particular* of the estate in fee (2 Black-Comm. 165). And during the continuance of such particular estate the interest of the tenant in fee simple, which still remains undisposed of—that is, his present estate, in virtue of which he is to have again the possession at some future time—is called his reversion."

2078. Interests are either vested or executory. Vested interests may be present or future. Future

(i) Vested remainder.

vested interests include vested remainders, quasi-remainders and reversions. Executory

interests may be certain or uncertain, *i.e.*, contingent. Article 140 makes no distinction between interests vested or

6-a. (1883) A.C. 767 (772).

7. *Kesho Pershad Singh v. Madho Pershad Singh*, 3 Pat. 880 (897) = 1924 Pat. 721 = 83 I.C. 812 (820).

7-a. See Halsbury's Laws of England, Vol. 24, p. 213 at p. 237.

8. *Kesho Pershad Singh v. Madho Pershad Singh*, 3 Pat. 880 (897) = 83 I.C. 812 (820); also see Brown's Law Dictionary, 2nd Edn., pp. 645 and 646; Digby, History of Real Property, p. 262.

9. 1 Inst. 143 (a).

executory, certain or contingent, and applies to all kind of remainders,¹⁰ In *Skinner v. Kunwar*

Remainderman not confined to legal estates. *Naunihal Singh*,¹¹ their Lordships of the Privy Council held that Art. 140 applies to a claim by a person of an equity of redemption. Where the mortgagee had

apparently ceased to be the mortgagee by getting in the equity of redemption and had obtained possession not under the mortgage but under the purchase of the equity, their Lordships considered it immaterial that the mortgagee should have thought he was absolute owner if in fact he was mortgagee; and immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee. But in that case the transfer which was *ex concessis* ineffective to give the absolute title was made during the existence of the particular estate vested in Skinner, and in such a case Article 140 applied, as the plaintiff claiming only an equity of redemption came within the meaning of a remainderman.

2079. The word "reversioner" in Art. 140 is used in the technical sense of English Law,¹² and a

(ii) Reversioner. reversioner under Hindu Law, who takes

an estate on the death of a Hindu widow, or other female life-tenant, is not a reversioner within the meaning of this article. See notes under Art. 141. A Hindu widow's estate is measured not by duration but by use: and, it is not quite accurate to describe it as being one for life. A Hindu reversioner has no interest or right *in praesenti* in the property which the female holds for her life. He has what is technically termed a *spes successionis*,¹³ that is, a bare chance of succession. It is not a vested interest; he cannot, therefore, make a valid transfer of it.¹⁴ A widow, or other limited heir is not a tenant for life, but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last full owner upon her death.¹⁵ Her right is in the nature of a right of property; her position is that of owner; her powers in that character are, how-

10. Dr. Pal's Limitation Act, p. 907.

11. 1929 P.C. 158 (161)=51 All. 367=117 I.C. 22=56 I.A. 192 (P.C.); Relied on *Skinner v. Naunihal Singh*, (1913) 35 All. 211=19 I.C. 267=40 I.A. 105 (P.C.).

12. *Roda v. Harnam*, 18 P.R. 1895 (F.B.).

13. *Amrit Narain Singh v. Gaya Singh*, (1917) 45 Cal. 590=34 M.L.J. 398 (P.C.).

14. *Brojo v. Gouree*, (1870) 15 W.R. 70; *Bahadur Singh v. Mohar Singh*, (1902) 24 All. 94=29 I.A. 1 (P.C.); also see *Annodomohan Roy v. Gour Mohan Mullick*, (1923) 50 Cal. 929=50 I.A. 239=45 M.L.J. 617 (P.C.) and *Sri Jaganadaraju v. Sri Raja Prasada Row*, (1915) 39 Mad. 554 (Contracts for sale of expectancies are void in India).

15. *Bijoy Gopal v. Krishna*, (1907) 34 Cal. 329=34 I.A. 87 (P.C.).

ever, limited; but so long as she is alive no one has any vested interest in the succession.¹⁶ A Hindu widow represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit, provided that the suit was fought out according to law and was not collusive or fraudulent. Adverse possession which bars her, bars also the reversionary heirs after her.¹⁷ A transfer or renunciation of a contingent right of inheritance is prohibited under Muhammadan Law.¹⁸ **The full heir succeeding after the widow's death, under Hindu Law, is treated in the Limitation Act not as a reversioner but as falling into a separate category.**¹⁹ Art. 141 gives a Hindu entitled to the possession of immoveable property on the death of a Hindu female, a period of 12 years within which to bring his suit for possession of that immoveable property, and provides that that period begins to run from the time when the female dies.²⁰ His title and his right to possession would not come into being until the death of the last surviving widow, and then and then only could he legally sue for the property.²¹ Hence a reversioner under Hindu Law who is to take after the widow's death is not a reversioner within the meaning of this article.²² Where the terms "*remainderman*", "*reversioner*" and "*devisee*" as used in a technical sense do not apply to plaintiff, his suit for possession would be governed by the residuary Art. 144.²³

2080. This article applies to a suit "by a reversioner (other than a landlord)". Article 139 deals expressly with the case of a suit by landlord *as such*: cases falling under Art. 139 were meant to be excluded from Art. 140, Limitation Act. According to English Law, a landlord is also a reversioner. The lessor, is a *reversioner*, whose suit against his tenant, being provided for by Art. 139, the legislature has restricted this present Art. 140 to reversioners "other than a landlord", to

16. *Janaki Ammal v. Narayanasami*, (1916) 43 I.A. 207 (209)=39 Mad. 634 (637)=37 I.C. 171 (P.C.).

17. *Vaithilinga Mudaliar v. Srirangath Anni*, 1925 P.C. 249=48 Mad. 883=52 I.A. 322=49 M.L.J. 769 (P.C.).

18. *Asa Beevi v. Karuppan Chetty*, (1917) 41 Mad. 365.

19. *Moro Narayan Joshi v. Balaji Raghunath*, (1894) 19 Bom. 809 (814).

20. *Cursandas Govindji v. Vundravandas*, (1889) 14 Bom. 482 (488).

21. *Vundravandas v. Cursandas*, (1897) 21 Bom. 646 (652), *affir.* in *Vundravandas v. Parvatibai*, (1899) 26 I.A. 71=23 Bom. 725 (P.C.).

22. *Kesho Pershad v. Madho Prasad*, (1924) 3 Pat. 880=1924 Pat. 721=83 I.C. 812.

23. *Bala v. Jatti*, 155 P.R. 1883.

prevent the overlapping of the two articles. Accordingly, it has been held in *Krishna Gobind Dhur v. Hari Churn Dhur*,²⁴ that "probably in this article, the expression 'other than a landlord,' means 'other than a landlord as such suing his tenant' . . . If the case does not fall within that article then it must fall within Art. 144".

Where there was sufficient indication that a tenancy by sufferance was assented to continue, and was so converted into tenancy from year to year, as a grant for maintenance, the suit was held governed by Art. 139, and not by Art. 140.²⁵

Adopted son.

2081. The Bombay High Court observed in *Moro Narayan v. Balaji*,²⁶ that

"the case of an adopted son superseding the widow's estate on his adoption is a *casus omissus* in Arts. 140 and 141, and must, therefore, fall under the provisions of Art. 144".

The Madras High Court agreed with this view that

"the case of a son adopted by the widow is not specifically provided for in the Limitation Act as are those covered by Arts. 140 and 141 of the Limitation Act; and, it will be straining the language of Art. 140 to include the adopted son in the term reversioner occurring therein. That term applies only to a donor or his representative to whom the remainder of an estate reverts, such remainder not having been disposed of by the donor. The case of an adopted son claiming during the lifetime of the widow falls, therefore, under Art. 144, and possession can be adverse to him only from the date of the adoption".²⁷

Under the Hindu Law, a son adopted by a widow does not derive his title from his adoptive mother, just as a reversioner does not derive his title from or through the widow. Time, therefore, does not run against the adopted son prior to the date of his adoption and adverse possession against the adoptive mother does not affect his rights.²⁸

2082. The position of a male-holder of ancestral land under

Collateral heirs in Punjab. customary law is that his right to sue for possession is derived from no individual but from the customary rule placing a restriction upon powers of alienation.²⁹ The right of reversioners of a sonless proprietor in the Punjab to sue for possession is not derived from the last holder of the estate, but is an independent right derived from the original ancestor who held the property.³⁰

24. (1882) 9 Cal. 367 (370).

25. *Ram Chandra Singh v. Bhikambar Singh*, (1910) 37 Cal. 674 (679).

26. (1894) 19 Bom. 809 (814).

27. *Sreeramulu v. Kristamma*, (1902) 26 Mad. 143 (147).

28. *Sitaram Sheokaran v. Rajaram Lutujee*, (1918) 48 I.C. 230 (Nag.); Reld. on 23 Bom. 725 and 25 I.C. 692=27 M.L.J. 569.

29. *Roda v. Harnam*, 18 P.R. 1895 (F.B.).

30. *Sundar v. Salig Ram*, 9 I.C. 300=26 P.R. 1911 (F.B.).

Accordingly, where the last male holder of agricultural land died leaving a widow who died in 1876, and a mother who died in 1892, and the widow had alienated without necessity part of her husband's land and put the alienee in possession and the nearest reversioner died in 1903, without challenging or expressly assenting to the alienation and the remote reversioner sued in 1909 the heirs of the alienee for possession of the land alienated, it was held by the Full Bench that the suit was not barred by limitation: that Arts. 140 and 141, were inapplicable to the claim, as the plaintiffs were not entitled themselves to claim possession when the mother died in 1892 nor did the estate at that time fall into their possession. As regards Art. 144, the plaintiffs could not sue for possession as long as the near reversioner lived, and the claim of remote reversioners was not barred by reason of any adverse possession against the near reversioner.³¹ As held in a Calcutta case, Art. 140 dealing with remaindermen, reversioners and others, deals with a class of persons who claim under a title quite independent of the particular limited estate upon which the remainder, reversion, or other estate is dependent.³²

2083. Where the purchaser of the rights of a devisee sues to obtain possession of the devised property, the period of limitation applicable, if the devisee or his transferee has once obtained possession, is provided by Art. 144. If the devisee has not obtained possession, the suit must be brought within the period prescribed by Art. 140 of the Limitation Act.³³ The right to property left by will (assuming that the testator had power to dispose of it) falls into possession, by **Hindu Law**, immediately upon the death of the testator; and, therefore, a claim, making title to share in immoveable property under a will is barred by time, unless brought within twelve years from the date of the testator's death under Art. 140 of Limitation Act.³⁴ Where **Succession Act** has to be applied, and the legacy is not payable for one year after the testator's death, the suit brought within thirteen years of the testator's death would be within time.³⁵ Under S. 119, Act XXXIX of 1925, the vesting in possession of the legacy may be postponed; and contingent and conditional bequests are provided for by Ss. 120 and 129 of that Act. Where under the provisions of a Hindu's will, the grandsons were not to get possession until they reached the age of thirty, the estate was held vested in the grandsons, and fell into possession within the

31. *Sundar v. Salig Ram*, 26 P.R. 1911 (F.B.).

32. *Azam Bhuyan v. Faizuddin Ahmed*, (1886) 12 Cal. 594 (596).

33. *Mt. Gajibai v. Nilkanth*, (1920) 56 I.C. 929 (Nag.); cf. *Mylapore Iyasawmy v. Yeo Kay*, (1887) 14 Cal. 801=14 I.A. 168 (P.C.).

34. *Mylapore Iyasawmy v. Yeo Kay*, (1887) 14 Cal. 801 (P.C.).

35. *Cursetji Pestonji Bottlicwalla v. Dadabhai Eduljee*, (1896) 19 Mad. 425 (432); see S. 337, Act XXXIX of 1925.

meaning of Art. 140 of the Limitation Act, when the testator died: and the executors were bound to have sued within twelve years from the date of the said cause of action.³⁶

2084. This article, as well as Art. 141, will not apply where the plaintiff relies only on his possessory title.³⁷ This article does not apply unless the plaintiff is out of possession. Where property was bequeathed to three persons in common, and after the testator's death, only two remained in possession of the property, it was held that whether they be taken as tenants-in-common or joint tenants, the entry of one would be entry on behalf of others, unless there were clear evidence of an intention to hold adversely. In the absence of such an intention, a suit for possession by the devisee not in possession is not governed by Art. 140 of the Limitation Act.³⁸ If the devisee has not obtained possession, actual or constructive, Art. 140 of the Limitation Act must apply; but if a devisee has once obtained possession within twelve years of the estate falling into possession, the limitation would be governed by Art. 144, Limitation Act.³⁹ Art. 140 applies to a case where an heir *first* succeeds *as such*, and not to cases where having succeeded, he creates a life-interest in favour of some other person.⁴⁰

2085. This article is also inapplicable where on the death of the last full owner, an executor under the will of the last owner is legally vested with the ownership of the estate, in which a life estate and remainder and reversion are created, and the estate remains unadministered at the time of the commencement of the cause of action. If the executor is barred, the beneficiaries under the will will be equally barred. Where the executor is also himself a life-tenant under the will, the remainderman or reversioner will not have a fresh cause of action under Art. 140, unless the executor has ceased to hold as such at the commencement of the cause of action, but holds as life-tenant only.⁴¹

2086. One entering as life-tenant does not hold adversely against the remainderman.⁴² The possession of a tenant for life is not rendered

36. *Krishna Kinkur Ray v. Panchuram Mundul*, (1889) 17 Cal. 272 (276).

37. *Harihar Prasad v. Kesho Prasad*, 1925 Pat. 68 (93)=5 P.L.T. Supp. 1=93 I.C. 454.

38. *Andipuranam Pillai v. Appusundaram Pillai*, (1909) 2 I.C. 311=5 M.L.T. 103.

39. *Mt. Gaji Bai v. Nilkanth*, (1920) 56 I.C. 929 (Nag.).

40. *Raja Baldeo Singh v. Mohan Singh*, (1914) 22 I.C. 855=119 P.L.R. 1914.

41. *Maharaja Kesho Prasad v. Madho Pershad*, (1924) 3 Pat. 880=83 I.C. 812.

42. *Skinner v. Naunihal Singh*, (1929) 51 All. 367=117 I.C. 22=1929

adverse within the meaning of the Limitation Act by a notice from the tenant that he claims to be holding on a perpetual or hereditary tenure.⁴³ Accordingly, where a grant of a village for maintenance was made by a Zemindar to his nephew, operating only for life, and the grantee, surviving the grantor acknowledges the succeeding Zemindar to be entitled to the village; however, he had already executed a pattah described as permanent to a lessee, and after the death of the original grantee for life, the *dwami pattadar*, paid the stipulated rent in the pattah to the Zemindar, who did not disturb his possession, it was held that the pattah was in excess of the estate for life granted originally, was void as against the successor-in-title of the grantor, and not merely voidable after the grantee's death. The duration of the *pattah* could not exceed that of the original grant, and the acceptance of rent could not confirm the permanency of the lease, or preclude claims for legal rights.⁴⁴ An assertion of absolute title by a life-tenant does not constitute adverse possession against the reversioners.⁴⁵ Persons, who and whose predecessors in title have been always holding service *vatan* lands as tenants, cannot acquire any title to a permanent tenancy in such lands by adverse possession as against the *vatan* *landars* from whom they hold the lands.⁴⁶ No adverse possession can run against a person till he becomes entitled to the possession of the property. An adverse possession for any length of time against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life.⁴⁷ Where the plaintiff became entitled to possession only after the determination of the limited or particular estate held by her mother-in-law, whatever its precise nature might have been, and that estate did not fall into possession until her death, which took place within twelve years before the suit, it was held that Art. 142 cannot apply as the plaintiff was never in fact dispossessed; nor can Art. 144, as possession of a trespasser cannot be deemed adverse against a person not entitled to be in possession at that time. There was thus no bar to the application of Art. 140, Limitation Act.⁴⁸

P.C. 158; also see *Madhav Rao v. Raghunath*, (1923) 47 Bom. 798=50 I.A. 225 (P.C.).

43. *Beni Pershad Koeri v. Dudnath Roy*, (1899) 27 Cal. 156=26 I.A. 216 (P.C.).

44. *Ibid.*

45. *Sheolal Singh v. Goor Narain*, (1910) 7 I.C. 218 (Cal.).

46. *Madhavrao v. Raghunath*, (1923) 47 Bom. 798=1923 P.C. 205=50 I.A. 255=25 Bom. L. R. 1005 (P.C.).

47. *Naunihal Singh v. Alice Georgia Skinner*, 1925 Lah. 707=47 All. 803 (820); s.c. on appeal *Skinner v. Naunihal Singh*, (1929) 50 I.A. 255=51 All. 367=56 I.A. 192 (P.C.).

48. *Secretary of State v. Wazed Ali Khan*, 1921 Cal. 687=34 C.L.J. 141.

The purchaser at the sale in execution of the rights and interests of a grantee for life could not as between the purchaser and grantee for life be considered to fall under Art. 134; their Lordships considered that Art. 144 gave twelve years from the time when the possession of the defendant became adverse to the plaintiff. Such possession was not adverse during the life possession of the grantee.⁴⁹ A suit for possession by the grantor's representatives in interest against such an alienee was within time if brought within twelve years of the death of the grantee for life.⁵⁰ There is no bar to the application of Art. 140, Limitation Act, to a suit for recovery of possession of a land of an estate which did not fall into possession of the plaintiff until after the death of a person who was in possession of the estate as a limited owner under an *ekrarnamah*. It is immaterial whether the *ekrarnamah* conferred a life-estate properly so called and whether the plaintiff was a remainderman or a reversioner, taking after the lapse of a life-estate in its strict sense. To such a suit Arts. 142 and 144 cannot apply.¹

2087. STARTING POINT OF LIMITATION.—This

Falls into possession. article provides that the starting point of limitation is the date when the future estate "falls into possession". The estate of the remainderman or the reversioner falls into possession on the determination of the particular estate which precedes it. The *terminus a quo* is in consonance with the principle "*contra non valentem agere nulla currit praescriptio*"—"prescription does not run against a party who is unable to act".² Where the plaintiff became entitled to possession only after the determination of the limited or particular estate held by her mother-in-law, whatever its precise nature might have been, and that estate did not fall into possession until her death which took place before the suit, it was held that there was no bar to the application of Art. 140, Limitation Act.³ In *Skinner v. Naunihal Singh*,⁴ their Lordships observed that if the time had begun to run in the lifetime of the settlor, the operation of the statute could not be postponed to subsequent settlement. This is in accordance both with the rule of English law, and the principle enunciated in S. 9 of the Limitation Act. Where at a partition between sons, a portion is left for the parents, to be

49. *Kalidas Mullick v. Kanhya Lal*, (1884) 11 Cal. 121 (131) (P.C.).

50. *Ibid.*; also see *Skinner v. Naunihal Singh*, (1929) 51 All. 367 (P.C.) and *Raghunath v. Madhav Rao*, 25 Bom. L. R. 456; s.c. on appeal, 25 Bom. L. R. 1005=47 Bom. 798 (P.C.).

1. *Promothanath v. Dinamani*, (1922) 65 I.C. 826=34 C.L.J. 129.

2. *Jnanendra Mohun Dutt v. Umesh Chandra Guha*, (1922) 26 C.W. N. 985 (989)=1922 Cal. 544 (547).

3. *Secretary of State v. Wazed Ali Khan*, 1921 Cal. 687=34 C.L.J. 141; also see *Promotha Nath v. Dinamani*, (1907) 34 C.L.J. 129.

4. (1929) 56 I.A. 192=51 All. 367 (P.C.).

divided among sons after parents' death, the sons get a vested remainder and not a contingent interest in the land. If a son mortgages his interest in that portion during the lifetime of the parents the right of the auction-purchaser under the mortgage decree to sue for possession accrues on the death of the parents.⁵ If the remainderman is in possession on behalf of the holder of a life-interest, limitation begins to run only when the holder of life estate dies.⁶ The right to property left by will, falls into possession, by Hindu Law, immediately on the death of the testator.⁷ But, under Succession Act, the terms of the bequest may often postpone the vesting in possession of the legacy. The direction for the management of the property however, is to be distinguished from a direction postponing the vesting in possession.⁸

2088. THE ONUS.—The onus is ordinarily on the plaintiff to prove that the suit is brought within twelve years of the estate falling into possession⁹: and this *onus* is not affected by the presumption as to the *factum* and not *date* of death under S. 108 of the Evidence Act.¹⁰ However, when plaintiff brings his case *prima facie* under Art. 140, and the defendants want to avoid the operation of these articles, the onus lies on them to prove that limitation began to run from the time of the full owner, that is to say, he was dispossessed when he was the full owner.¹¹

Article.	Description of Suit.	Period of Limitation	Time from which period begins to run.
141.	Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.	12 years.	When the female dies.

SYNOPSIS.

Title I: Historical.

2089-2091. Corresponding provisions.

2089. —under Act XIV of 1859.

2090. —under Act IX of 1871.

2091. —under Act XV of 1877.

5. *Raghunath v. Madhav Raval*, 25 Bom. L. R. 456=1923 Bom. 415=76 I.C. 217; Reld. on *Vyapuri v. Sonamma*, (1915) 39 Mad. 811=2 L.W. 1080=31 I.C. 412 (F.B.).

6. *Mitra's Limitation*, Vol. II, p. 1653.

7. *Mylapore Iyasawmy v. Yeo Kay*, (1887) 14 Cal. 801 (P.C.).

8. *Krishna v. Panchuram*, (1889) 17 Cal. 272.

9. *Jayawant v. Ram Chandra*, (1915) 40 Bom. 239.

10. *Lal Chand v. Ramrup*, 5 Pat. 312 (P.C.).

11. *Hemendranath Roy v. Janendra*, 1935 Cal. 702=62 C.L.J. 49=159 I.C. 1101=40 C.W.N. 115.

Title II: Scope and application.

- 2092. Scope and application—"Like suit".
- 2093-2102. Where this article does or does not apply.
- 2093. Independent title of a reversioner.
- 2094. Limited estate held by a female.
- 2095. Male or female reversionary heirs.
- 2096. Females out of possession.
- 2097. Suit by adopted son.
- 2098. Immoveable property.
- 2099. Successive female heirs.
- 2100. Alienations by females in possession.
- 2101. Suits involving questions of invalidity of adoption.
- 2102. Suits not under this article.

Title III: Article explained.

- 2103. Assignee of Hindu reversionary heir.
- 2104. "Entitled to possession of immoveable property."
- 2105. Effect of a decree against widow.
- 2105-A. Illustrations.
- 2106. Privy Council rulings.
- 2107. Effect of adverse possession against widow.
- 2107. Previous history.
- 2108. Alteration in the law.
- 2109. Present law.
- 2110. Illustrative cases.

Title IV: Starting point of limitation.

- 2111. Starting point of limitation.
- 2112. Effect of subsequent disability.
- 2113. Surrender in favour of daughter.
- 2114. Effect of bar of limitation—Right of suit by remote reversioner.
- 2115. Presumption of death of female—*Onus probandi*.

NOTES.**TITLE I: HISTORICAL.****2089. CORRESPONDING PROVISIONS.—**Under Act

Act XIV of 1859. XIV of 1859, suits of this nature were governed by the general provision in S. 1, cl. 12 of that Act, there being no special provision for a case like this. The words "**cause of action**" in Act XIV of 1859, were held to refer, not to a new cause of action accruing to the reversionary heirs personally, but to the cause of action which accrued to the heir or representative, for the time being of the deceased.¹² Accordingly, when alienations of her husband's estate were improperly made by the widow, they were good as against her for life; and the reversionary heir's cause of action did not accrue until her death. But, when property belonging to the husband's estate was held adversely to the widow, and never reached her hands, the cause of action accrued to her, and a suit, whether by her, or by the reversionary heir, had to be brought within the usual period, counting from the commencement of the adverse possession. The reversionary heirs were bound by decrees relating to her

12. *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*, (1868) 9 W.R. 505 (F.B.); Refd. *Shiv Gunga's case*, 2 W.R.P.C. 31=

husband's estate, which were obtained against her without fraud or collusion; and they were also bound by limitation by which she, without fraud or collusion, was bound.¹² The **Full Bench** decision in *Nobin Chunder v. Issur Chunder*,^{12-a} made a distinction between cases where the defendant entered under a grant from the widow, and others where the defendant was in adverse possession during the lifetime of the widow. In the former case limitation would not run against the reversioners during the widow's lifetime, and the widow herself had no cause of action against permissive occupier or grantee for her life. But, where the defendant was in possession as a trespasser during the widow's lifetime, the case was considered analogous to waste, and reversioners had a cause of action during the widow's lifetime to have the estate reduced into possession. As regards property of which a Hindu widow never got possession, and which was held adversely to her and to her husband's estate, limitation ran during her lifetime; and, if the ordinary period of limitation had elapsed since the cause of action accrued to her, the reversioner would be barred.¹³ The fact of a widow having been twelve years out of possession barred a reversioner's suit, though it was brought within twelve years of her death.¹⁴ In a suit by a reversioner, upon the death of a Hindu widow, to recover possession of property by right of inheritance, against a person adopted by the widow, and put in possession by her, the cause of action accrued to the plaintiffs on the death of the widow, if the reversioner denied the validity of the adoption.¹⁵ The **Privy Council** affirmed the principle of the Full Bench decision in *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*,^{15-a} and it was held in the case of *Amirtolall Bose v. Rajoneckant Mitter*,¹⁶ by their Lordships that if two sisters, upon the death of their mother, together constitute their father's heir, then, upon the death of one of them, the property which descends to both jointly survives to the other whose right of survivorship previously acquired by inheritance is not destroyed by her disqualification to inherit at that time by reason of her being a childless widow. Under Act XIV of 1859, it would be noticed, the starting point for suits for recovery of immoveable property was from the time the cause of action arose.

2090. The scheme of legislation under Act IX of 1871 was

Act IX of 1871.

modified by providing a special Art. 142, in Second Schedule of that Act, which introduced a new limitation for persons entitled to immoveable property on the death of a Hindu widow, *viz.*, twelve years from the death

9 M.I.A. 539; also see *Gunga Churn v. Juggurnath*, (1869) 12 W.R. 97 and *Ghisa Singh v. Gajraj Singh*, 33 I.C. 371 (375)=18 O.C. 289.

12-a. 9 W.R. 505 (F.B.).

13. *Brinda Dabee v. Pearce Lal*, (1868) 9 W.R. 460.

14. *Chunder Nath Sein v. Anundmoyee*, (1869) 11 W.R. 289.

15. *Sreenath Gangooly v. Mohesh Chunder*, (1869) 12 W.R. 14 (F.B.).

15-a. 9 W.R. 505 (F.B.).

16. (1875) 23 W.R. 214 (P.C.).

of such widow.¹⁷ This article was taken as applying only to widows, and did not affect the question of limitation in the case of persons claiming in succession to a daughter's or mother's estate.¹⁸

2091. Under Act XV of 1877, the Art. 141 was the same as under the present Act. The provision
Act XV of 1877. was enlarged so as to cover a suit by a *Muhammadan*, and the case of *females* entitled to a Hindu widow's estate. That article gave a Hindu (or Muhammadan) reversioner entitled to possession on the death of a Hindu (or Muhammadan) *female* (whether a widow or not), a period of twelve years within which to bring his suit for possession of that immoveable property, and provided that the period would begin to run from the time when the female dies.¹⁹ The Privy Council, in *Ranchordas Vundravandas v. Parvatibai*,²⁰ distinctly laid down that reversioners are not persons claiming from or through a female heir so as to make possession adverse to her adverse to the reversioners and that adverse possession against reversioners began only from the time when they became entitled to possession. In *Srinath Kur v. Prosunno Kumar Ghose*,²¹ the reversioners were the daughter's sons of a Hindu deceased and a **Full Bench** of the **Calcutta High Court** held that the reversioners suing within twelve years of the daughter's death were not barred. In a suit contemplated by Art. 141, brought by a plaintiff who was entitled to the property in question on the death of a Hindu *female*, limitation did not run against him until her death.²² A dismissal of a previous suit, which was for recovery only of the limited estate of the female heir, would not be a bar to the subsequent suit, which was for the recovery of an absolute estate, which vested in the reversioner.²³

TITLE II: SCOPE AND APPLICATION.

Sections 2092-2102.

2092-2102.—SCOPE, AND APPLICATION.

2092. Article 141 of the Limitation Act, is merely an extension of Art. 140, with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu

17. *Dwarkanath Gupta v. Komolmoni*, (1883) 12 C.L.R. 548.

18. *Sankaran v. Periasami*, (1890) 13 Mad. 467 (470).

19. *Cursondas v. Vundravandas*, (1889) 14 Bom. 482; *Vundravandas v. Cursondas*, (1897) 21 Bom. 646; s.c. *Ranchordas Vundravandas v. Parvati Bai*, (1899) 23 Bom. 725 (P.C.).

20. (1899) 23 Bom. 725=26 I.A. 71=1 Bom. L. R. 607 (P.C.); *Folld. in Neelkanta Rao v. Narayanaswami Aiyar*, (1917) 37 I.C. 733=20 M.L.T. 526=31 M.L.J. 847.

21. 9 Cal. 934=13 C.L.R. 372 (F.B.).

22. *Kokilmoni Dassid v. Manick Chandra*, (1885) 11 Cal. 791.

23. *Braja Lal Sen v. Jiban Krishna Roy*, (1898) 26 Cal. 285.

widow. The doctrine of non-adverse possession does not obtain in regard to such suits, and the plaintiff suing in ejectment must prove, whether it be that he sues as remainderman in the English sense, or as a reversioner in the Hindu sense, that he sues within 12 years of the estate falling into possession.²⁴ The

“Like suit”.

opening words of Art. 141 relate back to the language of the preceding article, which lays down the period of limitation governing suits

“by a remainderman, a reversioner (other than a landlord) or a devise for possession of immoveable property”.

The adjective “like” obviously imports degrees of similarity ranging from remote resemblance to all but identity: and the history of the enactment of Arts. 140 and 141 may usefully be referred to in order to arrive at a correct notion of the scope of these two articles.²⁵

Previous History.

We have noticed in Ss. 2089 to 2091, *ante* that

“under S. 1, cl. 12 of the Limitation Act, XIV of 1859, the period of limitation applicable to suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of the Act applied, was twelve years from the time the cause of action arose. . . . The consequence was that a reversionary heir who had no right to possession during the widow's lifetime, might lose his property to a person who had asserted adverse possession against the widow for a period of twelve years”.²⁶

Act XIV of 1859 was repealed by Act IX of 1871, and Art. 142 made special provision for the reversionary heir under Hindu Law, giving 12 years from the death of the widow to bring his suit.²⁷ In the later Act XV of 1877, the scope of this article was enlarged so as to give the same period to Hindus and Muhammadans entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.²⁸ There are among the Muhammadans certain groups whose ancestors were Hindus and professed the

24. *Jayawant Jivvanrao v. Ramchandra Narayan*, (1915) 40 Bom. 239.

25. *Ghisa Singh v. Gajraj Singh*, (1916) 33 I.C. 371 (374)=18 O.C. 289; also see *Bisheshar Baksh Singh v. Rameshar Baksh Singh*, (1918) 44 I.C. 368 (389)=4 O.L.J. 648=21 O.C. 1; and *Mt. Jagrani Misrain v. Mt. Sheo Dulari*, (1921) 64 I.C. 462 (All.) (*Held*, that the words “like suit” must mean in this connection a suit for possession against a person holding contrary to the interests of a Hindu entitled to the possession of immoveable property”).

26. *Ghisa Singh v. Gajraj Singh*, (1916) 33 I.C. 371 (375)=18 O.C. 289.

27. *Ibid.*, 33 I.C. 371 (375); also see *Hari Nath v. Mothur Mohun*, (1893) 21 Cal. 8 (17) (P.C.).

28. *Ibid.*, 33 I.C. 371 (375); also see *Kalyandappa v. Chanbasappa*, (1924) 51 I.A. 220=48 Bom. 411=46 M.L.J. 598=79 I.C. 971 (P.C.) (A suit for possession of immoveable property by a reversioner involving the invalidity of an alleged adoption by a Hindu widow is governed by Art. 141, and not by Art. 118).

Hindu religion and were then converted to Islam. Among these groups may be reckoned *Khojas*, *Sunni Bohras*, *Molesalam Girasias*, *Cutchi Memons*, *Nassaporia Memons*, and *Halai Memons* in Porebunder.²⁹ The first column of Art. 141 might be made clear by confining its operation to Muhammadans governed by Hindu Laws through custom.³⁰

"The same rule has been preserved in Art. 141 of the Schedule I to the Limitation Act now in force (Act IX of 1908), and looking to the previous history of the law one is led to conclude that the intention is to provide by this article a rule of limitation applicable to suits for the recovery of estates which were once estates in expectancy and which have become vested in the heir of the last male owner on the determination of the limited estate held by a Hindu or Muhammadan female."³¹

In the greater part of the Punjab, Muhammadan widows succeed to their husband's lands where there are no sons or descendants in the male line, and they hold such lands for life or till they marry again exactly in the same way as Hindu widows succeed.³² In *Vundravandas Purshotumdas v. Cursondas Govindji*,³³ Farran, C.J., observed that Art. 141

"appears to be intended for limitation purposes to do away with the anomalies which surrounded a Hindu widow's estate and other estates analogous thereto, and to assimilate it for these purposes and for these purposes only to that of the estate of an ordinary tenant for life. The term 'reversioner' being inapt to express the next heir of her husband succeeding upon a Hindu widow's demise the Legislature has adopted the phrase 'Hindu entitled to the possession of immoveable property upon the death of a Hindu female, to express the same idea.'"

The Art. 141, should be read along with Art. 140; as both these articles rest upon the same principle, that prescription does not run against a party who is unable to act.³⁴

2093. WHERE THIS ARTICLE DOES OR DOES NOT

APPLY.—(1) The Calcutta High Court has held in *Azum Bhuyan v. Faizuddin Ahmed*,³⁵ that Art. 141 applies only to those

(i) Independent title of a reversioner. cases in which the person who brings the suit is claiming under an independent title in the same way as remainderman and reversioners claim in suits under Art. 140, and not under a title derived from the

29. *Khatubai v. Mahomed Haji Abu*, (1923) 72 I.C. 202=50 I.A. 108=1922 P.C. 414=47 Bom. 146=44 M.L.J. 35 (P.C.).

30. (1918) 41 Mad. 659 (677) (F.B.).

31. *Ibid.*, 33 I.C. 371 (375); Folld. in *Bisheshur Buksh Singh v. Rameshar Baksh Singh*, (1918) 44 I.C. 368 (390)=4 O.L.J. 648=21 O.C. 1.

32. Stokes, Vol. II, p. 947; Civil Justice Committee Report. (1924-25), p. 474.

33. (1897) 21 Bom. 646 (669).

34. *Bisheshur Buksh Singh v. Rameshwar Baksh Singh*, (1918) 44 I.C. 368 (390)=4 O.L.J. 648=21 O.C. 1; also see *Kalyandappa v. Chanasappa*, (1924) 48 Bom. 411 (417)=1924 P.C. 137 and *Jayawant v. Ram Chandra*, (1915) 40 Bom. 239=18 Bom. L. R. 14=33 I.C. 484.

35. (1886) 12 Cal. 594.

Hindu or Muhammadan female who has been in enjoyment of the limited estate. Similarly, it has been held by the **Allahabad High Court** that Art. 141 does not apply to a suit by an heir-at-law for possession of immoveable property in that character, but to a suit by a Hindu or Muhammadan who, prior to the death of a female, occupied the position of remainderman or reversioner or devisee, and on the death of the female sues on the basis of that character.³⁶ The object of the alterations introduced in 1871 and 1877 into the earlier law was thus to protect the interest of the "reversioner" under Hindu Law and of any Muhammadans who might be similarly situated.³⁷ This special provision is intended to meet the case where the title of the plaintiff is independent of the title of the intermediate estate.³⁸

2094. (2) The article has consequently been held **not to apply**

(ii) **Limited estate of a female.** **to cases in which the Hindu or Muhammadan female has been in possession of a full estate.**³⁹ A suit by an immediate heir,

to a female holding absolutely for recovery of immoveable property belonging to his ancestor but in the possession of others since his death is ordinarily governed by Art. 144, Limitation Act.⁴⁰ To claim the benefit of Art. 141, the plaintiff must prove, *first*, that there was a qualified estate in the Hindu female, and *secondly*, that he was entitled to possession after the death of the female as the heir of the last male holder.⁴¹ Article 141, is intended to apply only to the case of a reversioner entitled to succeed on the death of a female heir, *i.e.*, a female who has succeeded as *heir* and not taken possession of the property in any other capacity, *e.g.*, as trespasser, legatee, or by way of favour.⁴² The article is restricted to suits by a plaintiff whose right and title to sue for possession accrued upon the

36. *Hashmat Begam v. Mazhar Husain*, (1888) 10 All. 344.

37. *Ghisa Singh v. Gajraj Singh*, (1916) 33 I.C. 371 (375)=18 O.C. 289=3 O.L.J. 45.

38. *Ibid.*, 33 I.C. 371 (376); also see *Runchordas v. Parvatibai*, (1889) 23 Bom. 725 (P.C.); *Kesho Prasad v. Madho Prasad*, (1924) 3 Pat. 880 (898) and *Hashmat Begam v. Mazhar Husain*, (1888) 10 All. 343.

39. *Ibid.*, 33 I.C. 371 (375)=18 O.C. 289=3 O.L.J. 45; Folld. in *Bisheshar Baksh Singh v. Rameshar Baksh Singh*, (1918) 44 I.C. 368 (390)=4 O.L.J. 648=21 O.C. 1; also see *Kalyandappa v. Chanbasappa*, (1924) 48 Bom. 411 (417) (P.C.) and *Zarifunnissa v. Shafiquz-saman*, (1923) 75 I.C. 626=1923 Oudh 185=26 O.C. 133.

40. *Ghisa Singh v. Gajraj Singh*, (1916) 33 I.C. 371 (375)=18 O.C. 289=3 O.L.J. 45.

41. *Kesho Pershad v. Madho Pershad*, 83 I.C. 812=3 Pat. 880 (898)=1924 Pat. 721; also see *Pandurang v. Basappa*, 1923 Bom. 364=77 I.C. 479.

42. *Raja Baldeo Singh v. Mohan Singh*, (1914) 22 I.C. 855 (857)=119 P.L.R. 1914=72 P.W.R. 1914; *Mahabir Pershad v. Adhikari Koer*, (1896) 23 Cal. 912 (P.C.).

death of a female holding the limited woman's estate.⁴³ The article contemplates that the female *intervenes* as the holder of a particular or peculiar estate. Where a Hindu widow has no right to an impartible estate, if she maintains possession against the rightful heir, her possession would be adverse to him and to all persons claiming through him, from the date of its commencement.⁴⁴

Illustrations.

(1) **A childless Jain widow** acquires an absolute right in her husband's separate property. Art. 141, therefore, does not apply to such a property of hers.⁴⁵

(2) **The customary law of French India** recognises an absolute estate of widows, and the character of the estate is not changed on migration by the widow of a Hindu subject of French India to British India, and acquisition of a British India domicile.⁴⁶

(3) **Under the Muhammadan law** a female heir obtains an absolute proprietary right in the intestate property and, therefore, a suit by her heir is not within Art. 141, Limitation Act.⁴⁷

(4) In a suit by Muhammadan plaintiffs for their share in the estate of their deceased father and mother, it was held that Art. 141 **did not apply to a suit by an heir-at-law** for possession of immoveable property in that character, but to a suit by a Hindu or Muhammadan who, prior to the death of a female, occupied the position of a remainderman, or reversioner or a devisee, and on the death of the female, sues on the basis of that character.⁴⁸

(5) Where, on the death of two widows of a deceased owner, his property vested in two daughters as reversionary heirs, and the suit was brought by the son of a daughter to recover possession of the property sold by one of the widows, it was held that Art. 141, Limitation Act, did not apply, but that plaintiff had twelve years from the date of death of the second widow, as no adverse possession, under Art. 144 began to run against the plaintiff until her death.⁴⁹

(6) In *Cursondas Govindji v. Vundravandas Purshotam*,⁵⁰ where a testator died childless, leaving two widows him surviving to whom he bequeathed certain properties, and a plaintiff-nephew of the deceased filed a suit within 12 years from the death of the second widow, it was held that Art. 141

43. *Malkarjun Mahadeo v. Amrita Tukaram*, (1918) 42 Bom. 714; also see *Bisheshar Baksh v. Rameshar Baksh*, (1917) 44 I.C. 368.

44. *Koolappa Naik v. Koolappa Naik*, (1893) 17 Mad. 34; also see *Lachman Kunwar v. Monarath Ram*, (1894) 22 Cal. 445 (P.C.) and *Sham Koer v. Dab Koer*, (1902) 29 Cal. 664 (P.C.).

45. *Harnabh v. Mandil*, (1899) 27 Cal. 379 (Art. 129 applied as it involved the setting aside of an adoption by the widow).

46. *Mailathi Anni v. Subbaraya Mudaliar*, (1901) 24 Mad. 650.

47. *Ali Ahmad v. Muhd. Owais*, (1908) 5 A.L.J. 715; also see *Azam v. Faizaddin*, (1886) 12 Cal. 594 and *Malkarjan v. Amrita Tukaram*, (1918) 42 Bom. 714.

48. *Hashmat Begam v. Mazhar Husain*, (1888) 10 All. 343.

49. *Malkarjan Mahadeo v. Amrita Tukaram*, (1918) 42 Bom. 714.

50. (1889) 14 Bom. 482; also see *Vandravandas v. Cursondas*, (1897) 21 Bom. 640; and *Ranchordas Vandravandas v. Parvati Bai*, (1899) 23 Bom. 725 (P.C.).

applied to the suit in respect of residue not disposed of by the widows legatees.

(7) Where on the death of a Hindu Proprietor, leaving a son who died a few years after his father, the mother was found in possession absolutely as against the son's widow and the reversioners, a suit by them was held barred by limitation on the ground that the possession taken had been adverse to them.¹

(8) Where on the death of a member of an undivided Hindu family, governed by Mitakshara, his widow and his son's widow obtained possession of a portion of his property, which was assigned by *Hibanama* to a third party, a suit by the reversionary heirs brought against the surviving widow and her assignee was held barred by Art. 144, as the widows being entitled only to maintenance out of estate, their possession was adverse to the plaintiffs.²

(9) A Hindu widow in possession of an estate as a *grantee* of her husband's brother's widow, is not such a Hindu female as is contemplated by Art. 141, Limitation Act.³

(10) Where on the death of the holder of an impartible Zamindary, which fell to the defendant, the two illegitimate sons had each a one-fourth share, and the widow the other half, but not absolutely, the claim of the plaintiffs, as tenants-in-common against the defendant was held to be in the capacity as heirs of the deceased Zemindar, and their right to recover the half share as heirs of the deceased after the death of his widow was not barred.⁴

(iii) **Reversionary heirs male or female.** 2095. This article applies to male as well as female reversionary heirs.⁵

Illustrations.

(1) In *Ramkali v. Kedarnath*,⁶ where the daughter of a separated Hindu, who was entitled to succeed to her father's immoveable property upon his widow's death, instituted, after the widow's death, a suit for the possession of such property against certain persons who, upon the Hindu's death, had obtained possession and held it adversely to the widow, it was held by the **Full Bench of Allahabad High Court** that Art. 141, of the Limitation Act was applicable, and that limitation ran from the date of the widow's death.

(2) A suit by a Hindu daughter to recover possession of her father's property after the death of her mother is governed by Art. 141, and not by Art. 127, or Art. 142, of the Limitation Act, and time begins to run after her mother's death irrespective of what persons were in possession during the period between her father's and mother's death.⁷

1. *Lachhan Kunwar v. Mortha Ram*, (1894) 22 Cal. 445 (P.C.).

2. *Sham Koer v. Rupan Koer*, (1902) 29 Cal. 665 (P.C.).

3. *Mahabir Pershad v. Adhikari Koer*, (1896) 23 Cal. 942 (P.C.); also see *Koolappa Naik v. Koolappa*, (1893) 17 Mad. 34 (Art. 141 not applied where plaintiff not a *reversionary heir*).

4. *Ponnayya v. Kandusami*, (1912) 17 Mad. 136 (Mad.).

5. *Ramkali v. Kedarnath*, (1892) 14 All. 156 (F.B.); *Tulsabai v. Bhagwat Prasad*, (1913) 20 I.C. 179 (All.); *Ramdei v. Abu Jafar*, (1905) 27 All. 494; *Ram Singh v. Mt. Bhani*, (1915) 38 All. 117 and *Pursut Koer v. Palut Roy*, (1881) 8 Cal. 442; *Prit Koer v. Mahadev Prasad*, (1894) 22 Cal. 85 (P.C.).

6. (1892) 14 All. 156 (F.B.); Followed *Srinath v. Prosunno Kumar*, 9 Cal. 934 (F.B.).

7. *Tulsibai v. Bhagwat Prasad*, (1913) 20 I.C. 179=11 A.L.J. 333.

(3) Where a separated Hindu died leaving him surviving his mother, two widows, and a daughter, and after the death of the mother and the widows, the daughter sued to recover certain property which had belonged to her father, but had been sold after his death by one of his widows, it was held that the suit brought within 12 years of the death of the second widow, was not barred by limitation.⁸

(4) Where the legitimate wife of a lunatic Hindu took possession during his lifetime of certain immoveable property which had belonged to his father and subsequently transferred part of it to her daughters and to the husband of one of them, and she retained a portion herself, which after her death came into the possession of one of the daughters, it was held that a suit to recover the property of which possession had been so obtained and held was governed by Art. 141, Limitation Act.⁹

(5) Where a widow, made over certain properties belonging to the estate of her deceased husband, to her brother-in-law, a suit brought by the daughters to recover the properties formerly belonging to their father, from the hands of certain vendees was held governed by Art. 140.¹⁰

(6) A suit by a Hindu daughter for possession of her share in her father's estate on the death of the mother falls under Art. 141, and time begins to run from the date of the mother's death.¹¹

2096. Article 141 would apply only if the female lifetenant was dispossessed; in that case the plaintiff as the

Females out of possession.

reversioner would have 12 years from the date of the death of the life tenant.¹² This

article contemplates suits for recovery of possession in respect of property of which the reversioners were out of possession at the death of the female and which was in the possession of another person from whom they sought to recover it. Where no one was in possession on the date of the death of the female the reversioners must be taken to have been in possession and Art. 141 would not apply.¹³ Article 141 applies to a suit by which the plaintiffs seek to undo the effect of act or inaction of the female which would remain effective if not avoided. It does not apply where the cause of action arises after the death of the female.¹⁴ Ramesam, J., observed in *Sesha Naidu v. Periasami Odayar*,¹⁵

"that Art. 141 should be construed to cover only those cases in which the cause of action is simply the death of the female and the only obstacle to the reversioner seeking to obtain possession is either an act of the female or her inaction—in either case resulting in the loss of possession to a stranger and the need of a suit on behalf of the reversioner. It does not cover cases where

8. *Ramdei Kunwar v. Abu Jafar*, (1905) 27 All. 494.

9. *Ram Singh v. Mt. Bhani*, (1915) 38 All. 117.

10. *Pursut Koer v. Palut Roy*, (1881) 8 Cal. 442.

11. *Ram Singh v. Mt. Bhani*, (1916) 32 I.C. 127=38 All. 117=14 A.L.J. 11.

12. *Govinda Chandra Bhattacharjee v. Dinanath Acharjee*, (1920) 56 I.C. 141=23 C.W.N. 977=30 C.L.J. 512=47 Cal. 274.

13. *Mahendra Nath Bagchi v. Tarak Chandra Sinha*, (1932) 138 I.C. 349=1932 Cal. 504=36 C.W.N. 326.

14. *Ibid.*, 138 I.C. 349 (350)=1932 Cal. 504.

15. (1921) 44 Mad. 951 (957)=1921 Mad. 272 (2).

the cause of action includes something more beyond this, *e.g.*, a transaction by the last male owner, such as a mortgage (Art. 148), a mortgage by him and transfer by the mortgagee (Art. 134), a purchaser in Court auction (Art. 138), a lease (Art. 139), or a carving by him of life-estates with a remainder or a reversion following it (Art. 140), or any transaction involving the possibility of forfeiture (Art. 143), or loss of possession by him (Art. 142). In these cases the specific article applies."¹⁶ Art. 144 has to be applied last. That is, "only when the suit is of a kind not described in the Arts. 134, 135, 138 to 140, 142, 143 and 148, does Art. 141 apply to suits by reversioners—the discontinuance of possession in Art. 142 referring to a discontinuance during the last male owner's lifetime".¹⁷

This article does not apply where the cause of action accrued not on the death of the female, but at some antecedent period, *e.g.*, on the alienation of the minor's property by his mother as guardian, who subsequently succeeded as heir to her minor son on his death, or against the last male owner.¹⁸ The **Allahabad High Court** held in *Gajadhar Pande v. Parbati*,¹⁹ that Art. 141 applied to a suit by reversioners of a separated Hindu who died leaving him surviving two widows and a daughter-in-law, the widow of a pre-deceased son, where upon the death of the survivor of the two widows, the daughter-in-law took possession of the property, and remained in possession thereof, for more than twelve years, adversely to the reversioners. It was held that their cause of action had commenced from the death of the survivor of the two widows of the last owner. Reliance was placed for this view on the **Privy Council** decision in *Sham Koer v. Dab Koer*,²⁰ where the owner of property died leaving a widow and a daughter-in-law, widow of a pre-deceased son. Immediately before or on his death, these two widows obtained possession of the property in dispute. In a suit by the reversioners it was held that the possession as of right by the widow and daughter-in-law of the deceased for 12 years barred the heirs unless they could show that the possession was permissive. The female from whose death the statute is to run must be the female whose death causes the estate of the plaintiff to fall into possession. Where a Hindu widow granted a life estate to her sister, the next reversioner had to bring a suit under Art. 141, within 12 years of the widow's death, and not from the death of the widow's sister.²¹

16. *Sesha Naidu v. Periasami Odayar*, 44 Mad. 951 (1958).

17. *Ibid.*

18. *Ramaliah v. Brahmiah*, (1930) 127 I.C. 801=59 M.L.J. 196=1930 Mad. 821 (824); also see *Amrita v. Jatindra*, 32 Cal. 165 (168) (Art. 141 not applicable where adverse possession against the last male-owner commenced before the female came in); and *Mohendra v. Shamsunnessa*, 27 I.C. 951 (Cal.); *Pandurang v. Basappa*, 77 I.C. 479=1923 Bom. 364; *Ramayya v. Katamma*, 45 Mad. 370 (373)=1922 Mad. 59=67 I.C. 246; and *Sreepati v. Sarbeshwar*, 1930 Cal. 474 (476).

19. (1910) 33 All. 312.

20. (1902) 29 I.A. 132 (P.C.).

21. *Mahabir Pershad v. Adhikari Koer*, (1896) 23 Cal. 942 (P.C.).

2097. The adopted son takes the property in supersession of the widow not on her death as a reversionary heir. Article 141 is, therefore, inapplicable to a suit for possession by an adopted son holding the estate adversely to the widow. Adverse possession against a Hindu widow for more than twelve years bars the rights of a subsequently adopted son.²² However, the possession of a transferee from the widow cannot become adverse to a son subsequently adopted by the widow, until he becomes entitled to possession of the property upon his adoption.²³ An estate of an adopted son falls into possession as soon as the adoption takes place. An adopted son does not derive his right to sue from or through the widow, and a possession of a third party even if adverse to the widow does not affect the adopted son.²⁴ However, the possession of the widow after adoption would be adverse to the adopted son.²⁵ There is no specific article in the Limitation Acts of 1871, 1877, or 1908, for a suit by an adopted son. Article 125 applies only to a reversionary heir which indeed a son adopted by a widow is not. Where Arts. 118 and 119 do not apply, the case must fall within Art. 144.²⁶ An adopted son is entitled under Art. 144 of the Limitation Act to sue for possession of immovable property within 12 years from the date of his adoption, inasmuch as like a reversioner his right is not lost to the property by adverse possession against his mother.²⁷ As pointed out by Mr. Justice Bhashyam Aiyangar in *Sreeramulu v. Kristamma*,²⁸ there is no justification for placing an adopted son in a worse position than that of a reversioner. It may be a case of omission on the part of the legislature to safeguard his interests in the same way as it has done in the case of a reversioner. However, as Art. 144 has been applied to the case of an adopted son, he will practically be in the same position as a reversioner.²⁹ The principle of the decision of the Judicial Committee in *Ranchordas v. Parvatibai*,³⁰ is that the cause of action to sue arises, on general

22. *Krishnaji Janardhan v. Morbhat*, (1888) 13 Bom. 276 (The adverse possession for more than 12 years was complete before operation of Act IX of 1871).

23. *Moru Narayan v. Balaji Raghunath*, (1894) 19 Bom. 809.

24. *Ibid.*; Followed in *Hari v. Waman*, 2 Bom.L.R. 411; also see *Harek Chand v. Bejoy Chand*, 9 C.W.N. 795=2 C.L.J. 87.

25. *Pirsab Valad v. Gurappa*, (1913) 38 Bom. 227.

26. *Ramakrishna v. Tripurabai*, (1908) 33 Bom. 88; also see, *Krishnaji Janardhan v. Merbhai*, (1883) 13 Bom. 276 (The widow divests herself of the estate by the adoption and the adopted son shall not get the benefit of Art. 141).

27. *Kancharla Venkataratnam v. Koganti Venkataramiah*, (1914) 25 I.C. 692=27 M.L.J. 569=16 M.L.T. 435.

28. 26 Mad. 143=12 M.L.J. 197 [O.R. on another point in *Vaidyanatha v. Savithri*, (1917) 41 Mad. 75].

29. (1914) 25 I.C. 692 (693), *supra*.

30. 23 Bom. 725=26 I.A. 71 (P.C.).

principles, on the death of the widow in the case of a reversioner. The same rule *a fortiori* governs the right of an adopted son, with this difference that in the case of a reversioner the cause of action will accrue on the death of the widow, in the case of an adopted son, on his adoption.³¹ Following this view the **Nagpur Judicial Commissioner's Court** has held that an adopted son does not derive his title from the adoptive mother, just as a reversioner under Hindu Law does not derive his rights from or through the widow: and, adverse possession against the widow cannot prejudicially affect the rights of the adopted son. Time, therefore, does not run against the adopted son prior to the date of his adoption.³² Adverse possession against reversioners begins only from the time when they become entitled to possession on the death of the widow.³³ The cause of action in the case of an adopted son to recover the estate of his adoptive father accrues only from the date of his adoption and there could be no adverse possession against him before the date of his adoption. There cannot be adverse possession against a person who is not in existence.³⁴

"It has now been well settled that an adopted son has all the rights of a natural son in his adoptive father's estate."³⁵ "The estate which the widow had between the date of her husband's death and the date of the adoption is *at once divested* and becomes vested in him not as succeeding to the widow making the adoption but to the deceased person in pursuance of whose authority the adoption was made. Though his rights arise only from the date of his adoption they are paramount to those of the widow who is at once relegated to the position of a female member of the family entitled only to maintenance and residence in the family house."³⁶ "The authorities clearly establish the view that an adoption puts an end to the widow's estate as fully and effectually as her death."³⁷

The Bombay High Court, points out that the case of an adopted son stands on a different footing from that of a reversioner in this sense that the rights of the adopted son come into existence as soon as he is adopted by the widow, and the rights of the widow as the heir of her husband come to an end on adoption, while in the case of of a reversioner his rights come into existence on the death of the widow. Subject to that important difference there is no essential difference in the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption and the reversioner seeking to enforce his rights with regard to property alienated by the widow before her death.

31. See 25 I.C. 692 (693, 694), *supra*.

32. *Sitaram Sheokaran v. Rajaram Latujee*, (1918) 48 I.C. 230 (Nag.).

33. *Neelakanta Rao v. Narayanaswami Aiyar*, (1917) 37 I.C. 733=20 M.L.T. 526=31 M.L.J. 847.

34. *Abdul Hakim Khan v. Saadat Ali Khan*, 108 I.C. 817=1928 Oudh 155.

35. Per Kumaraswami Sastriar, J., in *Vaidyanatha Sastri v. Savithri Ammal*, (1917) 41 Mad. 75 at pp. 91, 92 and 93=33 M.L.J. 387 (F.B.).

36. *Ibid*.

37. *Ibid*.

An adopted son may enforce his rights to property alienated by the widow (adoptive mother) prior to adoption, without setting aside the transfer.³⁸

2098. Article 141 is restricted to the case of immoveable property.³⁹ But, the Privy Council have extended the principle on which Art. 141 rests to moveable property vesting in a widow beneficially and liable to pass to the reversionary heir on her death holding that the six years' period applicable to the case runs, only from the date of the widow's death.⁴⁰ It was pointed out that there is nothing corresponding to Art. 141 regarding moveables. Their Lordships held that the cause of action to sue arises, on general principles, on the death of the widow in the case of a reversioner. The residuary Art. 120 applies to moveables.⁴¹ A claim for proceeds of what was once immoveable property but has been substituted by moveable property cannot be regarded as a claim for immoveable property or any interest therein or any benefit arising from land and is governed by Art. 120 of the Limitation Act.⁴² The interest of a mortgagee in the property mortgaged is "immoveable property" for the purposes of Art. 141.⁴³ Art. 141 applies to a suit for share in partnership assets consisting of immoveables, a ginning factory and cotton press. Art. 120 does not apply.⁴⁴

2099. Article 141, Limitation Act, contemplates the case of a plaintiff entitled to the property in question on the death of a Hindu or Mahomedan female; and the limitation does not run against him until her death. This article would apply where there are successive female heirs in possession of the property, *e.g.*, the widow and the mother.⁴⁵ The cause of action for posses-

38. *Hanamgowda v. Irgowda*, 1925 Bom. 9=84 I.C. 374=48 Bom. 654; also see *Vaidyanatha Sastri v. Savithri Ammal*, 41 Mad. 75 (F.B.) (*Held*, that an adopted son could sue to set aside an alienation by the widow made before his adoption, even during his lifetime).

39. *Vundravandas v. Cursondas*, (1897) 21 Bom. 646 (667); Reversed in 23 Bom. 725 (P.C.); *Aurabindanath Tagore v. Manorama Debi*, (1928) 112 I.C. 496=1928 Cal. 670=55 Cal. 903=32 C.W.N. 913.

40. *Pydigantam Jagannadha Row v. Ramadass Patnaik*, (1904) 28 Mad. 197 (200); see *Ranchordas v. Parvatibai*, 23 Bom. 725=26 I.A. 71 (P.C.).

41. *Kancharla v. Koganti*, (1914) 25 I.C. 692=16 M.L.T. 435; also see *Prqmath Nath v. Bhuban Mohan*, (1922) 25 C.W.N. 585=1922 Cal. 321 (328)=64 I.C. 980 and *Mt. Jaggo v. Utsava*, 51 All. 439=1929 P.C. 166=117 I.C. 498 (P.C.) (A suit to recover *malikana*, held to fall under Art. 120).

42. *Radhakrishnan Rai v. Nauratanlal*, (1918) 46 I.C. 627=3 P.L.J. 522.

43. *Jai Indar Bahadur v. Sheo Indar Bahadur*, (1923) 78 I.C. 393 (Oudh).

44. *Mt. Basanti Bibi v. Babulal Poddar*, (1930) 124 I.C. 19 (All.).

45. *Kokilmoni Dassia v. Manik Chandra*, (1885) 11 Cal. 793; *Shamlall Mitra v. Amarendro Nath Bose*, (1895) 23 Cal. 460.

sion of the property will not accrue until the death of the female heir, or of the last of such heirs if more than one.⁴⁶ Sulaiman, C.J., has in *Bankey Lal v. Raghunath Sahai*,⁴⁷ repelled the argument that this article applies only to a suit brought by the first Hindu entitled to possession on the death of the first female heir. Where mother and the widow both hold property of the deceased jointly without proprietary rights in the same but with rights of survivorship, a suit by reversioner impeaching alienations made by the survivor of the two, on the death of the survivor, is governed by Art. 141, Limitation Act.⁴⁸

2100. A Full Bench of the Calcutta High Court held in *Nobin Chunder v. Issur Chunder*,⁴⁹ that when alienations of her husband's estate are *improperly made* by the widow, they are good as against her for life; and the reversionary heir's cause of action does not accrue until her death. Where a widow, under an *ikrarnama*, made over to a relative of hers certain properties formerly belonging to her late husband's estate, a suit brought by reversioners to recover the property from the hands of the vendees had twelve years period from the date of the widow's death both under the Act XIV of 1859, and under the later Acts IX of 1871 and XV of 1877.⁵⁰ Even under old law, where a title by adverse possession for more than twelve years accrued during the lifetime of a Hindu widow, special provision was made for the right to sue on the part of the reversioners within twelve years from her death and the accrual of their title, if possession arose directly from any invalid alienation on her part.¹ Of course, under the present law, under Art. 141, a reversioner who succeeds to immoveable property has twelve years in every case to bring his suit for possession from the time when his estate falls into possession.² In case of an alienation by the widow, there would be no adverse possession during her life, and the period of limitation in a suit by the reversioners must be calculated from her death.³ Where a Muhammadan widow, who had been in possession of her husband's property sold away the property, a suit brought after the widow's death by the heirs of the husband for possession of the property is governed by this article, and limitation runs from the date of the widow's death and not from the date of the transfer.⁴

46. *Hanuman Prasad Singh v. Bhaganti*, (1897) 19 All. 357.

47. 1928 All. 561=51 All. 188=112 I.C. 801 (F.B.).

48. *Chandi Singh v. Gur Prasad Singh*, (1930) 126 I.C. 657=7 O.W. N. 711=1930 Oudh 339 (348).

49. 9 W.R. 505 (F.B.).

50. *Pursut Koer v. Palut Roy*, (1881) 8 Cal. 442.

1. *Gya Persad v. Heet Narain*, (1882) 9 Cal. 93.

2. *Srinath Kur v. Prosunno Kumar Ghosh*, (1883) 9 Cal. 934 (F.B.).

3. *Sheq Narain Singh v. Khurgo Kocry*, (1882) 10 C.L.R. 337.

4. *Sheikh Abdur Rahman v. Sheikh Wali Mahommad*, 2 Pat. 75 (80) =1923 Pat. 72=68 I.C. 601=4 P.L.T. 267.

The law is the same, in this respect, under the old Act XIV of 1859, or the altered law as provided by Art. 142 of Act IX of 1871, or Art. 141 of the Acts of 1877 and 1908. The plaintiff reversioner does not claim from or under the intervening females, and even where a suit by a female life tenant would have been barred as against a transferee from another female in possession, it would by no means follow that the plaintiff's claim would be also barred. The title which the alienee, from one female, would acquire as against the other female heir by the lapse of twelve years could not be higher than that which might be created by the conveyance by the female heir.⁵ A life interest sold by a widow, would terminate at her death. If there be any adverse possession, it would begin at her death. But, according to the correct interpretation of Art. 141, a possession adverse to the widow, or other female life tenants is not adverse to the reversioners.⁶ A female heir in possession of immovable property for her life can without legal necessity make a valid alienation of her life estate, but the possession of the alienee will not under ordinary circumstances be adverse to the reversioner, whose cause of action for possession of the said property will not accrue until the death of the female heir, or of the last of such heirs if more than one.⁷ Article 141 applies to a case in which the reversion comes after several successive female heirs, and a suit brought by the reversioners within twelve years after the death of the last female heir would be within time under this article. The old law that limitation which barred the widow would bar the reversioner has undergone a change since 1871, but in any case, even under the old law, possession held by an alienee from a widow was not adverse to the widow in the sense of being obtained against her will, and if the possession was permissive, or collusive, the reversioner's claim would not be barred where brought within

twelve years from her death.⁸ **Article 91**
Art. 91 inapplicable. **is not applicable in such cases** to protect the title of the defendant; that article applies only to suits in which the documents sought to be set aside were intended to be operative against the plaintiff or his predecessor in title and would remain operative if not set aside.⁹ Where a reversioner sues to recover certain property, which has been alienated, without necessity, by a Hindu widow, the reversioner who has not elected to assent to the transfer, need not sue to set it aside, and the suit for possession by the reversioner would be governed by Art. 141, and not by Art. 91 of the

5. *Sambasiva v. Ragava*, (1890) 13 Mad. 512.

6. See *Mukta v. Dada*, (1893) 18 Bom. 216.

7. *Hanuman Pershad Singh v. Bhaganti Prasad*, (1897) 19 All. 357.

8. *Shamlall Mitra v. Amarendro Nath Bose*, (1895) 23 Cal. 460.

9. *Ibid.*, (1895) 23 Cal. 460; also see *Rakhmabai v. Keshav Raghunath*, (1906) 31 Bom. 1.

Limitation Act.¹⁰ An alienation by a widow, even if not absolutely void, is *prima facie* voidable at the election of the reversionary heir, who may affirm it or treat it as a nullity without the intervention of any Court, there being nothing to set aside or cancel as a condition precedent to his right of action.¹¹ Art. 141 applies to suits for possession by a person entitled to the possession of immoveable property on the death of a female, and does not except the case where, during the lifetime of the female, the adverse possessor has been in possession for twelve years.¹² Accordingly, where a portion of the property in dispute was gifted by the widow of a deceased proprietor to her daughter's son, and another portion kept for her own maintenance was mutated in favour of daughter's son on her death, the reversioner's suit for possession being within twelve years of the death of the widow of the last male owner was held to be within time under Art. 141 of the Limitation Act.¹³ Similarly, where following a mortgage *without possession* by a sonless proprietor, the widow sold the lands, part of the consideration being the sum due under the mortgage by her husband, Art. 141, was applied to a suit by reversioners for possession of the property against the vendee and his alienee.¹⁴ In *Muni Lal v. Nath Sahoy*,¹⁵ where a Hindu widow in possession of her husband's estate which comprised a holding was dispossessed therefrom by the landlord under the provisions of the Bengal Tenancy Act, it was held that the reversioner was not required to sue within two years from the date of dispossession, under Art. 3, Sch. III of the Bengal Tenancy Act, but was entitled to sue for possession within twelve years from the death of the widow.

2101. See Notes under Art. 118, *ante*. Art. 118 of the Limitation Act applies only to suits where the

Suits involving question of validity of an adoption.

relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under Art. 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by Art. 141.¹⁶ This article applies to

10. *Harihar Ojha v. Dasarath Misra*, (1905) 33 Cal. 257; also see *Bachan Singh v. Kamta Prasad*, (1910) 32 All. 392 (*Held*, that Art. 141 applied to a suit to set aside an alienation of the plaintiff's property made during his minority by his guardian).

11. *Bijoy Gopal Mukerji v. Krishna Mahishi Debi*, (1907) 34 Cal. 329=34 I.A. 87 (P.C.).

12. *Chiragha v. Mehtaba*, 79 P.R. 1898.

13. *Khaire Khan v. Ghulam Ghaus*, 32 P.R. 1911.

14. *Khiali Ram v. Gulab Khan*, 33 P.R. 1911 (F.B.).

15. (1930) 9 Pat. 634=11 P.L.T. 714=1930 Pat. 573 (575)=128 I.C. 131.

16. *Basdeo v. Gopal*, (1886) 8 All. 644.

suits for possession of property incidentally necessitating the setting aside of or declaration of invalidity of an adoption.¹⁷ Arts. 118 and 119 are in terms confined to suits for declaration.¹⁸ And, a next reversioner suing to obtain possession within twelve years from the date of the widow's death or when the estate falls into possession are not precluded from suing having regard to the provisions of Arts. 140 and 141 of the Limitation Act.¹⁹ Article 118 does not operate to give validity by lapse of time to an invalid adoption, if no suit is brought by the reversionary heir within six years of its taking place to obtain a declaration that it is invalid.²⁰ The twelve years' period allowed under Art. 141, starts from the death of the widow, and an adoption to the deceased taking place before the widow's death, does not curtail such period, or impose upon the reversioner the necessity of filing a suit to have it declared invalid during the lifetime of the widow under pain of losing the inheritance upon the widow's death.²¹ Their Lordships of the **Privy Council** held in *Muhammad Umar Khan v. Muhammad Niaz-ud-Din Khan*,²² following the view taken in *Tirbhuzwan Bahadur Singh v. Rameshar Baksh Singh*,²³ that the omission to bring, within the period prescribed by Art. 118, Limitation Act, a suit to obtain a declaration that an adoption was invalid or never in fact took place, was no bar to suit by reversioners for possession of property against the defendant in possession under a gift from the last owner, who had adopted him as her heir, and who had herself received the property in dispute as a gift from her father in lieu of her mother's dower. This view has been followed by the **Madras High Court** in *Velaga Mangamma v. Bandlamudi Veerayya*,²⁴ as authority for holding that Art. 118 of the Limitation Act applies only to declaratory suits in respect of adoption, and the period of limitation applicable to suits for possession of immoveable property by reversioners is that prescribed by Art. 141 of the Limitation Act. The position is thus fully established that where the relief sought in a suit is the recovery of possession and not merely a declaration that a certain adoption is invalid, the provisions of Art. 118 do not apply, but Art. 141 applies, and the period of limitation is twelve years.²⁵

17. Cf. *Jagadamba v. Dakhina Mohun* (A case under Art. 129 of Act IX of 1871, involving the *setting aside* of an adoption, and claim for possession of the land); also see *Nathu Singh v. Gulab Singh*, (1895) 17 All. 167 and *Ghandarp Singh v. Lachman Singh*, 10 All. 485.

18. *Ganga Sahai v. Lakhraj Singh*, 9 All. 253; *Padaji Rav v. Ram Rav*, (1888) 13 Bom. 160 (165).

19. *Parbhulal v. Mylne*, (1887) 14 Cal. 401 (403).

20. *Harilal Prantal v. Bai Rewa*, (1895) 21 Bom. 376.

21. *Ibid.*

22. (1911) 39 Cal. 418 (P.C.).

23. (1906) 28 All. 727=33 I.A. 156 (P.C.).

24. (1907) 30 Mad. 308=2 M.L.T. 178=17 M.L.J. 182.

25. *Bhagabat Pershad v. Murari Lal*, (1910) 7 I.C. 427=15 C.W.N. 524=15 C.L.J. 97; Reld. on *Jagannath Prasad Gupta v. Ranjit Singh*, 25

And, the pronouncement of their Lordships of the Privy Council, after reviewing the case-law, finally settles the question in *Kalyandappa v. Chanbasappa*,²⁶ where it is held that a suit for possession of immoveable property by a reversioner involving the invalidity of an alleged adoption by a Hindu widow is governed by Art. 141, and not by Art. 118 of the Act.

2102. *See* Ss. 2093, 2094, 2096, 2097, *ante*. This article applies only to those cases in which a person who brings a suit is claiming under a title independent of the title of the intermediate estate. This does not apply to the case where the widow or limited owner is merely a trustee of an institution and the reversioner claims the office on her death as succeeding to the hereditary trusteeship as the reversioner of the last female owner.²⁷ It does not apply where the female in possession was not in enjoyment of a limited estate, but had been in possession as absolute owner.²⁸ This article does not apply where the plaintiff reversioner is not entitled to possession *immediately* on the woman's death.²⁹ It is inapplicable where the cause of action arises after the death of the widow³⁰ or where the adopted son is holding estate adversely to the widow from the date of his adoption.³¹ This article contemplates inheritance, not survivorship and the case of a co-heir succeeding to the other does not fall under Art. 141, as a suit to recover possession of the property on the death of a female.³² This article will not apply where there is a special law inconsistent with it.³³

TITLE III: ARTICLE EXPLAINED.

2103. **ARTICLE EXPLAINED.**—This article contemplates suits by reversionary heirs under the Hindu or Muhammadan law, whose estate falls into possession on the death of a Hindu

Cal. 354 (362); *Ram Chandra Mukerjee v. Ranjit Singh*, 27 Cal. 242 (254) = 4 C.W.N. 405.

26. (1924) 79 I.C. 971=1924 P.C. 137=48 Bom. 411 (P.C.); also see *Hirde Ram v. Jhandu*, 149 I.C. 434=35 P.L.R. 338=1935 Lah. 213 (2) and *Bhagirti Bai v. Appa Dada*, 58 Bom. 280=1934 Bom. 110 (The article applicable to a suit by a reversioner for possession of immoveable property on the death of a Hindu female is Art. 141 even if it is necessary to decide in the suit whether an adoption was or was not valid).

27. *Pydigantam v. Rama Doss*, (1904) 28 Mad. 197; cf. *Ayyasami v. Mahadeva*, (1928) 56 M.L.J. 441; *Suppa Bhattar v. Suppu Sakkaya*, 29 M.L.J. 558; *Lilabati v. Bishnu*, (1907) 6 C.L.J. 621, also see and cf. *Jharuda Das v. Jalandar*, (1912) 39 Cal. 878.

28. *See* S. 2094, *ante*: "Limited estate held by a female".

29. *Ganga Sahai v. Kanhaiya Lal*, 11 A.L.J. 179=18 I.C. 811 (813); *Sundar v. Salig Ram*, 26 P.R. 1911 (F.B.).

30. *See* S. 2096, *ante*: "Females out of possession".

31. *See* S. 2097, *ante*: "Suit by adopted son".

32. *Sachindra v. Rajani*, 27 I.C. 250 (Cal.).

33. *See* S. 20 of Act IX of 1859 and *Ramphul Tiwari v. Badrinath*, 13 All. 108; cf. *Muni Lal v. Nath Sahoy*, 9 Pat. 364=1930 Pat. 573.

or Mahomedan female in possession of the property, and it does not except the case where, during the lifetime of the widow, the adverse possessor has been in possession for twelve years.³⁴

In *Sati Prasad Sen v. Jogesh Chandra*,³⁵ the **Calcutta High Court** construed the word "auction-purchaser" in Art. 138, to include the case of a person claiming through the auction-purchaser, and consequently the expression "vendor" in Art. 136, was construed to mean a vendor other than the auction-purchaser, mentioned in Art. 138. The principle being that the construction of the provisions of the Limitation Act must be strict, but at the same time the articles must be so construed as to make them harmonious and consistent. However, in *Gudadhar v. Hare Krishna*,³⁶ it was *assumed* that Art. 141 does not refer to the case of an assignee suing for possession within twelve years of the widow's death. Of course, this article would, if applicable, only cover the case of a Hindu or Mahomedan assignee.

2104. "ENTITLED TO POSSESSION OF IMMOVEABLE PROPERTY".—These words in Art. 141, would have reference to the state of law of limitation when the suit was brought.³⁷ Prior to the Limitation Act of 1871 the law under Act XIV of 1859 was that suits for the recovery of immoveable property must be brought within twelve years from the time the cause of action arose. By the Limitation Act of 1871, the whole of the Act of 1859 which applied to the limitation of suits was repealed; and in 1877, when the Limitation Act XV of 1877 was passed, the same period of limitation, as provided in Art. 142 of the Second Schedule of Act IX of 1871, was prescribed by Art. 141 of the Act of 1877, to a suit by a Hindu or Mahomedan entitled to the possession on the death of a Hindu or Mahomedan female; and this article is now re-enacted in the present Art. 141 of Sch. I of the Limitation Act IX of 1908. Art. 141 is restricted to suits by plaintiff whose title and right, as the heir of the last full owner to sue for possession accrues upon the death of a female holding a woman's qualified estate under the Hindu or Mahomedan Law.³⁸ This article does not apply where plaintiff is not the nearest reversioner entitled to

34. *Chiragha v. Mehtaba*, 79 P.R. 1898.

35. (1904) 31 Cal. 681 (F.B.).

36. (1904) 8 C.W.N. 535.

37. *Hari Nath Chatterji v. Mothur Mohan Goswami*, (1893) 31 Cal. 8 (16, 17) (P.C.); Reld. in *Kesho Prasad Singh v. Madho Prasad Singh*, (1924) 83 I.C. 812 (820)=3 Pat. 880=1924 Pat. 721.

38. (*Maharaja*) *Kesho Prasad Singh v. Madho Prasad Singh*, (1924) 83 I.C. 812 (820)=3 Pat. 880; also see *Ganga Sahai v. Kanhaiya Lal*, 11 A.L.J. 179=18 I.C. 811 (813) (Entitled to possession immediately on the widow's death, but was entitled only after the satisfaction of a usufructuary mortgage by the widow).

sue for possession on the death of a Hindu or Mahomedan female. Where the last male owner of agricultural land died leaving a widow who died in 1876, and a mother who died in 1892, and the widow had alienated without necessity part of her husband's land and put the alienee in possession and the nearest reversioner died in 1903, without challenging or expressly assenting to the alienation and the remote reversioner sued in 1909 the heirs of the alienee for possession of the land alienated, it was held by a Full Bench of the Punjab Chief Court, that the suit was not barred by limitation. That Arts. 140 and 141 were inapplicable to the claim, as the plaintiffs were not entitled themselves to claim possession when the mother died in 1892 nor did the estate at that time fall into *their* possession, that plaintiffs could not sue for possession as long as the nearer reversioner lived, and the plaintiffs would not have improved their position by a declaratory suit.³⁹ To claim the benefit of Art. 141, the plaintiff must prove, first, that there was a qualified estate in the Hindu (or Mahomedan) female, and secondly, that he was entitled to possession after the death of the female, as the heir of the last male holder.⁴⁰ This title has regard to *existing law*, at the date of suit. As the **Judicial Committee** pointed out in *Hari Nath v. Mathuramohan*,⁴¹

"the intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right".

2105. A reversioner, coming in under Art. 141, of the Limitation Act, has, therefore, to show that his title is not affected, under the existing law, by any decree against the widow, or by any adverse possession against the female coming in before his reversionary title accrues. If under previous Limitation Acts, the period of limitation to enforce the right had expired, the later Acts need not be referred to; for, if they altered the law, they would not revive the right of suit.⁴²

2105-A. ILLUSTRATIONS.—

(1) Where the defendants had acquired a title by prescription under Act XIV of 1859, by more than twelve years' adverse possession against the widow, having elapsed when Act IX of 1871 came into force, that title could

39. *Sundar v. Salig Ram*, 26 P.R. 1911=9 I.C. 300 (F.B.); also see *Ganga Sahai v. Kanhaiyalal*, 11 A.L.J. 179=18 I.C. 811 (813) (This article does not apply where the reversioner is not entitled to possession immediately on the widow's death, but was entitled only after the satisfaction of a usufructuary mortgage by the widow).

40. (*Maharaja*) *Kesho Prasad Singh v. Madho Prasad Singh*, (1924) 83 I.C. 812 (820)=3 Pat. 880.

41. 21 Cal. 8 (18)=20 I.A. 183 (P.C.).

42. *Appasami Odayar v. Subramanya*, (1888) 12 Mad. 26 (P.C.); also see *Mohesh Narain v. Taruck Nath*, (1892) 20 Cal. 487 (P.C.) and *Khunni Lal v. Gobind Krishna*, (1911) 38 I.A. 87=33 All. 356 (P.C.) (Right to sue already barred under the previous Act, not revived by a later Act).

not be defeated by either of the Acts IX of 1871 or XV of 1877, subsequently passed, although there can be no doubt that the land in this respect was altered by Acts IX of 1871 and XV of 1877.⁴³

(2) Where the plaintiffs as collateral heirs of a childless Hindu, questioned adoptions purporting to have been made by his widows in pursuance of authority from him, such adoptions having been followed by continuous possession, and having been recognised in formal instruments, proceedings and decrees to which the plaintiffs were parties, it was held by their Lordships of the Privy Council, on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the plaintiffs' titles (if any) had accrued at the death of the surviving widow, that the suits were barred under Art. 129 of Sch. II of Act IX of 1871.⁴⁴

(3) Where on *R's* death, he was succeeded by his son *G*, and his widow *J*; and *G* also died later, leaving a widow *S*; but, the property remained in possession of *J*, who sold it to defendants in 1862; and in 1874, *J* died; and subsequently, *S* died; it was held that a suit by plaintiffs reversionary heirs in 1886, to set aside the alienation made by *J* in 1862 to the defendants was barred by time. The adverse possession of *J* and her alienees for more than twelve years during *S's* life was a bar, not only to *S*, but also to the claim of reversionary heirs on her death.⁴⁵

(4) Where *A*, a Hindu died in 1849, without issue leaving a widow *C*, who adopted *B* in 1862, and put him in possession of properties other than those alienated by her prior to adoption; and *B* died in 1864, leaving a widow *M*, who adopted *T*; and the latter was in possession till 1876, when he was dispossessed by *C*; and subsequently *T* died in 1881; and *M* recovered possession from *C* in 1887 by suit as *T's* heiress: and after *C's* death in 1905, the plaintiffs, claiming to be *A's* reversioners on *C's* death sued in 1895 for possession; held, that a suit by reversioners of *A* for recovery of possession of such of *A's* properties as were in the possession of the heirs of the adopted son had become barred in 1874 under Art. 129 of the Limitation Act, and that a title to such property was acquired by the heirs of the adopted son under S. 29 of the same Act and could not be affected by the provisions of the later Limitation Act XV of 1877, or Act IX of 1908.⁴⁶

2106. In *Nobin Chunder's case*,⁴⁷ in which the question arose under Act XIV of 1859, it was held following the *Shivaganga case*,⁴⁸ that, as the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against a widow without fraud or collusion, they are also bound by limitation

43. *Drobomoyi Gupta v. Davis*, (1887) 14 Cal. 323 (344); also see *Brajlal Sen v. Jiban Krishna Roy*, (1893) 26 Cal. 285 (296) (Suit by reversioner for possession—Right extinguished under previous Act of 1859, held, not revived under S. 2, Act XV of 1877).

44. *Jagadamba v. Saroda Mohun Roy*, (1886) 13 Cal. 308 (P.C.); cf. *Tirbhurwan Bahadur Singh v. Rameshar Baksh Singh*, (1906) 28 All. 727 (P.C.).

45. *Babu v. Bhikaji*, (1889) 14 Bom. 317.

46. *Somasundaram Chettiar v. Vaithilinga Mudaliar*, (1916) 40 Mad. 846.

47. 9 W.R. 505=B.L.R. Supp. Vol. 1008 (P.C.).

48. *Katama Natchiar v. Raja of Sivaganga*, (1862) 9 M.I.A. 539=2 W.R. 31 (P.C.).

by which without fraud or collusion she is barred. This view was affirmed by their Lordships in *Aumiratolall Bose v. Rajoneekant Mitter*,⁴⁹ which was also a case in which the question of limitation related to Act XIV of 1859. In *Hurri Nath Chatterji v. Mothoor Mohun*,⁵⁰ their Lordships held that the effect of Acts of 1871, and 1877, was not to except from the rule laid down in the *Shivagunga* decision the case where a decree had been obtained against a Hindu widow in her lifetime founded upon the law of limitation. It is, therefore, established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of Art. 141.¹ In *Vaithialinga Mudaliar v. Srirangath*,² it was held by their Lordships of the Privy Council, that a Hindu widow represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit provided that the suit was fought out according to law, and was not collusive or fraudulent. This ruling has been variously interpreted on the question of adverse possession which bars a widow, barring also the reversionary heirs after her. Justice Thiruvengkata Chariar has held in *Ayyasami Aiyar v. Mahadeva Aiyar*,³ that the principle laid down by this authority is that

"a decree passed against a widow or other female heir which is otherwise binding against the reversioner under the rule in *Sivaganga* case does not cease to be binding merely because it was passed on the ground of adverse possession against her which would be of no avail if the reversioner were himself the plaintiff".

Their Lordships of the Privy Council have considered this much discussed authority on the question of adverse possession against the widow, and its effect on the rights of the reversioners, in the recent case of *Mt. Jaggobai v. Utsava Lal*,⁴ and it is observed that the judgment of their Lordships in the *Shivaganga* case,⁵ established the principle of representation of the inheritance by a Hindu widow. That case was decided during the currency of Act of 1859. The principle thus laid down was applied also in the cases of *Pertab Singh v. Triloknath Singh*,⁶ and of *Jugal Kishore v. Jotindra Mohun*.⁷

49. (1876) 2 I.A. 113=23 W.R. 214 (P.C.).

50. (1893) 21 Cal. 8=20 I.A. 183 (P.C.); cf. *Ramchandra Reddi v. Andemma*, (1916) 32 M.L.J. 627.

1. *Mt. Jaggo Bai v. Utsava Lal*, 1929 P.C. 166 (170)=57 M.L.J. 160 (175) (P.C.).

2. 1925 P.C. 249=52 I.A. 322=92 I.C. 85=48 Mad. 883=49 M.L.J. 769 (782) (P.C.).

3. (1928) 56 M.L.J. 441 (449)=1929 Mad. 421.

4. 1929 P.C. 166=56 I.A. 267=117 I.C. 498=51 All. 439=57 M.L.J. 160 (175) (P.C.).

5. 9 M.I.A. 539.

6. (1884) 11 I.A. 197=11 Cal. 186.

7. (1884) 11 I.A. 66=10 Cal. 985.

The same principle is reaffirmed by the authority of Vaithilinga's case. Where there has been no decree against widow or other Act *in the law* in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled after the widow's death to rely upon Art. 141 for the purpose of the determination of the question whether the title is barred by lapse of time.⁸ A decree against a widow, as a party to the suit and representing the whole estate would bind the reversioner, but not if she was a party to the suit only in her capacity as owner of the limited interest⁹; *e.g.*, where she is suing to set aside her own gift, a decree dismissing suit would not be binding on the reversioners. Again, in order to make the principle laid down in *Shivganga case* applicable, the possession of the defendant must be, by force of the decree which is binding against the widow, and not in spite of the decree.¹⁰ Similarly, if there had been any other act in the law in the lifetime of the widow destroying the reversionary heir's interest, he will not be entitled to possession on the widow's death and as such Art. 141 will not help him. A reversioner, who is a party to and is benefitted by a transaction entered into by a Hindu widow, is precluded from questioning any part of it, and his sons cannot set it aside especially when he did not do so in his lifetime.¹¹ In *Kanhailal v. Brijlal*,¹² where a widow entitled to a life estate, in order to settle some *bona fide* disputes by certain reversioners, and the two widows of a pre-deceased member of the family, and an alleged adopted son, brought about a compromise settlement, under which the parties consented to a division of the family in certain shares, and this settlement had induced the widow, against her own interest, and those of her daughter, to alter her position by agreeing to the compromise, it was held that plaintiffs reversioners having obtained substantial benefits under that compromise, were bound by the same, and could not claim as reversioners.

2107-09. EFFECT OF ADVERSE POSSESSION AGAINST THE WIDOW.

2107. We have noticed in S. 2089, *ante*, that under Act XIV of 1859, there was no specific provision corresponding to this article: and the words "cause of action" were held not to refer to a new cause of action accruing to the reversionary heirs personally, but to the cause of action which accrued to the heir or representative, for the time being

8. *Mt. Jaggo Bai v. Utsava Lal*, 1929 P.C. 166=56 I.A. 267=117 I.C. 498=51 All. 439=57 M.L.J. 160 (175) (P.C.).

9. *Subbi v. Ramakrishna Bhatta*, (1917) 42 Bom. 69.

10. *Jagannath Singh v. Sardar Singh*, 1923 All. 448=75 I.C. 614.

11. *Ramgowda v. Bhausaheb*, 1927 P.C. 227=54 I.A. 396=52 Bom. 1=105 I.C. 708 (P.C.).

12. (1918) 40 All. 487 (P.C.).

of the deceased.¹³ Before the Act of 1871, adverse possession against the widow not only barred the widow, but the reversioners also, as the cause of action started in both cases from the date of adverse possession.¹⁴ However, where the possession of the defendant originated in an invalid alienation by the widow, the alienee was entitled to continue in possession during the widow's lifetime, and the reversioner's estate became an estate vested in possession on her death only, and from that date only the period of limitation would run against him. This view was adopted by the Madras High Court in *Atchamma v. Subbarayadu*,¹⁵ and re-affirmed in *Sambasiva v. Ragava*.¹⁶

2108. There can be no doubt that the law in this respect was altered by Act IX of 1871, and Act XV of 1877: and the special provision of Art. 142, in the former, and of Art. 141, in the later Acts, provides an independent cause of action for reversioners whose estate falls into possession on the death of a Hindu or Mahomedan female, where the defendant has not acquired a title by prescription under Act XIV of 1859,¹⁷ and where there has been no effective decree against the Hindu widow, or other act in the law in the lifetime of the widow depriving the reversionary heirs of the right to possession of the property after the widow's death.¹⁸ In such cases, the reversioner's right to sue for possession not being derived from or through the widow, is not affected by the fact that the widow has been out of possession for more than twelve years.

2109. In *Cursandas Govindji v. Vundravandas Purshotam*,¹⁹ the Bombay High Court held that under Art. 141, the plaintiff reversioner has twelve years from the death of the widow, and as long as the widows of the childless proprietor were living, the plaintiff had no cause of action, to sue for possession, and no right whatever to interfere in the management or disposition of the income of the property. On appeal, this view was upheld that under Art. 141, the plaintiff's

13. *Nobin Chunder v. Issur Chunder*, (1868) 9 W.R. 505 (F.B.); *Ganga Churn v. Juggurnath*, (18669) 12 W.R. 97; *Amritolal v. Rajoneekant*, (1875) 23 W.R. 214 (P.C.).

14. *Drobomoyi v. Davis*, (1887) 14 Cal. 323 (344); also see *Sambasiva v. Ragava*, 13 Mad. 512 (515) and *Kolla Subramanian v. Thellanayukolu*, (1881) 4 Mad. 124; *Folld. Saroda v. Doyamoyee*, 5 Cal. 940.

15. 5 M.H.C.R. 428.

16. (1890) 13 Mad. 512 (515).

17. *Drobomoyi v. Davis*, (1887) 14 Cal. 323 (344); *Shamlal v. Amarendra*, 23 Cal. 460; *Mohima v. Gouri*, 2 C.W.N. 162 (164); *Brojolal v. Jiban Krishna*, (1893) 26 Cal. 285 (296); *Babu v. Bhikaji*, (1889) 14 Bom. 317; also see *Somasundaram v. Vaithilinga*, (1916) 40 Mad. 846.

18. See S. 2102: "Effect of a decree against widow"; *Mt. Juggobai v. Utsavlal*, 51 All. 439 (P.C.).

19. (1889) 14 Bom. 482.

claim to immoveable properties left by the testator was not barred by limitation.²⁰ This view was approved by their Lordships of the Privy Council in *Runchordas v. Parbatibai*,²¹ where their Lordships observed that the right to property had not been extinguished under S. 28 of the Limitation Act, as the period limited for instituting a suit for the possession of property had not determined.

"It was not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff did not derive his right from or through them, and the *extinguishment of their right* would not *extinguish his*."

Following this view, the **Madras High Court** held in *Shrinivasa v. Ramappa*,²² that Art. 141 of the Limitation Act gives a fresh starting point to the reversioner on the death of the female limited owner, and a suit brought by the reversioner will not be barred even though the female owner was not in possession within 12 years before her death. In a case governed by Art. 141, under no circumstances can time run against a Hindu reversionary heir until the reversion vests by the death of the female holding the intervening estate.²³ The **Allahabad High Court** correctly found the law under the Act of 1871 in their **Full Bench** decision in *Ram Kali v. Kedarnath*,²⁴ where the daughter of a separated Hindu, who was entitled to succeed to her father's immoveable property upon his widow's death, instituted, after the widow's death, a suit for possession of such property against certain persons who, upon the Hindu's death, had obtained possession and held it adversely to the widow. It was held by the Full Bench that Art. 141, was applicable, and that limitation ran from the date of the widow's death. A **Full Bench** of the **Calcutta High Court**, in *Srinath Kur v. Prosunno Kumar Ghose*,²⁵ had taken the same view, holding that under Art. 141, a Hindu reversioner who succeeds to immoveable property has twelve years within which to bring his suit for possession from the time when his estate falls into possession. The **Allahabad High Court** came to a different conclusion in *Tika Ram v. Shama Charan*,²⁶ but this erroneous view was corrected in later cases.²⁷ In the **Full Bench** case of *Bankey Lal v. Raghunath*,²⁸ Sulaiman, A.C.J. and Mukerji, J., held that adverse possession against the widow will not

20. (1897) 21 Bom. 646.

21. (1899) 23 Bom. 725 (736) (P.C.).

22. (1915) 30 Mad. 991=18 M.L.T. 226=2 L.W. 751; Folld. *Venkataramayya v. Venkatalakshamma*, 20 Mad. 493=7 M.L.J. 204.

23. *Kashirao v. Ukarda*, (1915) 31 I.C. 290 (Nag.).

24. (1892) 14 All. 156=A.W.N. (1892) 22 (F.B.).

25. 9 Cal. 934 (F.B.).

26. 20 All. 42=A.W.N. (1897) 195; Folld. *Hanuman Prasad v. Bhagwati Prasad*, 19 All. 357=A.W.N. (1897) 80.

27. *Amrit Dhar v. Bindesri Prasad*, 23 All. 448=A.W.N. (1901) 133 and *Jhamman Kunwar v. Tiloki*, 25 All. 435=A.W.N. (1903) 93.

28. (1928) 112 I.C. 801=1928 All. 561.

be effective and binding on the reversioners: The rule laid down by their Lordships of the Privy Council in *Runchordas v. Parvatibai*,²⁹ which affirmed the view held in *Ram Kali v. Kedar Nath*,³⁰ is still good law, in spite of the observations on the question of limitation in *Vaithialinga Mudaliar v. Srirangath*,³¹ while affirming the rule in *Shivagunga case*.³² This view is supported by the Privy Council decision in *Mt. Jaggobai v. Utsavalal*,³³ where their Lordships have held that the principle of representation of the inheritance by a Hindu widow, established in the *Shivagunga case*,^{33-a} is not affected by any thing contained in Art. 142 of the Limitation Act, 1871 (now Art. 141). Accordingly, where a decree founded upon the law of limitation and adverse possession is obtained against a Hindu widow in her lifetime, the reversionary heir is equally barred by the decree, under the rule laid down in the *Shivgunga case*, and he does not get the benefit of Art. 141.³⁴ But, where no such decree has been obtained against the widow, nor has there been any other Act in the law in the lifetime of the widow operating to destroy the reversionary heir's interest and depriving him of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Art. 141, and he has by the *express* terms of that article, a period of 12 years from the widow's death to bring the suit notwithstanding that at the death of the widow a stranger had been in adverse possession, and adverse possession had already run against the widow for more than 12 years in her lifetime.³⁵

"The case of *Vaithialinga Mudaliar v. Srirangath Anni*, illustrates the application of the rule in *Shivagunga's case*^{35-a} where a decree founded upon adverse possession has been obtained against a Hindu widow in her lifetime. The decision is not, in their Lordships' judgment, in conflict with that in *Runchordas Wandravandas v. Parvatibhai*,^{35-b} in which no decree had been obtained against the widow, nor had there been any other act in the law in the lifetime of the widow destroying the heir's interest."³⁶

The decision of their Lordships, in *Runchordas v. Parvatibhai*,³⁷ has

29. 23 Bom. 725=1 Bom. L. R. 607=26 I.A. 71 (P.C.).

30. 14 All. 156=A.W.N. (1892) 22 (F.B.).

31. 92 I.C. 85=48 Mad. 883=1925 P.C. 249=49 M.L.J. 769=52 I.A. 322 (P.C.).

32. 9 M.I.A. 539=2 W.R.P.C. 31.

33. (1929) 117 I.C. 498=51 All. 439=1929 P.C. 166=1929 A.L.J. 716=57 M.L.J. 160=56 I.A. 267 (P.C.).

33-a. 9 M.I.A. 539.

34. *Mt. Jaggobai v. Utsavalal*, 117 I.C. 498 (506) (P.C.); Refd. to *Hari Nath v. Mothurmohun*, 21 Cal. 8=20 I.A. 183 (P.C.).

35. *Mt. Jaggobai v. Utsavalal*, 117 I.C. 498 (506) (P.C.); Folld. *Runchordas Wandravandas v. Parvatibhai*, 23 Bom. 725=26 I.A. 71 (P.C.).

35-a. 9 M.I.A. 539.

35-b. 23 Bom. 725 (P.C.).

36. *Mt. Jaggobai v. Utsavalal*, 117 I.C. 498 (506) (P.C.).

37. (1899) 23 Bom. 725 (736) (P.C.).

been followed by almost all the High Courts in India,³⁸ and it stands re-affirmed by the latest pronouncement of their Lordships in the case of *Mt. Juggobai v. Utsavlal*,³⁹ thus removing the doubts and difficulties created by the interpretation of the decision of the **Judicial Committee** in *Vaithilinga Mudaliar v. Srirangath Anni*,⁴⁰ which has been taken in some cases as unsettling the law in this respect⁴¹; but as held by the **Allahabad High Court**, in *Bankey v. Raghunath*,⁴² and by the **Calcutta High Court**, in *Abinash v. Narban*,⁴³ this authority is not to be taken as overruling the uniform current of decisions of all the Courts in India which have had the concurrence and the approval of their Lordships all along. **The legal position** is now settled that adverse possession against the widow is not adverse against the reversioners, unless a decree founded upon adverse possession has been obtained against a Hindu widow in her lifetime, or the heir's interest has been otherwise destroyed in the lifetime of the widow.⁴⁴ Where a widow has entered into possession as a Hindu widow and has either voluntarily parted with possession or been dispossessed against her consent, a suit by the reversioner brought for possession after her death is governed by Art. 141 and not by Art. 144, and a suit brought within 12 years of the death of the widow is not barred by limitation.⁴⁵ Although the Statute of Limitation can never begin to run against the reversioner in consequence of possession or dispossession of a female, so long as she holds as heir of the last male, yet if she holds under some claim of title independent of him, her possession is hostile to the rightful heir or reversioner from the time it begins.⁴⁶ Article 141 gives a fresh starting point to the reversioner on the death of the female limited owner, and a suit brought by the reversioner will not be barred even though the female owner was not in possession within

38. *Amritdhar v. Bindesri Prasad*, (1901) 23 All. 448; *Jhamman Kunwar v. Tiloki*, (1903) 25 All. 435; *Bankeylal v. Raghunath Sahai*, (1928) 112 I.C. 801=1928 All. 561=26 A.L.J. 1049 (F.B.); *Shrinivasa v. Ramappa*, (1915) 30 I.C. 991=2 L.W. 751; *Sreeramulu v. Kristamma*, 26 Mad. 143; *Baz Khan v. Sultan Malik*, 43 P.R. 1901; *Rulia v. Rulia*, 41 P.R. 1903; *Sheo Chaudhri v. Sadhodas*, 18 I.C. 948 (All.); *Hardwar Rai v. Balram Rai*, 18 I.C. 959 (All.); *Zarifunnissa v. Shafiqulzaman*, (1923) 75 I.C. 626=1923 Oudh 185; *Mt. Raj Dulari v. Chandeshur*, (1924) 78 I.C. 65=1925 Oudh 164.

39. 1929 P.C. 166=117 I.C. 498=51 All. 439 (P.C.).

40. (1925) 52 I.A. 322=48 Mad. 883 (P.C.).

41. *Aurabinda Nath v. Manorama Debi*, (1928) 55 Cal. 903=1928 Cal. 670; also see *Siva Prosad v. Bhadramoni*, (1928) 48 C.L.J. 368; *Ayyaswami v. Mahadeo*, (1928) 56 M.L.J. 441=1929 Mad. 421.

42. 1928 All. 561=51 All. 188 (F.B.).

43. 1930 Cal. 165 (168)=123 I.C. 444=57 Cal. 289.

44. *Bai Manchha v. Tribhovan Lallubhai*, 139 I.C. 28=34 Bom. L. R. 385=1932 Bom. 434.

45. *Bankey Lal v. Raghunath Sahai*, 1928 All. 561 (F.B.).

46. *Kedar Nath v. Jatindra Chandra*, (1909) 4 I.C. 44=9 C.L.J. 236.

12 years before her death.⁴⁷ During the continuance of a widow's life-estate, adverse possession which begins in and runs its course before that life terminates, will be no bar to reversioners.⁴⁸ Nor will litigation by the widow in the enjoyment of such a life estate, whether she be plaintiff or defendant, represent the estate fully so as to give rise to a bar of *res judicata* against reversioners if such litigation is qualified and personal to the widow or has arisen out of acts of her own affecting the estate during her own life estate therein.⁴⁹ The case-law establishes

"that a Hindu entitled to the possession of immoveable property on the death of a Hindu female can sue for possession within twelve years of her death even if such female had made a transfer of the property in suit more than three years or had made an adoption more than six years prior to the suit or had herself been out of possession for more than 12 years prior to her death. But if the trespasser had entered into possession after the death of the female and had retained possession for more than 12 years, then the claim of the reversioner was barred".⁵⁰ It has been definitely established by judicial decisions that in the case of a widow making an alienation of her husband's property, or even of her being dispossessed by a trespasser, she does not represent the inheritance for purposes of limitation, and that limitation does not begin to run during her lifetime, against any reversionary heir of her husband.¹ Upon the authorities, adverse possession in the lifetime of the female heirs does not avail against the reversioners who have twelve years after her death to sue to recover possession.²

2110. ILLUSTRATIVE CASES.—

(1) Where a female heir is kept out of possession by a trespasser for more than twelve years, and on the death of the female, the reversionary heir sues the trespasser for property, Art. 141 applies, giving 12 years from the death of the female.³

(2) Where *H*, died in 1856 possessed of certain immoveable property and leaving a son *J*, and a widow *C* surviving him. *J*, died in 1861, leaving a widow, *T*, and a daughter *J. K.* After *J*'s death, the widows *C* and *T*, divided the property between them, and *C*'s share, after passing through the

47. *Shrinivasa Raya v. Ramappa Hebbara*, (1915) 30 I.C. 991=2 L.W. 751.

48. *Subbi v. Ramkrishna Bhatta*, (1917) 42 Bom. 69.

49. *Ibid.*

50. *Ganga Sahai v. Kanhaiyalal*, (1913) 18 I.C. 811 (813)=11 A.L.J. 179; citing *Harihar Ojha v. Dasrath Misra*, 33 Cal. 257=9 C.W.N. 636=1 C.L.J. 408; *Bijoy Gopal Mookerji v. Krishna Mahishi*, 34 Cal. 329=34 I.A. 87=17 M.L.J. 154 (P.C.); *Bhagabat Pershad v. Murari Lal*, 7 I.C. 427=15 C.W.N. 524=15 C.L.J. 97; *Amritdhar v. Bindeshri*, 23 All. 448; *Jhamman Kunwar v. Tiloki*, 25 All. 435=A.W.N. (1903) 93; *Nanak v. Sibba*, 3 I.C. 536=6 A.L.J. 723.

1. *Srinath Kur v. Prosunno Kumar Ghose*, 9 Cal. 934 (F.B.); *Sreeramulu v. Kristamma*, (1902) 26 Mad. 143 (145).

2. *Baz Khan v. Sultan Malik*, 43 P.R. 1901 and *Rulia v. Rulia*, 41 P.R. 1903; *Sheo Chaudhri v. Sadhodas*, (1913) 18 I.C. 948 (All.); *Hardwar Rai v. Balram Rai*, 18 I.C. 959 (All.); *Mt. Raj Dulari v. Chandeshur Dei*, (1924) 78 I.C. 65=1925 Oudh 164; *Hemendra Nath Roy v. Janendra*, 1935 Cal. 702=159 I.C. 1101.

3. *Ram Kali v. Kedarnath*, (1897) 19 All. 357; *Amritdhar v. Bindesri Prasad*, (1901) 23 All. 448 (451).

hands of several persons, came to the defendant and *T*, having died in 1900, a suit by *J. K.* for the recovery of the immoveable property was held within time under Art. 141 of the Limitation Act.⁴

(3) Where in a suit brought to recover possession of certain property, it appeared that the original owner died in 1876 leaving a daughter, and a daughter-in-law (wife of a pre-deceased son) and the daughter, before dying in 1907, adopted a son who conveyed the suit properties to the plaintiff in 1911 while the daughter-in-law sold them to defendant's father in 1901; it was held that the suit was within time under Art. 141, Limitation Act.⁵

(4) Where *M* died issueless in 1865, and his property was entered in the name of his widow *B*; however, under a settlement arrived at in 1868, the names of his mother *R*, and widow *B*, were to be entered together in equal shares with a right of survivorship; and *R* died in 1884, and *B* died in 1927; and the reversioners thereupon instituted a suit for possession, it was held that there was no room for any plea of title by adverse possession in favour of *R* in respect of the half share, and Art. 141 applied to the suit, and not Art. 144.⁶

(5) Where *D* died leaving two widows *K* and *R*, and daughters *S* and *T*, and in 1897 *K* sold the property in suit to defendant No. 1; and in 1902, *K* died; thereupon, *R* as surviving co-widow took the property for a widow's estate and died in 1903: and, on her death the daughters, *S* and *T*, inherited the property: *S* died in 1907, and *T*, in 1911: and in 1915, *S*'s son brought a suit to recover possession of the property sold by *K*—it was held that Art. 141 did not apply as that article was restricted to suits by a plaintiff whose right and title to sue for possession occurred upon the death of a female holding the limited woman's estate; that Art. 144 applied to the suit, and adverse possession only commenced from the death of *R* in 1903.⁷

TITLE III: STARTING POINT OF LIMITATION.

2111. STARTING POINT OF LIMITATION.—A suit

Cause of action. by a reversioner challenging the alienation of a Hindu widow should be instituted within 12 years of the widow's death.⁸ A cause of action to recover possession of properties improperly alienated by a Hindu widow would accrue on the death of the widow.⁹ The possession of the transferee from the widow might constructively be regarded as the possession of the widow.¹⁰ An alienation made by a female heir in possession is good against her for her life, but is not necessarily binding on the reversioner, to whom, if it be invalid, a cause of action accrues on the death of the female heir.¹¹ As observed

4. *Jhamman Kunwar v. Tiloki*, (1903) 25 All. 435.

5. *Shrinivasa Raya v. Ramappa Hebbara*, (1915) 30 I.C. 991=2 L.W. 751.

6. *Chandisingh v. Gurprasad Singh*, (1930) 126 I.C. 657=1930 Oudh 339=7 O.W.N. 711.

7. *Malkarjun Mahadeo v. Amrita Tukaram*, (1918) 42 Bom. 714.

8. *Rajeshwar Bali v. Harkishen Bali*, 1933 Oudh 170 (2)=10 O.W.N. 147.

9. *Pursut Koer v. Palut Roy*, (1881) 8 Cal. 442 (445).

10. *Abdur Rahman v. Wali Mohammad*, (1922) 68 I.C. 601=2 Pat. 75=1923 Pat. 72.

11. *Hanuman Prasad v. Bhaganti Prasad*, (1897) 19 All. 357.

recently in *Hemendra Nath Roy Choudhry's case* by Derbyshire, C.J., and R. C. Mitter, J.,

"It is well settled that if a life tenant be dispossessed the reversioner or remainderman is in time if he institutes the suit for possession of immoveable property within 12 years of the death of the life tenant, and if successive life estates had been created the remainderman or the reversioner will be in time if he institutes the suit for possession within 12 years of the death of the last life tenant. Adverse possession against a life tenant will not be adverse possession against the reversioner or the remainderman. This has been settled by the decision of the Privy Council in *Runchordas v. Parbatibhai*,¹² and whatever doubts had been raised after that decision in India in regard to suits for possession of immoveable property by a reversioner succeeding on the death of a Hindu widow has been removed by the later decision of the Judicial Committee in *Jaggo Bai v. Utsava Lal*.¹³ It is also well settled that if the cause of action arose during the lifetime of the last full owner, the subsequent interposition of a life estate or a widow's estate would not bring into operation either Art. 140 or Art. 141, Limitation Act, on the principle formulated in S. 9 of the said Act. Art. 142, Limitation Act would apply, time running from the date of dispossession".¹⁴

A cause of action, for a suit under Art. 141, Limitation Act, accrues to a reversioner on the death of the Hindu or Mahomedan female, when his estate falls into possession, and he becomes "entitled to possession of immoveable property". There is no exception, under this article of the case where, during the lifetime of the widow, the adverse possessor has been in possession for twelve years.¹⁵ Article 141 of Limitation Act applies to a case where a reversioner is entitled to property on the deaths of more female heirs than one inheriting jointly, and limitation in such a case begins to run from the date of the death of the last surviving female heir¹⁶; as plaintiff's right to claim the property does not arise until the death of the surviving widow.¹⁷ As long as any of the widows, or female

12. (1899) 23 Bom. 725=26 I.A. 71 (P.C.).

13. 1929 P.C. 166=117 I.C. 498=56 I.A. 267=51 All. 439 (P.C.) (See S. 2109, ante: "Present Law").

14. *Sesha Naidu v. Periasami Odyar*, 1921 Mad. 272=68 I.C. 734=44 Mad 951=41 M.L.J. 163 and *Skinner v. Naunihal Singh*, 1929 P.C. 158=117 I.C. 22=56 I.A. 192=51 All. 367 (P.C.).

15. *Chiragha v. Mehtaba*, 79 P.R. 1898; also see *Bisheshur Baksh v. Rameshar Baksh*, (1917) 44 I.C. 368 (391) (The right of a reversioner to sue accrues on the death of the female whether she has been in possession or not).

16. *Muthiyalu Chengappa v. Burada Gunta*, (1921) 60 I.C. 135=43 Mad. 855=1921 Mad. 246=39 M.L.J. 567; also see *Gobind Chunder v. Dulmeer Khan*, (1874) 23 W.R. 125; *Runchordas v. Parbatibai*, (1899) 23 Bom. 725=26 I.A. 71 (P.C.); *Atchamma v. Bapiah*, (1920) 40 M.L.J. 83; *Tulsabai v. Bhagwat*, (1913) 11 A.L.J. 333; *Muthiyalu v. Burada*, (1920) 39 M.L.J. 567; *Chamansingh v. Salig Ram*, (1922) 68 I.C. 177 (Lah.) and *Nand Singh v. Dhan Kaur*, (1920) 2 L.L.J. 573.

17. *Ram Dei Kunwar v. Abu Jafar*, (1905) 27 All. 494 and *Mukta v. Dada*, (1893) 18 Bom. 216.

heirs is alive, the plaintiff reversioner has no cause of action.¹⁸ This article applies also to a case in which the reversion comes after several successive female heirs, *e.g.*, widows and mother, or widows and daughters, and a suit is within time if brought within twelve years of the death of the last female heir.¹⁹

2112. The cause of action for a suit by a Hindu reversioner for possession of an estate on the death of a Hindu female arises under Art. 141 of the Limitation Act on the death of the widow and once limitation has begun to run under the section no subsequent disability can stop it,²⁰ except in the particular exception mentioned in S. 9 of the Limitation Act.²¹ Where during the lifetime of a Hindu widow one *A* sued to set aside an alienation made by her, and his suit was dismissed on the ground that the nearest heir was not *A*, but *B*; and after the death of the widow, *B* sued to recover the properties, but his suit was dismissed on the ground that he was not the heir, his title being based on an alleged adoption which was held not proved, and *C*, who was the heir of *A*, then sued to recover the properties more than twelve years after the death of the widow, but within twelve years from the dismissal of *B*'s suit, it was held that the dismissal of *B*'s suit did not furnish *C* with a fresh cause of action: and that limitation having commenced to run on the death of the widow, *C*'s suit was barred by time.²² This article will not control S. 6, cl. 3 of the Act.²³ However, the Madras High Court has held in *Narasingayya v. Rajya Lakshamma*,²⁴ that where a Hindu widow sold certain properties of her late husband in 1899 and subsequently adopted a boy in 1905, who died a minor in 1909, and the widow also died in 1921, a suit by the reversioner filed within twelve years of the widow's death, but more than twelve years after the minor's death, was held not barred by limitation.

2113. Their Lordships of the Privy Council have observed recently that

18. *Cursandas Garidji v. Vandravandas Purshotum*, (1889) 14 Bom. 482.

19. *Kokilmoni Dossia v. Manick Chandra*, 11 Cal. 791; *Shamlall Mitra v. Amarendro Nath Bose*, (1895) 23 Cal. 460; *Sambasiva v. Ragava*, (1890) 13 Mad. 512.

20. See notes under S. 9, Limitation Act; *Rup Kishore v. Patrani*, (1928) 107 I.C. 45 (48)=25 A.L.J. 861=50 All. 152=1927 All. 818 (820).

21. *Ranganatha Rao v. Rama Pandithar*, (1922) 70 I.C. 446=16 L.W. 529=44 M.L.J. 87=1923 Mad. 108.

22. *Ibid.*

23. Mitra's Limitation Act, Vol. II, p. 1681.

24. (1930) 59 M.L.J. 949=1931 Mad. 273.

"The basis" of the doctrine of surrender in Hindu Law "is the effacement of the widow's interest and not the *ex facie*, transfer by which such effacement is brought about".²⁵ "The result (of surrender) is merely that the next heir of the husband steps into the succession in the widow's place. There is nothing, in the Hindu Law which would exclude the succession of a female heir in such cases and no reason for differentiation according to the nature of the estate she would take". "There is no reason for making any difference between surrender to a daughter and surrender to the nearest male reversioner."²⁶

Surrender in favour of daughter.

Acceleration of the right of a male reversioner by transactions between two or more joint female heirs is hardly possible without the consent or knowledge of the reversioner²⁷; and accordingly in the case of joint female heirs, cause of action arises on the death of the surviving female heir, unaffected by any transaction between the co-widow, or female co-heirs.²⁸

Relinquishment in favour of co-widow.

2114. Where a person who is a remote reversioner cannot sue as long as the near reversioner lived, it was held by the **Punjab Chief Court**, that the right to sue for possession, not being derived from or through the near reversioner, is not barred by reason of any adverse possession against the near reversioner.²⁹ Rattigan, J., observed

Right of suit by remote reversioner.

"that possession cannot be adverse against a person who has not (either on his own account or through his predecessor in title) an immediate right to possession." "That grave injustice would result from holding that an heir to the property is, under the law of limitation, to be held debarred from preferring a claim thereto because the claim was not preferred at a time, when by law it could not possibly be preferred, and when the only person who could prefer it was a third party through whom the plaintiff does not derive his right to sue for possession."

The **Bombay High Court** has similarly held that Art. 141 is restricted to suits by a plaintiff whose right and title to sue for possession occurred upon the death of a female holding the limited woman's estate. Where on death of last surviving widow, her two daughters inherited the property, a suit by daughter's son, as reversioner, to recover possession of property sold by one of the widows, was not governed by Art. 141, but by Art. 144, adverse

25. *Vytla Sitanna v. Marivada Viranna*, (1934) 148 I.C. 828=61 I.A. 200=57 Mad. 749=67 M.L.J. 20=1934 P.C. 105 (P.C.); cf. *Bhagwat Koer v. Dhanukhdhari*, 53 I.C. 347=46 I.A. 259=1919 P.C. 75=47 Cal. 466 (P.C.) and *Rangasami Goundan v. Nachiappa*, 50 I.C. 498=46 I.A. 72=36 M.L.J. 493=42 Mad. 523 (P.C.).

26. *Sartaji v. Ramjas*, 79 I.C. 25=46 All. 59=21 A.L.J. 796=1924 All. 166 (Approved in *Vytla Sitanna v. Marivada*, (1934) 148 I.C. 828=61 I.A. 200=57 Mad. 749=1934 P.C. 105, *supra*).

27. *Muthiyal Chengappa v. Burada Gunta*, (1920) 39 M.L.J. 567.

28. *Joga Veerayya v. Makina*, (1922) 69 I.C. 389 (Mad.).

29. *Sundar v. Salig Ram*, 26 P.R. 1911=9 I.C. 300 (F.B.).

possession began to run from the date of the death of the last

Effect of bar of limitation. surviving widow.³⁰ Where the plaintiff as purchaser of the rights of certain reversioners sued to recover possession of his

share by partition from the defendant, who was an alienee from the widows, and the reversioners representing the remaining share were impleaded being in possession of the plaintiff property, and claiming to be given their share in the property, it was held that their claim as defendants though preferred for the first time more than twelve years from the death of the widow could not be held to be extinguished under S. 28 of the Limitation Act.³¹ This section would operate to extinguish the right of a person who did not bring a suit within the period prescribed, but it did not follow that his right would be extinguished if he were a party to a suit instituted by another within the prescribed period in which his right to the property could be effectually determined.³²

2115. PRESUMPTION OF DEATH OF FEMALE.—In

Onus probandi.

a suit by a Hindu reversioner for possession of lands on the death of a Hindu widow, the onus lies on the plaintiff to prove that the widow died within twelve years prior to the suit. Under the Code of Civil Procedure, the plaintiff must show the grounds, etc., of the cause of action, and when the cause of action accrued.³³ Where, upon the facts as proved, the female was in possession of anything short of the full estate, limitation under Art. 141, would begin to run from the date of her death, when the right to sue accrues irrespective of the question whether she was in possession or not.³⁴ The doctrine of non-adverse possession does not obtain in regard to suits under Arts. 140 and 141, Limitation Act, and the plaintiff suing in ejectment must prove, whether he sues as a remainderman in the English sense, or as a reversioner in the Hindu sense, that he sues within twelve years of the estate falling into possession, and that onus is in no way removed by any presumption which can be drawn according to the terms of S. 108 of the Indian Evidence Act.³⁵ The burden lies on the plaintiffs to prove conclusively that her

30. *Malkarjun v. Amrita Tukaram*, (1918) 42 Bom. 714 (718).

31. *Rayegavda Hanmantraya v. Ramlingappa Shidgavdappa*, 119 I.C. 656=53 Bom. 472=1929 Bom. 345 (347)=31 Bom.L.R. 647.

32. *Narasinha Krishnaji v. Vaman Venkatesh Deshpande*, 4 I.C. 249=34 Bom. 91=11 Bom.L.R. 1102.

33. *Mylapore Iyasawmy v. Yeo Kay*, (1887) 14 Cal. 801 (805) (P.C.); *Venkata v. Lachchamma*, 14 M.L.J. 404; *Malraju v. Koppuravuri*, (1924) 46 M.L.J. 541=26 Bom.L.R. 563=20 M.L.W. 1 (P.C.).

34. *Bisheshar Baksh Singh v. Rameshar Baksh Singh*, (1918) 44 I.C. 368 (391)=21 O.C. 1=4 O.L.J. 648.

35. *Jayawant Jivan Rao v. Ramchandra Narayan*, (1916) 33 I.C. 434=40 Bom. 239.

death took place within twelve years of the suit.³⁶ In a suit in which the question is not merely of the death of a person but of his death at a particular time, there is no presumption as to the time, and the party concerned, to make out death at a specified date, must prove it by evidence.³⁷ However, in *Tani v. Rikhi Ram*,³⁸ it was observed that a person shown to have been once living is, in the absence of proof that he has not been heard of within the last seven years, presumed to be still alive: and in accordance with this principle it was held that the onus of proving that a widow died before a given date in a month lay upon the defendants who asserted it.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
142.	For possession of immoveable property when the plaintiff, while in possession of the property has been dispossessed or has discontinued the possession.	12 years.	The date of the dispossession or discontinuance.

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- 2116. Corresponding provisions.
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- 2117. Privy Council cases.
- 2118. Allahabad.
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- 2120. Calcutta.
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2129-42. Difference between Arts. 142 and 144.

- 2129. Specific or general provision.
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- 2131. Pleadings—Allegations of previous possession and dispossession.
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36. *Shib Deo v. Ram Pershad*, (1925) 46 All. 637 (641)=1925 All. 79 (81).

37. *Parsoo v. Mannalal*, (1917) 39 I.C. 21=13 N.L.R. 16, Relied on *Basant Singh v. Mahabir Prasad*, 40 I.A. 86=19 I.C. 340=35 All. 273 (P.C.); also see *Baliram v. Sitia*, 8 I.C. 1123=6 N.L.R. 160.

38. 56 I.C. 742=1 Lah. 554 (557).

- 2133. Adverse possession material under Art. 144.
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Title IV: Starting point of limitation.

- 2162. Starting point of limitation.

NOTES.

TITLE I: SCOPE AND APPLICABILITY OF ART. 142.

2116. **CORRESPONDING PROVISIONS.**—This article corresponds to Art. 143 of Act IX of 1871; and Art. 142 of Act XV of 1877. Under Act XIV of 1859, suits for immoveable property were provided for by S. 1, Cl. (12), which ran as follows:—

"To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose."

2117. SCOPE AND APPLICABILITY.—There is a considerable conflict of view as to the scope of Art. 142, and its applicability. The question is mostly one of pleading. The earliest Privy

Council case in which Art. 143 of Act IX of 1871, came in consideration along with Privy Council Rulings.

(i) 8 Cal. 224 P.C. Art. 144 of that Act, is the case of *Bibi Sahodra v. Rai Jang Bahadur*.³⁹ Sir A. Hobhouse observed that head 143 (now Art. 142)

“refers to a suit for possession of immoveable property, where the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, and it allows twelve years from the date of the dispossession or discontinuance. But in order to bring the case under that head of the schedule, he must show that there has been a possession or discontinuance.”

This article was not applied where pleadings distinctly showed that there was no dispossession or discontinuance of the plaintiff. In

(ii) 5 All. 1 (P.C.). *Karan Singh v. Bakar Ali Khan*,⁴⁰ there was a question of the application of Art. 145 of Act IX of 1871 (now Art. 144), and Sir B. Peacock, pointed out the difference of the provision from the rule formerly in force under Act XIV of 1859, S. 1, Cl. (12). Under the old law, the suit must have been brought within twelve years from the time of the cause of action; but under the Act of 1871, it might be brought within 12 years from the time when the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff. In *Sundar v. Parbati*,⁴¹ posses-

(iii) 12 All. 51 (P.C.). sion of the estate left by their deceased husband was taken by two widows of a deceased Hindu, who, being childless, had before his death adopted a son, to whom, also, by will he bequeathed his estate. The adoption of sister's son was invalid under Hindu Law, but the adopted son died soon after the testator. It was held by their Lordships, that the High Court had correctly stated the result of the well-known cases of *Armory v. Delamirie*,⁴² and *Asher v. Whitlock*,⁴³ that

“possession is a good title against all the world except the person who can show a better title. By reason of his possession such person has an interest which can be sold or devised.”

But, the position of the parties had been wrongly differentiated from the authorities cited. Their Lordships held that the widows had a **possessory title or interest** in the estate, notwithstanding that a preferable title might exist in others through the deceased legatee: also, the estate, being jointly held by them, was partible, and that

39. (1881) 8 Cal. 224=8 I.A. 210 (P.C.).

40. (1882) 5 All. 1=9 I.A. 99 (P.C.).

41. (1889) 12 All. 51=1 I.A. 186 (P.C.).

42. 1 Smith's L. C. 313.

43. L.R. 1 Q.B. 1.

either widow might maintain a suit for partition. This accords with the view in *Asher v. Whitlock*,^{43-a} where it was held,

"that a person in possession of land without other title has a devisable interest, and that the heir of his devisee can maintain ejectment against any person who has entered upon the land and cannot connect himself with some one having title or possession prior to the testator".

An important decision has been given by their Lordships in the case

(iv) 16 Cal. 473 (P. C.). of *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi*,⁴⁴ which has been considered as explaining the scope of Art. 142

of the Limitation Act, and laying down a rule as to burden of proof in cases of alleged dispossession or discontinuance of possession. In this case, the claimants had shown that they formerly were proprietors of the land to which they alleged title, and from which they claimed to oust the defendants; but they had been dispossessed, or their possession had been discontinued some years before the suit was brought by them, and the land was occupied by the defendants who denied their title. That being so, it was held that the burden of proof was on the claimants to prove their possession at some time within the twelve years, prescribed by Art. 142, Limitation Act, next preceding the suit. Their Lordships stated that the "question for decision is not whether the title of the defendants was created just after the disturbance or otherwise, but *when were the plaintiffs dispossessed or when did they discontinue possession*".⁴⁵

In the case of *Nawab Mahomed Amanulla Khan v. Badan Singh*,⁴⁶ their Lordships found that when

(v) 23 P.R. 1890 (P.C.). there was a refusal on the part of the plaintiffs or their ancestors to make the en-

gagement for the payment of revenue, and the Government made the engagement with the villagers, the defendants, there was a dispossession or discontinuance of possession of the plaintiffs within the meaning of Art. 142 of the Limitation Act, and that the case was not governed by the residuary Art. 144 as to adverse possession. This has been explained in *Bazkhan v. Sultan Malik*,⁴⁷ by the Punjab Chief Court, as holding that suit for possession of immoveable property upon a discontinuance of possession or dispossession is barred after 12 years under Art. 142 of the Limitation Act, although no adverse possession is proved; that Arts. 144, and 142 cannot both apply, and Art. 144 is in terms applicable only when there is no other

43-a. L.R. 1 Q.B. 1.

44. (1888) 16 Cal. 473=16 I.A. 23 (P.C.).

45. *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi*, (1888) 16 Cal. 473 (478)=16 I.A. 23 (P.C.).

46. 23 P.R. 1890=17 Cal. 137=16 I.A. 148 (P.C.).

47. 43 P.R. 1901 (Chatterji and Maude, JJ.).

article applicable. The rule was laid down, in *Dharani Kanta Lahiri v. Gabar Ali Khan*,⁴⁸ where the suit (vi) 17 C.W.N. 389 (P.C.). was one for ejectment of persons who were admittedly in possession of lands from which it was sought to eject them, that

"it lay upon the plaintiffs to prove not only a title as against the defendants to the possession, but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within the 12 years immediately preceding the commencement of the suit".

Their Lordships had to consider a claim by adverse possession against the Crown in certain forest lands in the case of *The Secretary of State v. Chelikani Rama Rao*.⁴⁹ The Crown desired to constitute certain areas into a reserved forest. The claimants objected alleging that these lands had been possessed by them and their predecessors-in-title from time immemorial, and that the lands were theirs. This assertion of property the Crown denied, and their Lordships found that, upon the particular case in hand, the owner-ships of the islands formed in the sea in the estuary or mouth of the Godaveri River was in the British Crown. In these circumstances the question before the Board was simply whether the claimants had established an adverse possession of 60 years against the Crown. The High Court had observed that

"though the title was originally in the Crown, still, as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, i.e., within sixty years before the notification".

Their Lordships were of opinion that the view thus taken of the law was erroneous. Lord Shaw stated that

"nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.'.....It would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession".⁵⁰

The respondent's case failed because of the finding that no adverse or exclusive possession was proved for the prescribed period of 60 years.

48. (1913) 18 I.C. 17=17 C.W.N. 389=17 C.L.J. 277=15 Bom. L. R. 445=13 M.L.T. 185=1913 M.W.N. 157=23 M.L.J. 95 (P.C.).

49. (1916) 39 Mad. 617=43 I.A. 192=1916 P.C. 21=35 I.C. 902=20 C.W.N. 311=(1916) 2 M.W.N. 224=31 M.L.J. 324 (P.C.).

50. 39 Mad. 617 (631)=35 I.C. 902 (909) (P.C.).

In *Basantakumar Roy v. Secretary of State*,¹ their Lordships were dealing with a suit to recover khas possession of lands diluviated and reformed *in situ*, and the question was whether the land in suit belonged to the plaintiff's or to the defendant's mahal; and the main contest was as to whether Art. 142 or Art. 144 of the schedule was applicable. The Judicial Committee held (upholding the decision of the First Court both on title and limitation) that there had not been any dispossession of the plaintiffs (except possibly within 12 years of the commencement of the suit), and Art. 144, not Art. 142 was the article applicable.

In *Kuthali Moothavar v. Peringati K. Kutty*,² their Lordships referred to and followed the doctrine of *onus probandi* in cases of adverse possession as laid down by the Board in *Secretary of State v. Chelikani Rama Rao*,^{2-a} that

"standing a title in 'A', the alleged adverse possession of 'B', must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the *onus* of establishing these things is upon the adverse possessor".

Their Lordships have pointed out with reference to Art. 142 of the Limitation Act, that there can be no discontinuance of possession by reason of the mere submergence of the land.³ The doctrine that possession follows title, has been held to be well-established, and its applicability in cases of submerged lands is that while lands are submerged, constructive possession is with the true owner, and that though immediately prior to the diluviation physical possession had been with the claimant. Similarly, it has been pointed out in *Bhupendra Narayan Sinha v. Rajeswar Prosad Bhakat*,⁴ that there can be no doubt that upon a grant of the surface rights by a Zamindar, he remains in the eye of the law in the possession of the sub-soil. It may be only constructive possession, and that is in one sense nothing more than the right to take physical possession.

"It is for this reason that cases as to adverse possession of mineral rights must ultimately fall to be decided under Art. 144, rather than Art. 142 of

1. (1917) 44 Cal. 858=21 C.W.N. 642=40 I.C. 337=44 I.A. 104=1917 P.C. 18 (P.C.).

2. (1922) 44 Mad. 883=30 M.L.T. 42=66 I.C. 451=48 I.A. 395=1922 P.C. 181 (P.C.).

2-a. 39 Mad. 617 (631)=35 I.C. 902 (909) (P.C.).

3. *Rampati v. Ramani Mohan*, 1930 P.C. 198=34 C.W.N. 772=52 C.L.J. 132=126 I.C. 81=59 M.L.J. 208 (P.C.); Referred to *Basanta Roy v. Secretary of State*, 1917 P.C. 118=44 Cal. 858=44 I.A. 104 (P.C.) and *Secretary of State v. Krishnamoni Gupta*, (1902) 29 Cal. 518=29 I.A. 104 (P.C.).

4. 1931 P.C. 162=132 I.C. 610=58 I.A. 228=59 Cal. 80=61 M.L.J. 632 (P.C.).

the Limitation Act. Once title is proved or admitted to be in the Zemindar he will be presumed to continue in possession until adverse possession by the trespasser is established, and that whether the trespasser is the grantee of the surface or a stranger. It is in effect only an instance of shifting onus".⁵

Where a person discontinued his possession and never resumed it, the suit for possession by him is governed by Art. 142, Limitation Act.⁶ From the Privy Council decisions above noticed, it would appear that Art. 142 is confined to

(xii) 1932 P.C. 55.

Conclusion.

cases where plaintiff while in possession of property has been dispossessed or has discontinued possession:⁷ that this article applies to all suits in ejectment, for possession on possessory title, based on allegations of plaintiff's prior possession lost by dispossession or discontinuance:⁸ but there are certain cases in which plaintiff alleged both title and possession in which the *onus* of establishing prior possession was laid on the plaintiff,⁹ where the case was not one based purely on title, in which the *onus* would rest on the adverse possessor to make good his title by adverse possession for the prescribed period to defeat plaintiff's admitted or proved title.¹⁰ Where the alleged dispossession is not proved, the case falls under Art. 144 and not Art. 142 of the Limitation Act.¹¹ Article applies only where a person previously in possession discontinued his possession and never resumed it.¹²

2118. In *Jai Chand Bahadur v. Girwar Singh*,¹³ the plaintiff who was the Zamindar, sued to eject the defendant from certain land within the plaintiff's Zamindari, alleging that the defendant was in possession merely as a licensee. The defendant denied that he was a licensee, and claimed that he had acquired a title to the land in suit by adverse possession. The plaintiff in this case was held entitled to succeed simply on the strength of his *prima facie* title as Zamindar, and the defendant having failed to prove that he had been in adverse possession of the land for more than 12 years, it was not necessary for the plaintiff to prove that he had been in actual possession at

5. 1931 P.C. 162 (164)=132 I.C. 610=58 I.A. 228=59 Cal. 80 (P.C.).

6. *Bageshwari Charan Singh v. Jagarnath Kuari*, 1932 P.C. 55=59 I.A. 130=11 Pat. 272=136 I.C. 798=62 M.L.J. 296 (P.C.).

7. See 8 Cal. 224 (P.C.), *supra*.

8. See 12 All. 51 (P.C.), *supra*.

9. See 16 Cal. 473 (478); 17 Cal. 137=23 P.R. 1890 and 18 I.C. 17=17 C.W.N. 389 (P.C.).

10. See (1882) 5 All. 1 (P.C.); 39 Mad. 617 (P.C.); also see 44 Mad. 883.

11. See 44 Cal. 858 (P.C.) and 1930 P.C. 198; 1931 P.C. 162.

12. See 1932 P.C. 55 (P.C.).

13. (1919) 41 All. 669; Relied on *Secretary of State v. Chellikani Rama Row*, 39 Mad. 617 (P.C.); cf. *Inayat Husen v. Ali Husein*, (1898) 20 All. 182 (No longer good law).

some period within twelve years previous to the commencement of the suit. Article 144, and not Art. 142 applied to the case. It has been observed, in *Kanhaiya Lal v. Girwar*,¹⁴ that

“this article applies to suit in which the plaintiff claims possession of the property on the ground that while in possession he was dispossessed or his possession was discontinued by the defendant. In other words that article is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as **possessory title**”.

It is explained, that

“possession is in itself title and good against every body except the true owner. In short, there may be cases in which a person, though not the true owner, has been in peaceful possession of property and his possession is disturbed. In such cases the person dispossessed has a right to be restored back to possession on proving the fact of his possession and his dispossession or discontinuance of his possession by the defendant within a period of 12 years prior to the institution of the suit. To such cases Art. 142 applies”.¹⁵

This view was held to have followed the principle laid down in several cases that the correct article to apply in cases based upon the allegation of title and possession is Art. 144 of the Limitation Act,

“because if plaintiff’s title is proved, he is entitled to succeed unless the defendant proves that the title has been lost on account of adverse possession on the part of the defendant”.¹⁶

It was added that,

“But, it may be that the plaintiff though not able to substantiate his title, is in a position to prove his possession and dispossession by defendant within the 12 years. If that be the case, Art. 142 will apply and the burden will lie on the plaintiff”.¹⁷

This view was approved in *Kallan v. Mohammad Nabikhan*,¹⁸ as in consonance with “the established practice of this Court in this matter”. But, it has been overruled by the **Full Bench** decision in the case of *Bindhyachal v. Ram Gharib*,¹⁹ where it was held that Art. 142 is not restricted to suits based on possessory title only, as distinguished from suits in which plaintiff proves his proprietary title as well.²⁰ It is observed that there are no words in this article

14. (1929) 51 All. 1042=1929 All. 753=1929 A.L.J. 1106=119 I.C. 6.

15. 51 All. 1042=119 I.C. 6 (7).

16. *Secretary of State v. Chelikani Rama Rao*, (1916) 39 Mad. 617 (P.C.) (Footnote 49, ante); *Kamakhyia Narain v. Ram Raksha*, 1928 P.C. 146 (149); *Kuthali Moothavar v. Peringati*, (1922) 44 Mad. 883 (P.C.) (Footnote 2, ante); *Jaichand v. Girwar Singh*, 41 All. 669 (Footnote 13, ante).

17. *Kanhaiyalal v. Girwar*, (1929) 51 All. 1042=119 I.C. 6 (7), *supra*.

18. 1933 All. 775=55 All. 209=1933 A.L.J. 105=143 I.C. 497.

19. 1934 All. 993=152 I.C. 1=1934 A.L.J. 973=1934 A.L.R. 968 (F.B.).

20. *Kunji v. Niaz Husain*, 1934 All. 362=152 I.C. 12=56 All. 755=1934 A.L.J. 147=1934 A.L.R. 961.

which would confine it to plaintiffs who claim the property wholly and are not co-sharers or co-owners with the defendants.²¹ Reliance is placed for this view on the Privy Council cases of *Mohima Chunder v. Mohesh Chunder*,²² and *Muhammad Amanullah Khan v. Badan Singh*,²³ in both of which cases the suits were brought on the basis of title by plaintiffs who were not in possession, and their Lordships applied Art. 142 and dismissed the claim on the ground that the plaintiffs had failed to establish their possession within 12 years. These cases were not brought to the notice of the Bench which decided.²⁴

2119. Article 142, applies to actions of ejectment, and where plaintiff alleges that he has been dispossessed, he is required to prove possession and dispossession within 12 years of the suit.²⁵ In cases falling under Art. 142, the plaintiff cannot rest merely on proof of title, but must, at the outset, show possession within 12 years.²⁶ Where the plaintiff alleged that he got into possession under his sale, and that his possession was obstructed by the defendants, and by his suit he claimed to recover possession from the defendants together with mesne profits until recovery of possession, the suit was held to be of the description contained in Art. 142 of the Limitation Act.²⁷ Similarly, in a suit brought by a vendee to recover possession of immoveable property which was not in the possession of his vendor at the time of the sale, the plaintiff was required to show that his vendor had been in possession within twelve years before the date of sale under Art. 142 of the Limitation Act.²⁸ In *Tarubai v. Venkat Rao*,²⁹ Batty, J., in an elaborate judgment, has held that the Privy Council case of *Karan Singh v. Bakar Ali Khan*,³⁰ when taken with that of *Mohima Chunder v. Mohesh Chunder*,³¹ means, that where a plaintiff has been in possession, and has been dispossessed, he must show possession and dispossession within 12 years, but where there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession, then the party relying on adverse possession to displace a proved or admitted title

21. *Bindhyachal v. Ram Gharib*, 1934 All. 993 (995) (F.B.); cf. *Mt. Jagrani v. Sheodulari*, (1921) 64 I.C. 462 (Suit by a joint tenant against another for possession of his share in joint property, held governed by Art. 142).

22. (1889) 16 Cal. 473=16 I.A. 23 (P.C.).

23. (1890) 17 Cal. 137=16 I.A. 148 (P.C.).

24. *Kanhaiya Lal v. Girwar*, 1929 All. 753=51 All. 402=119 I.C. 6.

25. *Moro v. Ramchandra*, (1882) 6 Bom. 508 (510).

26. *Faki Abdulla v. Babaji*, (1890) 14 Bom. 458.

27. *Faki Abdulla v. Babaji Gungaji*, (1890) 14 Bom. 458.

28. *Kashinath Sitaram v. Shridhar Mahadev*, (1891) 16 Bom. 343.

29. (1902) 27 Bom. 43 (66, 67).

30. (1882) 5 All. 1 (P.C.) (Footnote 40, ante).

31. (1888) 16 Cal. 473=16 I.A. 23 (P.C.) (Footnote 44, ante).

must show such adverse possession to have commenced and continued from twelve years prior to suit. Accordingly where there had been no allegation of possession lost by dispossession or discontinuance, but the case put forward had been a title of plaintiffs established by a decree, and a wrongful possession by defendant, the limitation applicable to the suit was not that provided by Art. 142, but by Art. 144 of the Limitation Act.³² Heaton, J, explained, in *Vasudev v. Eknath*,³³ that

"Article 142 has no application to claims which neither in terms nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession".

It was explained that

"as a general principle any one suing in ejectment must prove possession within 12 years, and the authorities seem to bear out that contention: but the reason for this is that

Possessory title.

possession is commonly effective assertion of title which is relied on, and the cases accordingly deal with that particular kind of assertion of title. *But, it is not the only one*; there is another which in some cases is equally good: and that is an assertion of title made in Court, and established by a decree. That is good

Title under a decree.

against those who are party defendants to the suit, and if the same title is re-asserted and made good in a later suit against other opposing parties, it is good against them also, and entitles to possession whether the title-claimant has or has not been in possession within 12 years; unless the opponent can defeat the title by adverse possession".³⁴

In *Subappa v. Venkappa*,³⁵ it was held that where the plaintiff alleges possession of land, and it is proved that part of the land is *de facto* in possession of the defendant the case falls under Art. 142, and not Art. 144. Every suit for possession of immoveable property, in which the plaintiff alleges that he has had possession, must fall under Art. 142. It is only where the plaintiff does not allege that he has ever been in possession that the case will fall under Art. 144. In a suit for ejectment, it is for the plaintiff to prove possession prior to the dispossession which he alleges. If it is proved that he has title, and he obtained possession under that title, the case is governed by Art. 144, Limitation Act.³⁶

2120. A Full Bench of the Calcutta High Court held in *Mahomed Ali Khan v. Khaja Abdul Gunny*,³⁷ that where the suit is for possession, and the cause of action is dispossession or discontinuance, the

32. *Vasudev Atmaram v. Eknath Balkrishna*, (1910) 35 Bom. 79.

33. (1910) 35 Bom. 79 (92).

34. *Ibid.*, (1910) 35 Bom. 79 (92, 93).

35. (1914) 39 Bom. 335=28 I.C. 24.

36. *Mahomed Saheb v. Tilok Chand*, (1922) 66 I.C. 764=46 Bom. 920=1922 Bom. 643=24 Bom.L.R. 373.

37. (1883) 9 Cal. 744 (F.B.).

plaintiff is bound to prove this event from which limitation is declared to run, having occurred within 12 years of the suit. Where the plaintiff makes no allegation of ever having been in possession of the property in suit or having been dispossessed, the suit must be governed by Art. 144, Limitation Act,³⁸ as Art. 142 applies only to suits for possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued possession.³⁹ Where a *patnidar* is in possession of *Chaukidari Chakran* lands through receipt of services performed by the *chaukidars*, there is discontinuance of possession on resumption of the lands, inasmuch as the services cease to be performed, and a suit to recover possession of the resumed land has to be brought by the *patnidar* within 12 years after the date of resumption, under Art. 142 of the Limitation Act.⁴⁰ Where a plaintiff alleges definite previous acts of possession in respect of a piece of land, and sues for possession on the allegation of subsequent dispossession, Art. 142 applies; and plaintiff has to show that a subsisting title at the date when he came to Court to recover possession of the land.⁴¹ But, where the plaintiff does not claim to have been dispossessed or to have discontinued possession, it is clear that Art. 144, and not Art. 142 must apply.⁴²

2121. The Lahore High Court has applied Art. 142 only in cases where it is clearly proved that the plaintiff has either been dispossessed or that he has discontinued possession:⁴³ *e.g.*, this article has been applied where land which had originally formed part of a village on one side of a river, had been transferred to a village on the other side of the river by a sudden change in the course of the river, and which later returned to its original side owing to the same cause.⁴⁴ Also, where a childless proprietor transferred his rights in certain lands to the defendant, and gave possession, a suit by reversioners for possession was held governed by this article.⁴⁵ But, this view

38. *Gurudas v. Kumar Basanta*, (1909) 3 I.C. 15=14 C.W.N. 317; see *Basanta Kumar v. Secretary of State*, (1917) 44 Cal. 858 (P.C.).

39. *Khiroda Kanta Roy v. Krishna Das*, (1910) 6 I.C. 467 (471)=12 C.L.J. 378; *Gopi Nath v. Bhugwat Pershad*, (1884) 10 Cal. 697.

40. *Mohendra Nath v. Rajani Kanta*, (1918) 46 I.C. 895 (Cal.); also see *Wasif Ali v. Amalendu*, (1926) 96 I.C. 568 (Cal.).

41. *Nalaki v. Abhayacharan*, 1934 Cal. 294=149 I.C. 1109=58 C.L.J. 478.

42. *Gaya Prasad v. Bakyamani Dasi*, 56 Cal. 914=119 I.C. 289=1929 Cal. 297; see *Janaki Nath v. Baikuntha*, (1922) 70 I.C. 602=1922 Cal. 1.

43. *Mahmud v. Udebhan*, 1921 Lah. 202=59 I.C. 891=3 L.L.J. 72; *Ismail v. Ibrahim*, (1925) 89 I.C. 995 (Lah.); *Mt. Janatbibbi v. Mt. Sairan*, (1926) 93 I.C. 1004.

44. *Gulabkhan v. Pira*, 34 P.R. 1889.

45. *Dina v. Dina*, 14 P.R. 1892.

was overruled in *Roda v. Harnam*,⁴⁶ where Art. 144 was applied to such suits. Article 142 does not apply to a suit for possession, in the absence of an allegation by the plaintiff or proof that he was ever dispossessed or that he discontinued possession.⁴⁷ A suit for ejectment in which the question of possession and dispossession is not raised, and does not form the basis of the suit is governed by Art. 144 of the Limitation Act.⁴⁸ Again, where in a suit to recover possession, the plaintiff establishes his title, Art. 144 would apply.⁴⁹ In cases where title was with the plaintiff, the *onus* has been placed on the defendant to establish adverse possession for the requisite period. See *Daulu Mal v. Rawal Baksh*,⁵⁰ *Kallu Mal v. Maman*,¹ where a Bench of the Lahore High Court (Sir Shadilal, C.J., and Broadway, J.), has purported to follow the authority of the Privy Council ruling in *Secretary of State v. Chellikani Rama Rao*²; and also see *Ganpat Rai v. Hardial*,³ (Tek Chand, J.), where Art. 144 has been applied. But, a recent **Full Bench of the Lahore High Court**,⁴ has on an examination of the case-law, differed from the above-mentioned cases, and has followed the Full Bench decision of the **Allahabad High Court** in *Bindhyachal v. Ramgharib*.⁵ The Lahore Full Bench also differs from the Madras case of *Govinda Ramanuja v. Md. Esoof Sahib*.⁶ In a single judge judgment of Agha Haider, J., in *Kaur Sain v. Gulab*,⁷ Art. 142 has been applied where the plaintiff's case was based upon the fact of his possession and subsequent dispossession by the defendant, referring to *Secretary of State v. Chellikani* for a description of the nature of cases which would come in under Art. 144, Limitation Act.

2122. According to the Madras view, Art. 142 has no application to claims which neither in terms nor in substance are claims to possession made necessary by reason of dispossession or discontinuance of posses-

46. 18 P.R. 1895 (F.B.).

47. *Kanshi Ram v. Taja*, (1927) 100 I.C. 477=1927 Lah. 236; also see *Daulu Mul v. Rawal Baksh*, 1930 Lah. 608; *Harnam Singh v. Upendra Chand*, 1934 Lah. 576=151 I.C. 490.

48. *Nawazbai Cooper v. Ghulam Mohiuddin*, (1926) 98 I.C. 878=1927 Lah. 70.

49. *Ismail v. Ibrahim*, (1925) 89 I.C. 995 (Lah.).

50. 1930 Lah. 608; Relied on 16 Cal. 473 (P.C.).

1. 1933 Lah. 721=14 Lah. 302=135 I.C. 680=33 P.L.R. 494.

2. 1916 P.C. 21=35 I.C. 902=43 I.A. 192=39 Mad. 617 (P.C.) (Footnote 50, p. 2090, ante).

3. 1933 Lah. 722=146 I.C. 725=34 P.L.R. 1007.

4. *Behari Lal v. Narain Das*, 1935 Lah. 475=16 Lah. 442=157 I.C. 686=37 P.L.R. 743 (F.B.).

5. 1934 All. 993 (995) (F.B.).

6. 1925 Mad. 834=87 I.C. 386.

7. 1935 Lah. 507=37 P.L.R. 171=157 I.C. 399.

sion.⁸ But Art. 142 applies to a suit in ejectment based on dispossession by the defendant.⁹ Art. 144 was applied to the case of a tenant in common whose possession was not inconsistent with the title of the plaintiff at the outset, and it could not be assumed that the plaintiff had been dispossessed so as to render Art. 142 applicable to the case.¹⁰ However, it is to be noticed that Art. 144 is only a residuary article which will not apply where there is another article applicable to the case.¹¹ In *Mayyi Karan v. Kalandiakath*,¹² the Madras High Court takes the view that there is nothing in Art. 142 to support the contention that it refers to claims on possessory title as opposed to claims on title.¹³ Three Privy Council decisions are opposed to this contention, where Art. 142 of the Limitation Act was applied, though they were all based on title and possession.¹⁴

2123. Article 142 has no application where the plaintiff has never been in possession, and where neither
 Nagpur. the plaintiff nor any rightful holder from whom they derive title was ever dispossessed by any of the defendants or by any of the trespassers who preceded them.¹⁵ Every suit for possession of immoveable property in which the plaintiff alleges that he has had possession must fall under Art. 142, Limitation Act. It is only where the plaintiff does not allege that he has ever been in possession, that the case will fall under Art. 144.¹⁶ Peaceful possession is itself a good title against all the world except a person who can show a better title and such possession is an interest which can be sold and devised.¹⁷ If a person, though not the owner, is, while in the enjoyment of his peaceful possession, ousted, he has

8. *Kuppuswami v. Chokkalinga*, (1925) 91 I.C. 454=1926 Mad. 181=49 M.L.J. 788; *Jeyangar Swami v. Mahomed Esoof*, (1924) 87 I.C. 386.

9. *Ibid.*, 91 I.C. 454=1926 Mad. 181.

10. *Ittappen v. Manavickrama*, (1897) 21 Mad. 153.

11. *Seshamma v. Chickaya*, (1902) 25 Mad. 507; *Rajai Tirumal v. Pandha Muthia*, (1910) 35 Mad. 114 (119).

12. (1927) 99 I.C. 971=1927 Mad. 1094=38 Mad. L. T. 137.

13. *Bindhyachal v. Ram Gharib*, 1934 All. 993 (995) (F.B.) and *Behari Lal v. Narain Das*, 1935 Lah. 475=16 Lah. 442=157 I.C. 686=37 P.L.R. 743 (F.B.).

14. See 16 Cal. 473=16 I.A. 23 (P.C.); 17 Cal. 137=16 I.A. 148=23 P.R. 1890 (P.C.) and 18 I.C. 17=25 M.L.J. 95=15 Bom.L.R. 445 (P.C.).

15. *Ganno v. Benni*, (1918) 43 I.C. 943 (950)=14 N.L.R. 82; also see 68 I.C. 320=1923 Nag. 2.

16. *Singuji v. Gambhirji*, (1925) 87 I.C. 1023=1925 Nag. 370; Relied on *Mohima Chunder v. Mohesh Chunder*, 16 Cal. 473=16 I.A. 23 (P.C.).

17. *Mt. Jijibai v. Zabu*, 1933 Nag. 274=30 N.L.R. 18; Relied on *Sundar v. Parbati*, (1888) 12 All. 51=16 I.A. 186 (P.C.).

a right to claim to be restored to possession. It is to such cases that Art. 142 applies.¹⁸

"Under Art. 142 the question of limitation does not depend on the length of the defendant's possession, but on the question whether plaintiff was dispossessed or discontinued his possession. The article makes no reference to the defendant at all".¹⁹

Where the plaintiff does not claim to have been dispossessed or to have continued possession, Art. 144, and not Art. 142, applies.²⁰

2124. The Oudh Chief Court has held that where the plaintiff alleges his possession over immoveable property and dispossession by the defendant, and where it is found that the possession of the plaintiff was discontinued when defendant entered into possession not as a tenant of the plaintiff, but in his own rights the article of limitation applicable to such a suit is Art. 142, and not Art. 144, Limitation Act.²¹ In cases under Art. 142, the claimant must prove his possession within twelve years next preceding the date of the institution of the suit, and in cases of that nature an enquiry into questions of adverse possession is irrelevant.²² Art. 142 is restricted to suits which are in terms and in substance based on plaintiff's prior possession which he has lost by dispossession or discontinuance of possession.²³ Consequently, where the suit was for possession by partition and the basis of the suit was the title of the daughter to her share in the property left by her deceased father, and where the plaintiff as the vendee from the daughter did not allege that she had been dispossessed from the property in suit at any time and it was also found that she as the rightful heir and successor of her father was entitled to the property to the extent claimed, the suit was held governed by Art. 144, and not by Art. 142 of the Limitation Act.²⁴ Suits based on plaintiff's title in which there is no allegation of prior possession and subsequent dispossession or discontinuance of possession must fall within the residuary Art. 144,

18. *Mt. Jijibai v. Zabur*, 1933 Nag. 274 (276); Relied on *Kanhaya Lal v. Girwar*, 1929 All. 753=119 I.C. 6=51 All. 1042; But cf. *Bindhyachal v. Ram Gharib*, 1934 All. 993 (F.B.); also see and cf. *Beharilal v. Naraindas*, 1935 Lah. 475 (F.B.).

19. *Mt. Jijibai v. Zabur*, 1933 Nag. 274 (276).

20. *Ganpatrao v. Vithabai*, 1934 Nag. 36 (38); Relied on *Gaya Prasad v. Bakyamani Dasi*, 1929 Cal. 297=119 I.C. 289=56 Cal. 914.

21. *Mohammad Azim Khan v. Mohammad Saadatali*, 1931 Oudh 177 (228)=8 O.W.N. 349; Relied on *Gur Sahai v. Chhedi*, 1925 Oudh 42=76 I.C. 964.

22. *Ibid.*, 1931 Oudh 177 (229); Relied on *Secretary of State v. Chelikani*, (1916) P.C. 21=35 I.C. 902=43 I.A. 192=39 Mad. 617 (P.C.).

23. *Mt. Zahida Begum v. Mumtaz Ali Khan*, 1932 Oudh 122=8 O.W.N. 1364=136 I.C. 256; also see 134 I.C. 599=1931 Oudh 382; *Mahomed Mahmud v. Mahomed Afaq*, 1934 Oudh 21=147 I.C. 805=11 O.W.N. 104.

24. *Ibid.*, 1932 Oudh 122=136 I.C. 256.

Limitation Act.²⁵ In a suit for possession, where the claim is based on dispossession, is governed by Art. 142 of the Limitation Act, and the burden is on the plaintiff to establish his possession within limitation.²⁶

2125. A Full Bench of the Patna High Court has held in *Raja Shiva Prasad Singh v. Hira Singh*,²⁷ Patna.

that in a suit for ejectment on the ground of wrongful dispossession the plaintiff must prove possession on the part of himself or those through whom he claims within the period of limitation, and that he does not discharge the burden merely by establishing his title and proving enjoyment at some period beyond twelve years from the commencement of the suit, because he may still have lost by lapse of time his right to recovery. The principle is established that in all cases where a plaintiff sues in ejectment, he must prove a subsisting title and possession within 12 years of the commencement of the suit; and that in the absence of any credible evidence as to possession, the plaintiff must fail and that the presumption arising from title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. Jwala Pershad, J., dissented from the view observing that where the plaintiff has proved his title, the case is not one under Art. 142, but under Art. 144, and the defendant must prove that the plaintiff has lost his title by reason of the defendant's adverse possession. In this view

"if the evidence of possession on both sides is valueless or unreliable, the plaintiff having title in him must oust the defendant who is in possession without any title".²⁸

Article 142 applies to the case of a possession and dispossession, and not to a case where plaintiffs are in joint possession with the defendants, and never ask for recovery of possession, or for separate exclusive possession,²⁹ where the catching of fish is a benefit derived from the ownership of the land upon which water collects, dispossession from the benefit, is dispossession within the meaning of Art. 142, and a suit to obtain possession of such benefit must be brought within 12 years of the dispossession.³⁰ If the plaintiffs are entitled to recover possession without setting aside a mortgage-decree

25. *Mahomed Mahmud v. Mahomed Afaq*, 1934 Oudh 21=147 I.C. 805=11 O.W.N. 104.

26. *Ram Shankar v. Sheo Dutt*, (1935) 153 I.C. 371=1935 O.W.N. 8=1935 Oudh 88.

27. 1921 Pat. 237 (239 and 242)=6 P.L.J. 478=2 P.L.T. 487=62 I.C. 1 (F.B.).

28. *Ibid.*; Per Jwala Pershad, J., 1921 Pat. 237 (258) (F.B.).

29. *Radhakanta Lal v. Bhagwat Prasad*, (1920) 55 I.C. 247=1 P.L.T. 192.

30. *Baker Husain v. Ranjit Koor*, (1917) 39 I.C. 777 (Pat.).

or sale thereunder, the suit would be governed by Art. 142 of the Limitation Act.³¹

2126. The Judicial Commissioner's Court, at Peshawar, has held in *Mulla Ahmad v. Fazal Ahmad*,³² that where the plaintiff alleged a title to the land in suit, but nowhere specifically stated that the plaintiffs had possession, and were dispossessed by the defendants, that the case did not fall under Art. 142 of the Limitation Act. "It was unnecessary for the plaintiffs to show in the plaint that the case was of a nature to which Art. 144 applied. That article is a residuary article and must be applied unless some special article applies.

2127. Similarly, it was held by the Lower Burma Chief Court in *Aung Hla v. Ton Gyi*,³³ that in a suit for possession of immoveable property based on title, in which plaintiff does not allege dispossession, the case falls under Art. 144 and not under Art. 142 of the Limitation Act. In order to avail himself of the period of limitation prescribed by Art. 142, the plaintiff in a suit for possession of immoveable property must prove the dispossession which he alleges, and that he was in possession within 12 years of the suit.³⁴ Where the plaintiff claims the legal title to lands in dispute, and says that the defendants have entered upon these lands and interrupted the possession, to enable a suit for recovery of possession, under Art. 142, Limitation Act, it is incumbent upon the plaintiff to show not only a good title, but also that the date of dispossession is less than 12 years from the date of filing the suit.³⁵ The case was not one to which Art. 144 applied as the defendants were not claiming title to the land by reason of adverse possession only, but they were claiming a title which really ran back to a date before the plaintiff claimed a title through the predecessors in interest.

2128. In suits for ejectment of persons who at the date of suit were admittedly in possession of the land from which it was sought to eject them, the plaintiffs had to establish not only a title as against the defendants to their possession, but to prove that the plaintiffs had been dispossessed or had discontinued possession within 12 years immediately preceding the commencement of the suit.³⁶

31. *Hitendra Singh v. Rameshwar Singh*, 87 I.C. 849 (856)=1925 Pat. 625=4 Pat. 510.

32. 1935 Pesh. 133=158 I.C. 968.

33. (1916) 35 I.C. 432=1 Rang. 405.

34. *Muthiah Chetty v. Seena V. Thevar*, (1920) 56 I.C. 951=12 Bur. L. T. 234.

35. *Ma Hme Ni v. Ma Hmwe Yan U*, 1933 Rang. 48=144 I.C. 274.

36. *Khana Chuhar v. Panjal Shah Mir*, 1933 Sind 279=27 S.L.R. 341=146 I.C. 777.

TITLE II: DIFFERENCE BETWEEN ART. 142 AND ART. 144.

2129-2142. DIFFERENCE BETWEEN ART. 142 AND ART. 144.

2129. (1) Article 142. is one of the specific provisions for suits for possession of immoveable property, and
 (i) Specific or general provision. contemplates a suit for possession when the plaintiff while in possession has been dispossessed or has discontinued possession.³⁷ See Ss. 2117-2128, as to the scope and application of Art. 142 of the Limitation Act. Article 144 of the Limitation Act is a residuary article, which can be applied only to a suit not otherwise specially provided for,³⁸ and should only be resorted to when there is no other specific provision in the other articles of the Act.³⁹ It would be erroneous to read Art. 142 as subordinate or subject to Art. 144 of the Limitation Act.⁴⁰ Article 144 is not to be taken into consideration if the case is one covered by Art. 142,⁴¹ though it will have application when the other article has no application.⁴² If on the allegations made in the plaint the suit falls within Art. 142, there is no justification for taking it out of that article, and for applying Art. 144.⁴³

2130. (2) The **Bombay High Court** has held in *Faki Abdullah v. Babaji*,⁴⁴ that in cases following under
 (ii) Possessory, or proprietary title. Art. 142, the plaintiff cannot rest merely on proof of title, but must, at the outset, show possession within 12 years. Where the suit is based simply on the ground that the plaintiff is the owner, and the defendant is a trespasser having no right to remain in possession, Art. 142 can have no application and the residuary Art. 144, is the article which will govern the suit. In *Vasudev v. Eknath*,⁴⁵ it was held that Art. 142 has no application to claims which neither in terms nor in substance are claims to possession made necessary by reason of dispossession or discontinuance of possession. Where the

37. *Abbas Dhali v. Masabdi Karikar*, (1914) 24 I.C. 216 (Cal.).

38. *Rajai Tirumal v. Pandla Muthial*, (1910) 35 Mad. 114 (119).

39. *Hassan Ammal v. Ismail Moideen*, (1915) 29 I.C. 976 (980)=28 M.L.J. 642.

40. *Seshamma v. Chickaya*, (1902) 25 Mad. 507 (510); Reld. on *Runchoddas v. Parvathibai*, 23 Bom. 725=26 I.A. 71 (P.C.).

41. *Sesha Naidu v. Periasami*, (1921) 44 Mad. 951 (955)=41 M.L.J. 163.

42. *Mt. Jagrani Misrani v. Sheo Dulari*, (1921) 64 I.C. 462 (All.).

43. Per Mukerji, J., in *Bindhyachal v. Ram Gharib*, 1934 All. 993 (1000) (F.B.).

44. (1890) 14 Bom. 458.

45. (1910) 35 Bom. 79 (92); also see *Tarubai v. Venkatrao*, (1902) 27 Bom. 43 (66, 67) and *Jhangar Swami v. Mahomed Esoof*, (1924) 87 I.C. 386 (Mad.) and *Kuppuswami v. Chokkalinga*, (1925) 91 I.C. 454=1926 Mad. 181=49 M.L.J. 788.

plaintiff alleges possession of land, and it is found that part of the land is *de facto* in possession of defendant, the case falls under Art. 142, and not Art. 144 of the Limitation Act.⁴⁶ It is only where the plaintiff does not allege possession, and relies merely on title that the case would fall under Art. 144.⁴⁷ It was considered at one time that Art. 142 applies to suits based on possessory title, and not to suits based on proprietary title.⁴⁸ Peaceful possession is itself a good title against all the world except a person who can show a better title, and such possession is an interest which can be sold and devised: and a person in the enjoyment of his peaceful possession has a right to claim to be restored to possession.⁴⁹ But, it has been held recently, by a Full Bench of the **Allahabad**,⁵⁰ and **Lahore High Courts**,¹ that there is nothing in the language of Art. 142, to support the contention that it refers to claims on possessory title as opposed to claims on proprietary title, in which plaintiff alleges previous possession and dispossession or discontinuance of possession: and the **Madras High Court** has taken a similar view in *Mayyi Karan v. Kalandi Kath*.² Mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in suits under S. 9 of the Specific Relief Act. To sustain an action in ejectment, it is not sufficient to prove possession, but the plaintiff must show title.³ Article 142 has been applied in certain Privy Council cases, to suits based on title alleging possession and dispossession, or discontinuance of possession, and this supports the view taken above.⁴

2131. In all cases in which the applicability of Art. 142 or Art. 144 is in controversy, it is necessary to
Pleadings. scrutinize the pleadings of the plaintiff and to ascertain exactly the allegations on which the plaintiff has come

46. *Subappa v. Venkappa*, (1914) 39 Bom. 335.

47. *Ibid*.

48. *Sundar v. Parbati*, (1889) 12 All. 51 (P.C.); *Jai Chand v. Girwar Singh*, (1919) 41 All. 669; *Kanhaiya Lal v. Girwar*, (1929) 51 All. 1042; *Kallan v. Mohammad Nabi Khan*, (1933) 55 All. 209; *Tarubai v. Venkatrao*, (1902) 27 Bom. 43; *Vasudev v. Eknath*, (1910) 35 Bom. 79; *Khiroda v. Krishnadas*, (1910) 6 I.C. 467 (471); *Ismail v. Ibrahim*, (1925) 89 I.C. 995 (Lah.); *Daulumal v. Rawal Baksh*, 1930 Lah. 608; *Kallumal v. Mamman*, 14 Lah. 302; *Ganpatrao v. Hardial*, 1933 Lah. 722; *Govinda Ramanuja v. Mahomed Esoof*, (1925) 87 I.C. 386=1925 Mad. 834.

49. *Mt. Jijibai v. Zabu*, 1933 Nag. 274=30 N.L.R. 18; *Sundar v. Parbati*, (1888) 12 All. 51 (P.C.); *Kanhaiyala! v. Girwar*, (1929) 51 All. 1042=1929 All. 753=119 I.C. 6 (7).

50. *Bindhyachal v. Ram Gharib*, 1934 All. 993 (F.B.).

1. *Behari Lal v. Narain Das*, 1935 Lah. 475=16 Lah. 442=157 I.C. 686 (F.B.).

2. (1927) 99 I.C. 971=1927 Mad. 1094=38 M.L.T. 137.

3. *Ram Chandra v. Raman Mani Dasi*, (1916) 36 I.C. 890 (Cal.).

4. 16 Cal. 473 (478) (P.C.); 17 Cal. 137=23 P.R. 1890 (P.C.) and 18 I.C. 17=17 C.W.N. 389 (P.C.) [F.n. (44), (46), p. 2089 and F.n. (48), p. 2090, ante].

into Court, and the reliefs sought by him. Sometimes the pleas raised in defence of the defendant are also relevant to the enquiry.⁵

Allegations of pre-vious possession and dispossession. As the Nagpur Judicial Commissioner's Court has held, every suit for possession of immoveable property in which the plaintiff alleges that he has had possession must fall under Art. 142 of the Limitation Act. It is only where the plaintiff does not allege that he has ever been in possession, that the case will fall under Art. 144. Where the plaintiff while in possession has been dispossessed and is out of possession, the *onus* is upon him to prove that he was in possession and was dispossessed within 12 years of the suit.⁶ Where the plaintiff alleging definite previous acts of possession regarding a piece of land sues for possession, the proof of his possession may be such as the land is capable of by exercising acts of ownership on it which need not be continuous or frequent, when it appears that the land was not capable of actual and continuous physical possession having regard to the purpose for which the land is used.⁷ In a suit governed by Art. 142, the question to be decided is whether the plaintiff, directly or constructively, has been in possession within 12 years of the suit, and it does not matter if within the period continuous exclusive possession adverse to him has been with one or a hundred successive trespassers. But, in a case governed by Art. 144, the question is whether the defendant against whom the suit is brought has held adversely personally or by persons who represented him, or whom he represents for more than 12 years continuously.⁸

No question of adverse possession under Art. 142.

2132. In *Gobind Lall Seal v. Deben-dro Nath Mullick*,⁹ it was pointed out by the Calcutta High Court, that the meaning of Art. 142 is,

"that where there has been possession followed by a discontinuance of possession, time runs from the moment of its discontinuance, whether there has or has not been any adverse possession, and without regard to the intention with which, or the circumstances under which possession was discontinued."

In a suit for possession the plaintiff must prove not only that he is entitled to the property but also that he has not been out of possession during the whole of the 12 years preceding the suit. The

5. *Kaur Sen v. Gulab*, 1935 Lah. 507.

6. *Singu Ji v. Gambhirji*, (1925) 87 I.C. 1023 (Nag.); *Ganno v. Beni*, 43 I.C. 943=14 N.L.R. 82 (94, 95).

7. *Nalaki v. Abhayacharan Sil*, (1934) 149 I.C. 1109 (2)=1934 Cal. 294=58 C.L.J. 478; also see *Rakha! Chandra Ghose v. Durgadas Samanta*, 1922 Cal. 557=26 C.W.N. 724 (Possession is not necessarily the same thing as actual user. The nature of the possession to be looked for, and the evidence of the continuance must depend upon the character and condition of the land in dispute).

8. *Ganno v. Banny*, (1918) 43 I.C. 943 (950)=14 N.L.R. 82.

9. (1880) 5 Cal. 679.

facts that the defendants are not able to establish affirmatively that they have been continuously in possession for the said period of 12 years under Art. 144, does not necessarily entitle the plaintiff to succeed unless the requirements of Art. 142 are also satisfied.¹⁰ In Art. 142, the legislature intended to adopt the policy of the English Acts, 3 and 4, Will IV, C. 27, S. 3, from which the language is taken: and,

"it seems clear that the framers of the Act were minded to get rid of the distinction between adverse and non-adverse possession wherever it could be done, wherever any other test could be found. Accordingly, it is only in the last Art. 144, in cases not otherwise provided for, that the idea of adverse possession is allowed to come in".¹¹

Under Art. 142 of the Limitation Act, adverse possession is not required to be proved in order to maintain a defence.¹² Where a plaintiff sues for possession on the ground that he is the owner of the property and that the defendant is a tenant under him, if he is able to prove his title, but not the tenancy, it is necessary for him to prove possession within 12 years of the suit and the *onus* is not on the defendant to prove adverse possession.¹³ In a suit under Art. 142, the burden is on the plaintiff to show possession within 12 years, and it is irrelevant to enter into question of adverse possession.¹⁴ Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than 12 years the question of limitation becomes a question of title,¹⁵ and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of his possession within 12 years of the suit.¹⁶ The reason is that in cases falling under Art. 142, where the plaintiff has been in possession and has been dispossessed, he practically admits adverse possession at least to have commenced; and he must therefore show possession and dispossession within 12 years or

"dating from a time too recent to allow of its ripening into a statutory title".¹⁷

10. *Kaliaperumal v. Chidambaram*, (1915) 29 I.C. 10 (Mad.).

11. 5 Cal. 679 (682).

12. *Muhammad Amanullah v. Badan Singh*, (1889) 17 Cal. 137=23 P.R. 1890 P.C.; also see *Uday Mandal v. Ram Durlabh*, (1921) 62 I.C. 707 (The defendant need not prove adverse possession for twelve years).

13. *Ghulam Mohammad v. Fateh Khan*, (1929) 115 I.C. 534=1928 Lah. 896; also see *Hasan Mahomed v. Ahmed Baksh*, 1933 Lah. 893.

14. *Mahabir Singh v. Chitta Singh*, (1930) 121 I.C. 84=1930 Oudh 46; also see *Mohammad Azim Khan v. Mohammad Saadat Ali*, 1931 Oudh 177=8 O.W.N. 349; *Gur Sahai v. Chhedi*, (1924) 79 I.C. 964=1925 Oudh 42=27 O.C. 130=11 O.L.J. 251 and *Sheru v. Sham Singh*, 1933 Lah. 627=143 I.C. 428.

15. *Jafar Husain v. Mashuq Ali*, (1892) 14 All. 193; Reld. on *Parmanand Misr v. Saluf Ali*, 11 All. 438.

16. *Ibid.*

17. *Tarubai v. Venkatrao*, (1902) 27 Bom. 43; also see *Raja Sahib Perhlad Sen v. Maharaja Rajendra Kishore*, (1869) 12 M.I.A. 292 (337);

In cases coming under Art. 142, although the plaintiff's title is proved, the *onus* is not upon the defendant to show that the plaintiff lost his title by adverse possession on the part of the defendant.¹⁸

2133. But, where there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance, then the party relying on adverse possession to displace a proved or admitted title must show such adverse possession to have commenced and continued from twelve years prior to suit.¹⁹ The defendant in such cases has got to show

"not only that his possession has lasted for twelve years, but that it has all the time been in open conflict with the title on which the plaintiff relies".²⁰

"If there has been no ouster, or 'open and notorious act of taking possession,' then the person relying on his possession to defeat title must show that it was of such a nature, and involved the exercise of rights so irreconcilable with those claimed by the plaintiff, as to give the plaintiff occasion to dispute that possession throughout the twelve years next preceding the suit. The mere existence of a claim without possession, actual or constructive will not suffice as a bar to a title proved or admitted."²¹

Question of adverse possession is thus material only in cases governed by Art. 144 of the Limitation Act. It is immaterial how long the defendant is in possession so far as Art. 142 goes. Under this article there is no reference to the defendant at all. The sole question is whether the *plaintiff* has been dispossessed or has discontinued possession within twelve years of the suit. But, Art. 144 is worded differently; there time begins to run when the possession of the defendant or of some person through whom he claims became adverse to the plaintiff.²² Under Art. 144 of the Limitation Act it is not for the plaintiff to prove that he has been in possession within twelve years before suit, but it is for the defendant to show that he has held adversely to the plaintiff for twelve years.²³ Art. 144 only properly applies to a case in which the defendant is holding adversely to the plaintiff without title.²⁴

Beer Chunder Joobraj v. The Deputy Collector, (1870) 13 W.R. (P.C.) 23; *Mohim Chunder v. Mahesh Chunder*, (1888) 16 I.A. 23=16 Cal. 473 (P.C.).

18. *Rakhal Chandra v. Durga Das*, (1922) 67 I.C. 673=1922 Cal. 557=26 C.W.N. 724.

19. *Tarubai v. Venkatrao*, (1902) 27 Bom. 43 (66).

20. *Ibid.*

21. *Ibid.*, 27 Bom. 43 (67); *Reld. on Secretary of State v. Krishnamoni Gupta*, (1902) 29 I.A. 104 (P.C.).

22. *Dewan Manwar Ali v. Annodapersad Rai*, (1879) 5 Cal. 644 (653)=7 I.A. 1 (P.C.); *Karan Singh v. Bakar Ali Khan*, (1882) 5 All. 1 (P.C.).

23. *Jai Chand Bahadur v. Girwar Singh*, (1919) 41 All. 669=52 I.C. 366; *Daulu Mal v. Rawal Baksh*, 1930 Lah. 608=122 I.C. 81=31 P.L.R. 231; *Muthiah Chetty v. Thevar*, (1920) 56 I.C. 951.

24. *Muhammad Yusuf v. Mohammad Wahced*, 1936 Pat. 147.

2134. ONUS PROBANDI.—The essential difference between Art. 142 and Art. 144

“is that when a plaintiff is suing for possession on the basis of dispossession, the burden lies on him to show that the date of his dispossession or discontinuance of possession, which gave him the cause of action for the suit, was within 12 years of the suit; while if the suit is not for possession based on the ground of dispossession, but is a suit for possession of immovable property not especially provided for in any other article of the Act, then on proof of title, the plaintiff's suit cannot be dismissed until the defendant further establishes his adverse possession for more than 12 years”.²⁵

In cases falling under Art. 142 of the Limitation Act, the plaintiff must at the outset, show possession within twelve years, and cannot rest merely on proof of title, while in cases falling under Art. 144, the plaintiff may rest content with proof of title only in the first instance, and the burden lies on the defendants to show that they had a possession inconsistent with the title of the plaintiff for more than twelve years before suit.²⁶ Where the plaintiff fails to show that he was in possession of the property within twelve years from the date of filing the plaint, the suit must be held to be time-barred.²⁷

2135. We have noticed already that in cases arising under Act XIV of 1859, S. 1, cl. 12, it was a settled rule that the plaintiff must show that he or some one through whom he claimed had had possession within twelve years before the suit for recovery of immovable property on the ground of having been wrongfully dispossessed from it.²⁸ It was not sufficient for him to allege or prove his title to the property which was the subject of the suit, and leave it to the defendant to prove plaintiff's loss of title by twelve years' adverse possession.²⁹ This was also the rule in suits for ejectment governed by the Regulation.³⁰ Under the Act XIV of 1859, the plaintiff had to establish that the cause of action (the alleged dispossession)

25. *Bindhyachal v. Ram Gharib*, 1934 All. 993 (997) (F.B.).

26. *Faki Abdulla v. Babaji Gungaji*, (1890) 14 Bom. 458; *Muthiah Chetty v. Thevar*, (1920) 56 I.C. 951 (L.B.); *U Maung Gyi v. Maung on Bwin*, (1929) 117 I.C. 591=1929 Rang. 153=7 Rang. 85 (Ordinarily, in a suit under Art. 142, the burden of proof would lie on the plaintiff and in a suit under Art. 144, it would lie on the defendant); also see *Maung Sin v. Maung So Min*, 1931 Rang. 40=8 Rang 556=129 I.C. 511.

27. *Abdul Rahim v. Mohammad Nazir*, (1931) 134 I.C. 475=8 O.W. N. 797.

28. *Gossain Doss v. Servo Kumari*, 19 W.R. 192.

29. *Ibid.*

30. *Maharaja Koonwar v. Nundolall*, 1 W.R.P.C. 51=8 M.I.A. 199 (P.C.); *Raja Sahib Perhlad Sen v. Budhu Singh*, 12 W.R. 6 (P.C.); *Beer Chunder v. Deputy Collector*, 13 W.R. 23 (P.C.).

accrued within the period of limitation made applicable to the suit, under S. 1, cl. 12 of that Act.³¹ He had no cause of action unless he was ousted or ejected, and dispossessed by another person taking possession of the same.³²

2136. Under the Acts of 1871, 1877 and 1908, the ordinary rule applicable to suits for recovery of possession is that the onus rests on the plaintiff to prove such allegation. This rule rests on the authority of the rulings of their Lordships of the Privy Council, which have been followed by all the High Courts in India.

2137. **PRIVY COUNCIL RULINGS.**—In *Mohima Chunder v. Mohesh Chunder*,³³ where the claimants had shown that they were formerly proprietors of the land to which they alleged title, and from which they had been dispossessed, or their possession had discontinued some years before the suit for possession was brought by them, and the land was occupied by the defendants who denied their title; it was held that the burden of proof was on the claimants to prove their possession at some time within the twelve years next preceding the suit. In *Mahomed Amanullah v. Badan Singh*,³⁴ where the suit was for recovery of possession of lands which the plaintiff claimed as belonging to them by virtue of a proprietary right, but which the defendants, certain villagers, held from the Collector under an engagement to pay the land revenue, which had been refused by the plaintiff's ancestors, their Lordships held that the only question under Art. 142 was whether there had been a dispossession or a discontinuance, which there clearly was, and it was not material to consider whether any proprietary right may have existed. Art. 144, as to adverse possession was excluded as Art. 142 applied to the suit on the allegations in the plaint as interpreted by their Lordships. In *Raj Kumar Roy v. Gobind Chunder Roy*,³⁵ the defendants were found in possession for ten years prior to suit; and the plaintiff's title and possession had been previously affirmed in certain revenue survey proceedings, and the plaintiff's evidence as to possession of land reclaimed from a bhil within the confines of the adjoining mahals belonging to the parties was held to be "in accordance with and aided by his title and previous possession", and the onus was discharged.

31. *Pandurang Govind v. Balkrishna*, (1869) 6 Bom.H.C.R. (A.C.J.) 125.

32. *Ibid.*

33. (1888) 16 Cal. 473 (P.C.).

34. (1889) 16 I.A. 148=17 Cal. 137=23 P.R. 1890 (P.C.).

35. 19 Cal. 660 (P.C.).

In *Uditnarayan Singh v. Golabchund*,³⁶ the plaintiffs had alleged to have acquired title to certain lands by adverse possession, and they claimed to have been dispossessed within twelve years of the suit to recover possession. Their Lordships held that plaintiffs had to sustain their case that they were in possession and not merely claimed so to be. Similarly, in *Secretary of State v. Krishnamoni Gupta*,³⁷ where the Government claimed certain lands by virtue of a title by adverse possession for twelve years, the *onus* was placed on them to prove it; and this *onus* was held not discharged as the adverse title was not completed before the land became submerged, during which period the true owner's possession was held constructively revived in them, breaking the continuity of the Government's adverse possession before submergence and possession of the lands after its reformation. The principle laid down by their Lordships in *Mohim Chunder v. Mohesh Chunder*,³⁸ was followed in the case of *Rani Hemanta Kumari v. Maharajah Jagadindranath*,³⁹ which was a suit for ejectment, based on the allegations that the plaintiff was in previous possession but was dispossessed by the defendant eleven years before suit; while the defendant rested his case on possession of over twelve years before suit. Their Lordships placed the *onus probandi* on the plaintiff, observing however that

"the initial fact of the appellant's title comes to her aid, with greater or less force according to the circumstances established in evidence".

Again, in *Dharini Kanta v. Garban Ali*,⁴⁰ where the plaintiffs admitted that the defendants were in possession as trespassers, and they alleged their title to possession, which the defendants denied, on the plea that the disputed lands were included in a grant to them and they were entitled to hold the same as permanent tenants at fixed rates, their Lordships held that

"it lay upon the plaintiffs to prove not only a title as against the defendants to the possession, but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within twelve years immediately preceding the commencement of the suit".

Their Lordships' decision in the leading case of *Secretary of State for India v. Chelikani Rama Rao*,⁴¹ has not been uniformly interpreted by the various High Courts. This is a case which was taken

36. (1899) 27 Cal. 221=26 I.A. 236 (239) (P.C.).

37. (1902) 29 Cal. 518=29 I.A. 104 (P.C.).

38. 16 Cal. 473 (P.C.), *supra*.

39. (1906) 16 M.L.J. 272 (P.C.).

40. 23 M.L.J. 95 (P.C.) (The pleadings in this case are not quite clear: but the case was treated as an ordinary ejectment suit falling under Art. 142 of the Limitation Act).

41. (1916) 43 I.A. 192=39 Mad. 617=31 M.L.J. 324 (P.C.).

to fall under Art. 144 of the Limitation Act, and the claimants to proprietary or adverse title in certain islands formed in the bed of the sea near the mouth or delta of the river Godavari were held to have failed in establishing their adverse title of over sixty years prior to the date of Government Notification reserving the areas as forests under the Madras Act (V of 1922). In this view this ruling merely confirms the proposition laid down in two earlier cases of *Karan Singh v. Bakar Ali*⁴² and *Udit Narayan v. Golab Chand*⁴³; but the statement of the legal position is emphatic and clear, and it lays down a fresh principle as regards the *onus* of proof not shifting in any case by proof of long possession short of the statutory period. As noticed in S. 2117, *ante*, their Lordships laid down the rule by observing that

"nothing is better settled than that the *onus* of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this observation. If it were not correct it would be open to the possessor for a year or a day to say: 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions'.....It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession".

Their Lordships referred to *Radha Gobind Rai v. Inglis*,⁴⁴ as analogous in principle; that in an ordinary suit for a declaration of title the *onus* of establishing possession for the requisite period would rest upon the plaintiff; and in their Lordships' opinion the claimants under afforestation proceedings held the same position. Where the plaintiffs have shown their title and possession, actual or constructive, within twelve years of the suit, this is sufficient for the purposes of Art. 142 of the Limitation Act. In *Basanta Kumar v. Secretary of State*,⁴⁵ their Lordships have followed and applied their earlier decision in *Secretary of State v. Krishnamoni Gupta*,⁴⁶ that title is not lost in lands under submergence. In cases falling under Art. 144, where the *onus* of establishing adverse possession having all the qualities of adequacy, continuity and exclusiveness rests on the defendant, the case is entirely different.⁴⁷ Where a plaintiff seemingly admits that the defendants have been in possession of properties for over twelve years, but pleads that the suit is brought within twelve years from the date of the death of the previous head of a religious institution, and in this way seeks to

42. (1882) 9 I.A. 99=5 All. 1 (P.C.).

43. (1899) 26 I.A. 236=27 Cal. 221 (P.C.).

44. 7 C.L.R. 364 (P.C.).

45. (1917) 44 I.A. 104=44 Cal. 858=32 M.L.J. 505 (P.C.).

46. (1902) 29 I.A. 104=29 Cal. 518 (P.C.).

47. *Kuthali Moothavar v. Peringati*, (1921) 48 I.A. 395=44 Mad. 883=41 M.L.J. 650 (P.C.).

apply Art. 142 of the Limitation Act, the Court may apply Art. 144, on the true state of things disclosed on the pleadings.⁴⁸ The observation by their Lordships that

"in such circumstances it may well be that it is the obligation of the plaintiff by the law of India as it is by law of England to satisfy the Court that his action is not barred by lapse of time,"

would seem to be directed to the pleadings of the plaintiff on the face of the plaint. Similarly, in *Kamakhya v. Ram Raksha*,⁴⁹ where the plaintiffs admitted that the defendants were in possession for over twelve years, but alleged that the plaintiffs were the landlords and defendants were their tenants, and that this relationship continued to within twelve years of the suit, their Lordships held, that the suit was barred by time, as the Privy Council found on the facts that the alleged relationship of landlord or tenant did not arise. Likewise, in *Raja of Bobbili v. Ayyagiri Sodemma*,⁵⁰ where the plaintiff sued to recover possession of certain lands of which the original title rested in the plaintiff, but which was alleged to have been handed over to defendant under certain arrangements for liquidating debts, which the defendant denied as applicable to the lands in suit, their Lordships in spite of finding against the plea of the defendant that the plaintiff's husband being out of possession of the lands the same had been resumed by the defendants, held that the plaintiff had failed to prove that her husband was in possession and dispossessed or discontinued possession within twelve years of the suit. This case is therefore authority for the proposition that the onus lies on the plaintiff, under Art. 142 of the Limitation Act, even where the plaintiff tries to get over Art. 142, by alleging a false case of permissive possession and that plaintiff must prove a subsisting title as against a defendant in possession, and cannot shift the *onus* on to defendant merely by proving his own title at some anterior time. However, in *Satish Chandra Joardar v. Kumar Birendra Nath Roy Bahadur*,¹ where plaintiffs originally in possession as owners, and found to be so until the date of submergence of the lands in suit, were held to be in constructive possession of the lands within the twelve years preceding the suit, the suit was held to be within time in spite of the plaintiff's admission that they were dispossessed by the defendants, there being no proof of plaintiff's dispossession beyond twelve years before suit. In *Nageshar Bux Roy v. Bengal Coal Co., Ltd.*,² their

48. *Lalchand Marwari v. Mahant Ramrup Gir*, (1925) 53 I.A. 24=5 Pat. 312=1921 P.C. 9 (P.C.); Relied on *Raja Sahib Perhlad v. Maharaja Rajendra Kishore*, (1869) 12 M.I.A. 334; *Mahomed Ibrahim v. Morrison*, (1878) 5 Cal. 37.

49. (1928) 55 I.A. 212=7 Pat. 649=55 M.L.J. 882 (P.C.).

50. (1928) 55 M.L.J. 302 (P.C.).

1. (1929) 56 I.A. 305=57 Cal. 623=57 M.L.J. 602 (P.C.).

2. 1931 P.C. 186=130 I.C. 315=10 Pat. 407=58 I.A. 29=60 M.L.J. 183 (P.C.).

Lordships observed that the Courts below had treated the case as raising an issue of adverse possession under Art. 144 rather than of dispossession under Art. 142, but

"in the result the distinction is here probably not material as adverse possession by the defendant may and in the present case does imply dispossession of the plaintiff".

Consequently their Lordships without treating the question of *onus* to be of any practical importance observed

"that the question was whether the defendant company have established dispossession of the plaintiff for a period of twelve years preceding suit".....
 "They will have established this if they can show that they have for such period been in possession to the exclusion of or adverse to the plaintiff".

2138. HIGH COURT DECISIONS.—The result of an ex-

General Principle.

amination of the case-law based on Privy Council decisions may now be briefly noticed. It is a **general principle** that anyone suing in ejectment must prove possession within 12 years.³ Where a plaintiff has been in possession, and has been dispossessed, he must show possession and dispossession within twelve years,⁴ but where there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession, then the party relying on adverse possession to displace a proved or admitted title must show such adverse possession to have commenced and continued from twelve years prior to suit.⁵ A suit for recovery of possession on a declaration of title is barred by Art. 142 of the Limitation Act, if the plaintiff fails to prove that he ever exercised possession within 12 years before the suit, and there is nothing to show that the land was not capable of ordinary occupation or cultivation.⁶ In a suit for possession of land under cultivation plaintiff, in order to succeed, must prove his possession and dispossession within 12 years,⁷ and

3. *Vasudeo Atmaram v. Eknath*, (1910) 35 Bom. 79 (92); *Muthiah Chetty v. Thevar*, (1920) 56 I.C. 951; *Lakhan Chandra v. Gopal Sheikh*, (1926) 98 I.C. 912=31 C.W.N. 60; *Gopal Chandra v. Nilmoney Mitter*, (1884) 10 Cal. 374; *Sevugan Chetty v. Kannappa Chetty*, 139 I.C. 845 (2)=1931 M.W.N. 299=33 L.W. 457=60 M.L.J. 430=1931 Mad. 282.

4. *Madalli Venkatarayadu v. Morva Sankarayya*, (1910) 20 M.L.J. 306=6 I.C. 667; also see *Faki Abdulla v. Babaji Gangaji*, (1890) 14 Bom. 458; *Gopal Chunder Chuckerbutty v. Nilmony Mitter*, 10 Cal. 374 and *Ghura Rai v. Harihar*, (1925) 97 I.C. 267 (Pat.); *Champalal v. Mangal Chand*, (1917) 40 I.C. 420 (All.); *Raghuraj v. Ballabhdas*, (1922) 69 I.C. 883 (Nag.).

5. *Fakir Abdulla v. Babaji Gangaji*, (1890) 14 Bom. 458; *Tarubai v. Venkatrao*, (1902) 27 Bom. 43 (66, 67).

6. *Uday Mandal v. Ram Durlabh*, (1921) 62 I.C. 707 (Cal.); *Ram Ratan Mandal v. Nilmoni*, (1922) 66 I.C. 914=1923 Cal. 286; also see *Khedon Lal v. Rajendra*, (1919) 51 I.C. 70=29 C.L.J. 259; and *Satish Chandra v. Brojogopal Datta*, (1918) 46 I.C. 104=22 C.W.N. 807.

7. *Rahmatullah v. Mazab*, (1926) 94 I.C. 417 (Lah.).

to do so it is sufficient to prove possession of the plaintiff within 12 years, and the possession of the defendant on the date of suit. It is not necessary that the plaintiff should prove the exact date on which, or the circumstances under which, he was dispossessed.⁸ Where plaintiff alleges that he, or any one on whose behalf he claims has been dispossessed by defendant, the burden of proof is on the plaintiff to establish that his possession, or the possession of the person on whose behalf he claims continued within 12 years before suit.⁹ **The plaintiff must prove a subsisting title at date of suit**, not merely that he is entitled to possession, *i.e.*, that he had lost or given up possession within 12 years. It is not enough for him to show that he once had property; but he may show that he once owned the property, and that at the time he was unlawfully dispossessed he was still the owner of that property.¹⁰ Where the plaintiff while in possession has been dispossessed and is out of possession the *onus* is upon him to prove that he was in possession and was dispossessed within twelve years of the suit.¹¹ In a suit for recovery of possession it is not for the defendant to prove that the dispossession of the plaintiffs took place further back than 12 years from the beginning of the suit, but it is for the plaintiffs to prove dispossession within that period.¹² Where plaintiff alleges dispossession he must prove it, although defendant may be entered in the revenue papers as tenants-at-will of the plaintiff.¹³ **The proper issue** in a suit for possession falling under Art. 142 of the Limitation Act is "whether the plaintiff was in possession within twelve years prior to the suit",¹⁴ and the *plaintiff* is bound to show that the dispossession or discontinuance of possession which gave rise to the starting point of limitation was within twelve years of the date of suit.¹⁵ But, where in a suit for possession

8. *Dain v. Khanu*, (1928) 109 I.C. 266=8 Lah. 655=1928 Lah. 98=9 P.L.R. '77; also see *Mahammed v. Tilokchand*, (1922) 46 Bom. 920.

9. *Prakhateri v. Koram*, (1912) 14 I.C. 295 (Mad.); *Maddali Venkatarayadu v. Morva Sankarayya*, (1911) 6 I.C. 667=20 M.L.J. 306; also see *Jaichand v. Girwar Singh*, (1919) 52 I.C. 366=41 All. 669=17 A.L.J. 814 (Burden of proof—Title by adverse possession).

10. *Duni v. Maleri Ram*, (1922) 69 I.C. 171=1922 Lah. 432=4 L.L.J. 382; *Ma Pyan Gyi v. U Shwe Kyun*, 1936 Rang. 124=161 I.C. 833.

11. *Rakhal Chandra v. Durga Das*, (1922) 67 I.C. 673=1922 Cal. 557; *Singnaji v. Gambhirji*, (1925) 87 I.C. 1023 (Nag.); *Ganno v. Beni*, 43 I.C. 943=14 N.L.R. 82 (94, 95); *Bindhyachal v. Ram Gharib*, 1934 All. 993 (F.B.).

12. *Chandra Dip Rai v. Ramanand*, (1928) 110 I.C. 623=1928 Pat. 653; *Daulat Ram v. Ballu*, 108 I.C. 374=1928 Lah. 704; *Appan Charan v. Kyause Ma*, (1917) 41 I.C. 722 (L.B.).

13. *Mian Mohd. v. Sharaf Shah*, (1925) 89 I.C. 687; Followed in *Rabella v. Wazira*, (1928) 109 I.C. 320=1928 Lah. 32=9 L.L.J. 334.

14. *In re Rangachariar*, (1912) 15 I.C. 190 (Mad.).

15. *Subappa v. Venkappa*, (1914) 39 Bom. 336 (338); *Bhikhan v. Mardanali*, (1920) 56 I.C. 40 (Pat.).

on dispossession, the defendants admit plaintiff's possession up to the date of the suit and deny that they ever dispossessed the plaintiff, the latter has nothing left to prove respecting his possession within 12 years and as such it is not incumbent on him to prove dispossession within twelve years.¹⁶

2139. The *onus*, however, which rests upon the plaintiff in ejectment to prove his title and possession within the statutory period, may be discharged or shifted on to the other side if he starts with a presumption in his favour.¹⁷ For instance, a mere allegation in the plaint that the persons sought to be ejected were the tenants of the person through whom the plaintiff claims will not shift the burden of proof; but, the plaintiff may rely on the presumption that the possession of the lawful owner continues, if the land was incapable of actual user within 12 years before suit; and constructive possession of the true owner would be presumed during submergence of the land.¹⁸ As Sulaiman, C.J., observed, in *Bindhyachal v. Ram Gharib*.¹⁹

"The plaintiff.....may discharge his burden by leading direct or circumstantial evidence to show that he was either in actual or in constructive possession sometime before the period during which he was admittedly out of possession and within twelve years of the suit. He may either show that the possession of the defendant was permissive as that of a licensee, lessee or, at any rate, even that of a co-owner, or he may show that he was actually in the enjoyment of the property and exercising other acts of ownership."

2140. On a question of evidence to establish possession, the initial fact of the plaintiff's title comes to his aid with greater or less force according to circumstances. The doctrine that "**possession follows title**", is helpful in cases where there is conflicting evidence on both sides, because the Court may presume that possession was with the party whose title has been established.²⁰ When

16. *Sheoram v. Kisan*, 1935 Nag. 205=18 N.L.J. 261=31 N.L.R. 393=158 I.C. 344.

17. *Golap Moni Dasi v. Kalicharan*, (1912) 16 I.C. 17 (Cal.); also see *Barkat Ali v. Basant*, (1917) 39 I.C. 356 (Cal.); *Mahomed Ali v. Abdul Ganny*, (1883) 9 Cal. 744 (F.B.).

18. *Gopaul Chunder v. Nilmony Mitter*, (1884) 10 Cal. 374; *Golapmon Dasi v. Kalicharan*, (1912) 16 I.C. 17 (Cal.); *Khedon Lal v. Rajendra*, (1919) 51 I.C. 70=29 C.L.J. 259; and *Birendra Nath Roy v. Satish Chandra*, (1926) 97 I.C. 1003=1926 Cal. 1166=44 C.L.J. 121 and *Suresh Chandra v. Shitikanta*, 78 I.C. 679=1924 Cal. 855=51 Cal. 669=28 C.W.N. 637 (See S. 2141, *post.*).

19. 1934 All. 993 (F.B.).

20. *Runjeet Ram v. Goberdhun*, 20 W.R. 25 (29) (P.C.); *Mahomed Saheb v. Tilok Chand*, 1922 Bom. 243=46 Bom. 920; *Kalikananda v. Biprodas*, (1915) 26 I.C. 436=19 C.W.N. 18=21 C.L.J. 265; *Midnapore Zamin-dary v. Panday Sardar*, (1917) 41 I.C. 114 (Pat.); *Bhikad Bhunjan v. Upendranath*, (1919) 51 I.C. 801 (Pat.).

there is evidence of possession on both sides, the Court can rightly accept the plaintiff's evidence which accords with his title.²¹ The presumption that possession must be deemed to follow title arises only when there is no definite proof of possession by either party in the case of land incapable of actual possession owing to its nature.²² Where the plaintiff has to establish possession at a particular point of time, the presumption is not to be made that possession follows title.²³ This presumption can be of no avail where there is clear evidence on behalf of the defendants showing that the plaintiffs were not in possession or exercising any right as owners within twelve years.²⁴ When a man sues for the possession of property which is in the possession of another, he must show that he has a subsisting title to the property. It is not enough for him to show that he once had a title to that property, as there is no presumption always that he continues to be the owner of the land. Where a plaintiff's suit for possession is based upon his dispossession by the defendant, the *onus* is on the plaintiff to prove his possession at some time within 12 years preceding the suit and it is not enough to show merely an anterior title.²⁵ Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than 12 years, S. 28 of the Limitation Act makes limitation a matter of title, and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of his possession within 12 years of suit.²⁶ Where a plaintiff representing an auction-purchaser sues for recovery of possession, it is upon him to prove whether or not the judgment-debtor was in possession at the date of sale, and he does not discharge the burden merely by proof that the judgment-debtor was in possession at some time antecedent to 12 years before suit.²⁷

21. *Dharm Singh v. Hur Pershad Singh*, 12 Cal. 38; *Shiva Prasad v. Hira Singh*, (1921) 62 I. C. 1 (17)=6 P. L. J. 478 (F. B.); also see *Ismail v. Ibrahim*, (1925) 89 I. C. 995 (Lah.) (Presumption in favour of plaintiff from proof of title); *Nandlal v. Lahiri*, (1928) 111 I.C. 533 (Lah.).

22. *Bahadur v. Saghar*, (1926) 94 I.C. 1048 (Lah.); *Ganpati Ambadas v. Raghnunath*, (1909) 33 Bom. 712.

23. *Kalikananda v. Biprodas*, (1915) 26 I.C. 436 (439).

24. *Nandlal v. Lahiri*, (1928) 111 I.C. 533 (Lah.); *Ma Pyan Gyi v. U Shwe Kyun*, 161 I.C. 833=1936 Rang. 124.

25. *Shiva Prasada Singh v. Hira Singh*, (1921) 62 I.C. 1=6 P.L.J. 478 (F.B.); also see *Rawal Baksh v. Dolumal*, (1926) 93 I.C. 1006 (Lah.) and *Sattar Diwan v. Sajed Ali*, (1928) 108 I.C. 732 (Cal.).

26. *Jafar Husain v. Mashug Ali*, (1892) 14 All. 193 (P.C.); *Bishambar Satbhaya v. Nadiar Chand*, (1914) 22 I.C. 64 (Cal.); cf. *Bapuji Narayan v. Bhagwant*, (1918) 45 I.C. 550=42 Bom. 357=20 Bom.L.R. 346 (Plaintiff must prove good title).

27. *Nasir-ud-din v. Sayadur Rahman*, (1914) 23 I.C. 811=19 C.L.J. 209.

2141. It has been observed in a **Full Bench of the Calcutta High Court**,²⁸ that under the Act of 1877, the event from which limitation was declared to run must have occurred within the prescribed 12 years, and the *onus* of proving possession and dispossession was on the plaintiff, under Art. 142 of the Limitation Act. **Possession, however, is not the same thing as actual user**, and when land has been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would and probably did continue till within 12 years before suit, it may properly be presumed that it did so continue, and that the previous possession continued also until the contrary is proved.

Possession distinguished from actual user.

Possession even in contemplation of law is enough where possession in fact is undetermined, possession in law follows the right to possession. **Constructive possession.** In other words, the presumption that possession follows title applies where definite acts of ownership cannot be exercised from the nature of the property in question.²⁹

Of submerged lands. For instance, where land is covered with water, possession is determined by title, and so long as land remains submerged, the possession in law must remain with the proprietor.³⁰ Where in a suit for possession of land which was covered with water more than 12 years before the institution of the suit, the plaintiff proved his exercise of acts of ownership, as by letting out the *julkur* to tenants, this was held to be *prima facie* evidence of possession and ownership, and the defendant had to make out a statutory title by adverse possession.³¹ Similarly, in the case of lands gradually diluviated, and gradually reformed, where the true owner is found in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged; probably also afterwards, until he is dispossessed; and, if the diluviation has been more than twelve years

28. *Mahomed Ali Khan v. Abdul Gunny*, (1883) 9 Cal. 744 (F.B.); *Folld. in Ramzan Ali v. Basharat Ali*, 115 P.R. 1901.

29. *Ibrahim Bhura v. Isa Rasul*, (1916) 41 Bom. 5=18 Bom. L. R. 810; *Mohini Mohan v. Promoda Nath*, (1896) 24 Cal. 256; *Brijraj Singh v. Ganga Baksh*, (1915) 28 I.C. 855 (Oudh).

30. *Mohendranath v. Nabadwip Chandra*, 1927 Cal. 97=43 C.L.J. 180; *Gajadhar Parshad v. Dulhin Gulab Kuer*, (1920) 57 I.C. 744=5 Pat. L. J. 632 and *Parbhu Pande v. Rameshwar Das*, (1929) 117 I.C. 202=10 Pat. L. T. 122 (In a suit for recovery of submerged land, burden is on the defence to prove possession for twelve years before the suit).

31. *Mohiny Mohun Das v. Krishno Kishore Dutt*, (1883) 9 Cal. 802; *Reld. on Radha Gobind Roy v. Inglis*, 7 C.L.R. 364 (P.C.); also see *Khedarilal v. Rajendra*, 51 I.C. 70=29 C.L.J. 259 (Land subject to inundation wholly or partially).

before suit, the claimant unless he can show possession since the reformation, must at least show that he was in possession down to the date of the diluviation.³² For another instance, a narrow strip of unenclosed land adjoining a public lane, may be presumed to have continued in the possession of the plaintiff as previously till the contrary is proved.³³ Though as a general rule the plaintiff in a suit for ejectment should prove possession within 12 years of the suit, and it is not enough to show that 13 or 14 years before suit he was exercising acts of ownership, yet possession is to be proved only such as the property is capable of, and that in fact no one was interfering with his right. It is possession not user that has to be shown.³⁴ Where it is difficult or impossible, as in cases of expenses

Of jungle land. of jungle land, to ascertain who is in actual possession, the presumption is that possession follows title, and this is not rebutted by mere casual acts of cutting wood, or occasional cultivation of certain portions in a large tract of area.³⁵ Where the plaintiff alleging definite previous acts of possession regarding a piece of land sues for possession, the proof of his possession may be such as the land is capable of by exercising acts of ownership on it which need not be continuous or frequent, when it appears that the land was not capable of actual and continuous physical possession having regard to the purpose for which land is used.³⁶

2142. Where neither party has had complete possession, over a disputed land, the possession, in the eye of the law must be with the rightful owner.³⁷ In the case of jungle lands, possession *prima facie* is with the person whose title is established; and waste lands are presumably in possession of the party who has

32 *Mano Mohan Ghose v. Mothura Mohan Roy*, (1881) 7 Cal. 225; *Golap Moni Dasi v. Kalicharan*, (1912) 16 I.C. 17 (Cal.); *Barkat Ali v. Basant*, (1917) 39 I.C. 356 (Cal.); *Birendra Nath v. Satish Chandra*, 97 I.C. 1003=1926 Cal. 1166; *Suresh Chandra v. Shiti Kanta*, (1924) 78 I.C. 679=51 Cal. 669=1924 Cal. 855 and *Panchanan v. Basanta Kumari*, 1925 Cal. 1230=30 C.W.N. 497=88 I.C. 567.

33. *Indarlal v. Ram Surat Kuar*, (1920) 58 I.C. 773=1921 Pat. 158=2 Pat. L. T. 55; Reld. on 19 Cal. 660 (P.C.) and 9 Cal. 744 (F.B.).

34. *Ramanatha v. Lakshmanan*, 1931 Mad. 644=54 Mad. 622=133 I.C. 9=61 M.L.J. 224; *Gopal Chandra v. Manmohini Dasi*, (1927) 105 I.C. 369=1928 Cal. 118=31 C.W.N. 806; Reld. on 29 Cal. 518=29 I.A. 104 (P.C.); also see *Kuthali Moothavar v. Peringati*, 66 I.C. 451=44 Mad. 883=48 I.A. 395 (P.C.) and *Basanta Kumar Roy v. Secretary of State*, 40 I.C. 337=44 I.A. 104=44 Cal. 858 (P.C.).

35. *Ratipal v. Bipin Chandra Chatterji*, (1917) 41 I.C. 80=4 O.L.J. 354.

36. *Nalaki v. Abhayacharn Sil*, (1934) 149 I.C. 1109=1934 Cal. 294=58 C.L.J. 478.

37. *Secretary of State v. Kalika Prosad*, (1912) 14 I.C. 609 (Cal.); Reld. upon *Runjeet Ram v. Gobardhun*, 20 W.R. 25.

title to them.³⁸ Similarly, where land is admittedly vacant, possession may be presumed to go with title, but before this can be presumed, it must be clearly proved that the land had been lying vacant.³⁹ In the case of vacant site of which no effective physical possession is feasible the presumption is that possession will follow title,⁴⁰ until the date when the plaintiff admits dispossession⁴¹; and the mere use by a neighbour of the land in dispute for the purpose of tethering cattle cannot be regarded as such dispossession.⁴² It is well established that in the case of lands which are for one reason or another not actually occupied by any one, legal presumption must be presumed to continue with the actual owner.⁴³ This rule applies to jungle,⁴⁴ and uncultivated lands,⁴⁵ to khals and khal-bharati lands,⁴⁶ to beel lands,⁴⁷ and to unoccupied narrow strips of lands,⁴⁸ also to re-formed alluvial lands,⁴⁹ or new lands gained from the river.⁵⁰ It has been observed by Madhavan Nair, J., in *Sevugan Chetty v. Koovanna*,¹ that

"it is true that in the case of waste land, if the plaintiff proves his title to it, he can prove possession by relying on the presumption that possession follows title inasmuch as possession of waste land cannot be proved by acts of actual user; but if the plaintiff puts forward a case of effective possession and adduces evidence in support of it, then he cannot give up that case, and rely upon any 'presumption' in support of his possession because the special case set up by him is inconsistent with any such presumption".

38. *Murugappa Mudaly v. Panaganti*, (1915) 30 I.C. 191 (Mad.); *Priyanath v. Mahendra Kumar*, (1911) 10 I.C. 376; *Mohesh Chandra v. Hemendranath*, 107 I.C. 95=1928 Cal. 104=46 C.L.J. 575; *Gangaram v. Hasanshah*, 1927 Lah. 230=100 I.C. 51.

39. *Sampat Ram v. Ganga Datt*, (1922) 69 I.C. 427 (Lah.).

40. *Srinivasachariar v. Raghavachariar*, 1924 Mad. 676=46 M.L.J. 560=79 I.C. 1011=1924 M.W.N. 628; also see *Abdulla v. Girdhari*, (1924) 79 I.C. 692 (Lah.).

41. *Bhola Singh v. Jagat Singh*, 1929 Lah. 669.

42. *Lachhman Das v. Narsingh Das*, (1916) 36 I.C. 207 (Punjab); also see *Radhikadas v. Harmohanlal*, (1917) 39 I.C. 54=13 N.L.R. 25.

43. *Radhika Das v. Harmohan Lal*, (1917) 39 I.C. 54=13 N.L.R. 25 and *Nandlal v. Lahiri*, 111 I.C. 533=1929 Lah. 34.

44. *Watson & Co. v. The Government*, 3 W.R. 73 (80, 82); *Mahomed Ali v. Abdul Gunny*, 9 Cal. 744 (F.B.); *Raja Leelanund v. Mt. Baseeroonnissa*, 16 W.R. 102.

45. *Watson & Co. v. The Government*, 3 W.R. 73 (80, 82).

46. *Sunnud Ali v. Mt. Kurrimoonissa*, 9 W.R. 124.

47. *Mahomed v. Kurrum*, 11 W.R. 268.

48. *Mocheeram v. Bissambhur*, 24 W.R. 410.

49. *Monmohun Ghose v. Mothura Mohun Roy*, 7 Cal. 225=8 C.L.R. 126.

50. *Luchmee v. Jatadharce*, 7 W.R. 89; *Mahomed Ibrahim v. Morrison*, 5 Cal. 36.

1. 1931 Mad. 282=130 I.C. 845=60 M.L.J. 430=33 L.W. 457; also see *Rambandhu v. Kassu*, 5 C.L.R. 481.

Similarly, it was held in *Rambandhu v. Kasu Bhatta*,^{1-a} that as long as reliable evidence of acts of ownership is *forthcoming*, there is no difference between the proof of possession in the case of jungle or waste or uncultivated lands, and that in the case of cultivated lands. It is doubtful if any land is altogether incapable of enjoyment. In any case it is not necessary before plaintiff can raise in his favour the presumption that possession follows title, that he must show that the land was incapable of enjoyment.² Where the title to the land is in the plaintiff, and it is found that the defendant has made no permanent use of it inconsistent with its being the plaintiff's land, a case is made out for the presumption stated by their Lordships of the Privy Council in *Runjeet Ram Panday v. Goburdhun Ram Panday*,^{2-a} that possession goes with title.³ It was observed by their Lordships of the Privy Council in *Agency Company v. Short*,⁴ that

"If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place."

Possession of open sites goes naturally with the possession of the property to which they adjoin. If the defendant asserts his rights, he must show, that he has been in possession adversely against the owner of the property.⁵ In case of fallow land possession follows title⁶; and in the case of waste land covering a very small area, possession may be presumed to follow title.⁷

2142-A. ILLUSTRATIONS.—

(1) In *Leelanund Singh v. Mt. Basheeroonnissa*,⁸ it was held that in a suit for possession of **jungle lands**, where there is no proof of acts of ownership having been exercised on either side, possession must be presumed to have continued with the person to whom they rightfully belong.

(2) Similarly, in *Mohima Chunder v. Hurro Lal*,⁹ it was observed that

1-a. 5 C.L.R. 481.

2. *Jira Bewa v. Uma Charan*, 1931 Cal. 501=134 I.C. 319=53 C.L.J. 411 (Onus on plaintiff may be discharged by reference to evidence on either side).

2-a. (1873) 20 W.R. 25 (P.C.).

3. *Ganpati v. Raghunath*, (1909) 33 Bom. 712.

4. (1888) 13 App. Cas. 793 (798).

5. *Mahomed Sahib v. Tilokchand Abheerchand*, 1922 Bom. 243=46 Bom. 920.

6. *Smail v. Gajjan*, (1927) 106 I.C. 130 (Lah.).

7. *Bhagwan Chandra v. Dayal Hari Das*, (1912) 16 I.C. 623 (Cal.); also see *Nur Muhammad v. Qaim*, (1928) 110 I.C. 857 (Lah.).

8. (1871) 16 W.R. 102.

9. (1878) 3 Cal. 768=2 C.L.R. 364; also see *Ram v. Kusu*, 5 C.L.R. 481 (In disputes as to the right to possession of jungle lands, it is only in cases where neither party has exercised any acts of ownership over lands in question that the Court may resort to evidence of title, and presume that the party proved to have the title has also possession).

in cases of waste or jungle lands, where the right to those lands is disputed, it is often impossible to give evidence of acts of ownership or possession over the property because it is uninhabited and uncultivated, and no acts of ownership by any one have been exercised over it. "In such cases it is often necessary, for the purpose of deciding the question of limitation to rely upon very slight evidence of possession, and sometimes possession of adjoining land, coupled with evidence of title, such as grants or leases, and the Courts are justified in presuming, under such circumstances, that the party who has the title has also the possession."

(3) Where in a suit for possession of certain land as having accreted to plaintiff's village by alluvion, the plaintiff's title and possession is disputed, it is open to the plaintiff to prove that the land in suit had accrued by alluvion within limitation, or that although it had accreted more than twelve years before the institution of the suit, it had remained, within the limitation period, waste or jungle land, in respect of which the presumption would arise that possession went with title.¹⁰

(4) Where the owner of *parti* land has proved his title to it, his possession will be presumed, and small acts of possession like that the plaintiff's sweepers used to pass over this land, would be sufficient to throw the onus on the defendant to prove his possession for twelve years prior to the suit.¹¹ In a suit for possession of waste land it is for the defendant to prove adverse possession for more than twelve years under Art. 144, and not for the plaintiff to prove his possession within twelve years.¹²

(5) There is an undoubted presumption that forest tracts and old wastes belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract, or piece of land, been granted by the sovereign power to any individuals or bodies of individuals; or rights have been consciously allowed to grow up adversely to the Government.¹³

(6) Where Government granted a lease of certain lands to Defendant No. 1 on condition that he reclaimed the jungle lands comprised in the demise; and defendant leased a portion of the lands to K, and later the Government cancelled the former lease, and granted a fresh lease on more stringent terms, and Defendant No. 1 gave leases to Defendants 2 to 3 of lands included in K's lease, and plaintiff, a purchaser of K's leasehold rights, sued for possession, alleging dispossession, within twelve years of the time the land remained unclaimed jungle, *held*, that the suit was not time-barred.¹⁴

(7) Where the land in suit belonging to the plaintiffs, was shown in possession of the defendants, but it had remained uncultivated from the

10. *Habibullah Khan v. Lalta Prasad*, (1912) 34 All. 612=17 I.C. 94; *Reld. on Jagadindranath Roy v. Hemanta Kumari*, 8 A.L.J. 1176=15 C.W.N. 887=13 Bom. L. R. 806=11 I.C. 542 (P.C.).

11. *Gopal Sahu v. Ghanshyam Das*, 1929 Pat. 529 (1); also see *Kuman Das v. Gulam Ali Nadaf*, (1920) 57 I.C. 323 (The possession of *parti* or jungle lands must be deemed to be with the rightful owner thereof).

12. *Ganga Ram v. Hassan Shah*, (1927) 100 I.C. 51=1927 Lah. 230.

13. *Kodoth Ambu Nair v. Secretary of State*, (1924) 80 I.C. 835=51 I.A. 257=47 Mad. 572=1924 P.C. 150; also see *Secretary of State v. Krishnayya*, 28 Mad. 257 (284) (*Held*, that the presumption that all primæval and immemorial forest or waste lands presumably belong to the Government may be rebutted).

14. *Gopal Chandra Maiti v. Manmohini*, (1927) 105 I.C. 369=1928 Cal. 118=31 C.W.N. 806.

year 1907 to 1919, and the suit was brought within twelve years of the land being cultivated, *held*, that the onus was on the defendants to prove their own rights by adverse possession for more than twelve years.¹⁵

TITLE III: ART. 142 EXPLAINED.

2143. **POSSESSION.**—The expression “possession”, does not necessarily mean “physical occupation”.¹⁶
Definition. According to Markby,

“possession originally expresses the simple notion of a physical capacity to deal with a thing as we like, to the exclusion of every one else”;

But the legal notion of possession is not confined to this simple physical condition.

“In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as we like, and to exclude others, but also the determination to exercise that physical power on our own behalf.”

According to Savigny, besides the **physical element**, there is what may be called the **mental element**,

“without which the physical relation will remain as a mere fact, having no legal consequences, and not in any way subject to special legal considerations.”

The physical fact, called “*corpus*” and the mental state, named “*animus*” by the Roman lawyers, are both requisite in combination to gain possession—*Apiscimur possessionem corpore et animo; neque per se animo, aut per se corpore.* (D. 41, 2, 3, 1). “We gain possession with the body and mind, not with the mind only, nor with the body only”.¹⁷ Thus, according to Dr. Hunter, “possession is the occupation of anything with the intention of holding it as owner”.¹⁸ But, according to Halmes,

“to gain possession, a man must stand in a certain physical relation to the object, and to the rest of the world, and must have a certain intent”

which need not be the “*animus domini*” of the Roman Law, but “the intent which the law should require is an intent to exclude others.” . . .

“A tenant for years intends to exclude all persons, including the owner, until the end of his term; yet he has not the *animus domini* in the sense explained.”

To gain a complete idea of possession, we have to consider, *firstly*, the person possessing, *secondly*, the thing possessed, and *thirdly*, the person excluded from possession.¹⁹

15. *Mohammad Yar v. Mohammad Yar*, 1929 Lah. 596; also see *Nur Muhammad v. Kaim*, (1928) 110 I.C. 857 (Waste land must be considered to be in the possession of the real owners until overt acts of adverse possession are proved).

16. *Lake v. Dean*, (1860) 28 Beav. 607.

17. Dr. Pal's Limitation, p. 938.

18. *Ibid.*; see Hunter's Roman Law, p. 341.

19. *Ibid.*; see Banerji's Specific Relief Act, Lecture II, p. 46.

Continuance of pos- 2144. We have seen above, that
session.

"to gain possession there must be certain physical relations and a certain intent".

To continue the original physical relation to the object, the mental intent, or the manifestation of power to reproduce at will the original physical relation to the object is alone sufficient. Domat says:—

"Although possession implies the detention of what we possess, yet this detention ought not to be understood as if it were necessary to have always, either in our hand or in our sight, things of which we have the possession. But, after possession has been once acquired, it is preserved without an actual possession."²⁰

But some jurists think that both elements must exist throughout as at the beginning, for a continuous possession or enjoyment of the thing possessed, and Markby says "The possession of immovables lasts so long as there is any physical control over them, and ceases when that physical control ceases".²¹ Similarly, Dr. Hunter observes

"Both *occupation* and *intention* are necessary to constitute possession; it follows, therefore, that if either occupation or intention ceases, the possession is destroyed."

There is a presumption of law in favour of the continuance of possession once begun, and

"so long as there is no hostile occupant, the possessor, who has been merely neglectful, may at any moment renew his occupation. If there is no physical obstruction in dealing with land, and no opposition from the will of a hostile occupier, there is no difficulty in presuming a continuance of possession, unless there is proof of an intention to give it up".²²

A loss of occupation is not material, unless it is followed by the gain of occupation to some one else; so long as the original possessor retains the animus. But a person may, while retaining *occupation*, lose his possession by change of *animus* alone, *e.g.*,

"a man may resolve to hold not for himself but on behalf of another, and thereby that other at once becomes possessor".²³

2145. Possession of immoveable property varies in its character with the nature of the land. We have
Nature of posses- seen in S. 2141, ante, that possession is
sion. not the same thing as actual user. As
pointed out, by a **Full Bench** of the **Calcutta High Court**,²⁴

20. Cited in *Watson & Co. v. The Government*, (1865) 3 W.R. 73 (80).

21. Dr. Pal's Limitation, p. 940.

22. Dr. Pal's Limitation, p. 941.

23. *Ibid.*

24. *Mahomed Ali Khan v. Abdul Gunny*, (1888) 9 Cal. 744=12 C.L. R. 257 (F.B.).

"the nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land may be either permanently or temporarily incapable of actual enjoyment in any customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation, it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it will be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that *the plaintiff should show such acts of ownership as are natural under the existing condition of the land*, and, in such cases, when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed."

The rule of law laid down by Wilson, J., is

"that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that the state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown";²⁵

and, we have already discussed its application to the case of jungle land, or of land covered by water, in Ss. 2141 and 2142, *ante*. Garth, C.J., in the same case differed so far as to observe that the rule is not confined to waste land or to land of any other special character, but is only an illustration of the well known rule of evidence that a state of things once proved to exist is presumed to continue.

Under the Act XIV of 1859, when the starting point of limitation was the date from which the cause of action arose, there was no question of discontinuance of possession, or of dispossession,²⁶ but under the later Acts, the plaintiff in a suit for possession, under Art. 142 of the Limitation Act, is required to bring his suit within the period prescribed from the date of dispossession or discontinuance of possession. (*See S. 2135.*) Under the Acts of 1871, 1877 and 1908, "possession" thus signifies possession of that character of which the thing is capable.²⁷ "It is an axiom of law relating to possession that where possession in fact is undetermined, possession in law follows the right to possess: in other words possession follows title."²⁸ This principle, we have noticed already, is applied to cases where the land in suit is under water,²⁹ or is waste land

25. *Mahomed Alikhan v. Abdul Gunny*, (1888) 9 Cal. 744=12 C.L.R. 257 (F.B.).

26. *Pandurang Govind v. Bal Kishen*, 6 Bom. H. C. R. 125; see footnotes 31 and 32, p. 2108, *ante*; *Moro Desai v. Ram Chandra*, (1882) 6 Bom. 508.

27. *Lord Advocate v. Young*, (1887) 12 A.C. 544.

28. *See S. 2140, ante*; also see *Brijraj Singh v. Ganga Baksh Singh*, (1915) 28 I.C. 255=18 O.C. 43=2 O.L.J. 346.

29. *Ibid.*; also see *Basanta Kumar Roy v. Secretary of State*, 44 I.C. 858 (871) (P.C.) and *Ram Pali v. Ramani*, 1930 P.C. 198=126 I.C. 81 (P.C.).

or a vacant site.³⁰ In such cases possession in law is taken to be with the plaintiff's whole title or right to possess is proved or acknowledged.³¹ In cases falling under Art. 142 of the Limitation Act, if the plaintiff establishes his proprietary title, there is a presumption that his possession continues till within twelve years of the suit, and it is for the defendant to rebut that presumption.³² The nature of the land must govern the extent to which exclusive occupation is possible.³³

2146. IMMOVEABLE PROPERTY.—(1) The term “immoveable property” is not defined in the Limitation Act; but, under the **General Clauses Act, 1868**, this expression

“includes lands, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth”.

According to S. 3 of that Act, this is the meaning to be taken of the terms in all Acts of the Governor-General in Council, “unless there is any thing repugnant in the subject or context”. The expression was not defined in any of the earlier Limitation Acts also; but under Act XIV of 1859, the term “immoveable property” was held as not identical with “lands or houses,” and included incor-

<p>Incorporeal hereditaments.</p>	<p>poreal hereditaments; and comprehended certainly all that would be <i>real property</i> according to English Law, and possibly more,³⁴</p>
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(2) In a **Bombay Full Bench case**,³⁵ where the question concerned the rights of Hindus, the expression “immoveable property” was taken to include whatever the Hindu Law classed as immoveable, although not such in the ordinary acceptation of the word. And, in *Futtehsinghji v. Desai Kullianrai*,³⁶ their Lordships of the Privy Council saw no objection to the application of this

<p>Hereditary offices.</p>	<p>rule of construction within proper limits. Accordingly, in the Calcutta case of <i>Raghoo Pandey v. Kassy Parey</i>,³⁷ a right to officiate as priest at funeral ceremonies of Hindus was held to be in the nature of</p>
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30. See Ss. 2141, 2142, ante.

31. See S. 2140, ante.

32. *Midnapore Zemindary v. Panday*, (1917) 41 I.C. 114=2 P.L.W. 143=2 P.L.J. 506.

33. *Bahadur Chand v. Nainamal*, 25 I.C. 35=14 P.R. 1915; *Birjoo v. Bhiku*, (1921) 64 I.C. 876; also see *Wali Ahmed v. Tota Meah*, (1903) 31 Cal. 397 (405) and *Ali Hammad v. Ghur Pattar Singh*, (1924) 47 All. 389.

34. *Maharana Futtehsingh Ji v. Desai Kullianrai*, 21 W.R. 178 (181)=1 I.A. 34 (P.C.) (*Toda Gras Hak*); also see *Collector of Thana v. Krishnanath Govind*, 5 Bom. 322 (335).

35. *Purshotam v. Sidheswar*, 9 Bom. H. C. R. 99 (F.B.) [Right to hold hereditary office of a village Joshi (astrologer)]; also see *Krishnabhat v. Kapabhut*, 6 Bom. H. C. A. C. 137.

36. 21 W.R. 178=1 I.A. 34 (P.C.).

37. (1883) 10 Cal. 73.

immoveable property, and a suit to establish such right, therefore, fell under Art. 148 and not under Art. 145 of the Limitation Act. In a case relating to the office of a karnam, or village accountant, which is an office in no way connected with the Hindu religion or usages, although it had almost invariably been held by Hindus of the accountant caste, the Madras High Court saw no reason to construe the expression "immoveable property" by the light of ancient Hindu texts.³⁸ In *Lakshman Das v. Monohar*,³⁹ the Bombay High Court, held that a right to receive fixed allowance under the Hindu Law (*Nibandha*), was regarded as immoveable property, but

"the above rule of Hindu Law could not enable the payments to be regarded as the possession of immoveable estate so as to enable the right to be acquired by prescription".

(3) The expression "immoveable property" has been defined
Growing crops. in the **Registration Act**, as including

"land, buildings, hereditary allowances, rights to way, lights, ferries, fisheries; or any other benefit to arise out of land and things attached to the earth or permanently fastened to any thing which is attached to the earth, but not standing timber, growing crops, not grass".

The **Transfer of Property Act** defines it as not including standing timber, growing crops, or grass. The **Code of Civil Procedure** also classes growing crops as moveable property.

(4) In *Jagrani Bibi v. Ganeshi*,⁴⁰ the **Allahabad High Court** has held that trees growing upon land are
Growing trees. "land" within the meaning of S. 29 of the Limitation Act of 1871 (now S. 28): and in *Mangal Sain v. Mt. Naohi*,⁴¹ the same High Court held that a mango grove, apart from the land on which it stands, is not immoveable property for the purposes of the Registration Act; however, for the purposes of the Limitation law, such grove of trees comes within the meaning of immoveable property. Trees being things permanently attached to the earth are immoveable property under the definition given in S. 3 of the General Clauses Act for the purpose of the Limitation Act.⁴²

(5) A majority of the Judges in the Full Bench case of *Fadu v. Gour Mohan*,⁴³ have held that "right of
Rights of fishery. fishery" though falling within the defini-

38. *Venkatasubbaramayya v. Surayya*, (1880) 2 Mad. 283 (286).

39. (1885) 10 Bom. 149; also see *Collector of Surat v. Daji*, 8 Bom. H. C. R. 166.

40. (1881) 3 All. 435.

41. (1911) 9 I.C. 478; Reld. upon *Ram Ghulam v. Manohar Das*, A.W.N. (1887), 59.

42. *Ghafur Khan v. Prag Narain*, (1922) 66 I.C. 799=9 O.L.J. 17; cf. *Musharaf Ali v. Iftikhar Husein*, 10 All. 634=A.W.N. (1888) 257 (A claim for removal of trees).

43. (1892) 19 Cal. 544 (F.B.).

tion of immoveable property as “*benefits arising out of land*,” was however, not included within S. 9 of the Specific Relief Act, as this was something repugnant to the subject or context of that section. In *David v. Grish Chunder Guha*,⁴⁴ it was held by the Calcutta High Court that a jalkar does not import any interest in the soil itself, and grants of jalkar import only the use and enjoyment of what have been termed purely aqueous rights.⁴⁵ In *Natabar Parne v. Kubir Parne*,⁴⁶ it was held that S. 9 of the Specific Relief Act does not refer to a suit for the possession of a jalkar, that is to say, a right of fishery over land belonging to a stranger. These decisions were followed by the majority of the Full Bench Court. On the other hand, the minority view was that taken in *Bhundal Panda v. Pandol*,⁴⁷ that such a suit to recover possession of a fishery by exclusive right thereto is cognizable under S. 9 of the Specific Relief Act, and this case had been followed in *Krishna v. Akilanda*,⁴⁸ in a suit to obtain possession of a ferry. A jalkar or right of fishery, as being a benefit arising out of land covered by water, comes within the definition of immoveable property set out in the General Clauses Act.⁴⁹

(6) The minority Judges (Prinsep and Pigot, JJ.) drew attention that the definition of “immoveable property” in the General Clauses Act while including a fishery *in alieno solo*, as a “benefit to arise out of land” covered by water, does not, of course, include easements.⁵⁰ But, the **Bombay High Court** has held in *Mangaldas v. Jewanram*,¹ that a right of way is not “immoveable property” within the meaning of S. 9 of the Specific Relief Act, according to the definition in the General Clauses Act. Candy, J., observed

“that a right of way is not a ‘benefit to arise out of land,’ but it does not, therefore, follow that a right of way is not immoveable property. The word ‘include’ in S. 2 of the General Clauses Act is enumerative, not exhaustive. A right of way would certainly seem to be an interest in immoveable property.”

Admitting, therefore, that a right of way is, speaking generally, immoveable property, it was held that it is not such within the terms of S. 9 of the Specific Relief Act, there being something

44. 9 Cal. 183.

45. *Radha Mohun Mundal v. Neel Madhub*, 24 W.R. 200.

46. 18 Cal. 80.

47. 12 Bom. 221.

48. 13 Mad. 54.

49. *Ram Gopal v. Nurumuddin*, (1892) 20 Cal. 446 (Right of fishery is immoveable property within the meaning of S. 106 of the Transfer of Property Act).

50. *Fadu Jhala v. Gour Mohan*, (1892) 19 Cal. 544 (F.B.); also see *Bibi Ahmadi v. Taraknath*, (1913) 18 C.L.J. 399.

1. (1899) 23 Bom. 673; cf. *Junasi v. Sviagnana*, (1894) 5 M.L.J. 95.

repugnant in the subject or context of S. 9 of the Specific Relief Act which prevents such an effect being given to the definition.

(7) Possession of the house is also possession of the site on which that house stands, and if the house has been in adverse possession for more than twelve years, a suit for the recovery of the site is barred by limitation.² A suit for possession of land free of the house and trees wrongfully built and planted by the defendant as distinguished from a claim merely for the removal of trees is governed by Art. 142 of the Limitation Act.³ A claim for the removal of the trees on waste land belonging to the plaintiff in which the defendant had no right or interest of any sort is not a suit for possession of any interest in land.⁴ However, a suit for possession of land coupled with an ancillary prayer for the removal of the trees planted on it is governed by Art. 142 of the Limitation Act.⁵

2147. We have noticed above that a **right to fishery**,⁶ and a **right to ferry**,⁷ have been held to be benefits arising out of land. Suit for money charged upon **rents and profits** is a suit for money charged upon immoveable property within the meaning of Art. 132, Limitation Act.⁸ **Jagir income** is a benefit to arise out of land.⁹ A *hat* is a benefit arising out of land and, therefore, within the definition of "immoveable property" as given in S. 2, cl. 5 of the General Clauses Act, I of 1868.¹⁰ The rents and profits derivable from a *hat* or bazaar which the owner is entitled to receive for the use of land or for houses, shops or other buildings erected thereupon, can form the subject of a valid mortgage.¹¹ Similarly, in the case of *Sikandar v. Bahadur*,¹² the validity of a lease of the right to collect **market dues** was assumed as it was held that such market dues were in the nature of benefits arising out of land.

2. *Nuradin Kasim v. Morris S. Pereira*, (1910) 7 M.L.T. 309=6 I.C. 683.

3. *Jagmohan Singh v. Tula Ram Das*, (1914) 25 I.C. 701 (Oudh).

4. *Musharaf Ali v. Iftkhar Husain*, 10 All. 634=A.W.N. (1881) 257 and *Badal v. Nageshwar*, 52 I.C. 858=6 O.L.J. 329.

5. *Ghafur Khan v. Prag Narain*, (1922) 66 I.C. 799=9 O.L.J. 17; *Muhammad Shafi v. Bindeshri Saran Singh*, (1923) 75 I.C. 266 (All.).

6. *Fadu v. Gour Mohun*, (1892) 19 Cal. 544; *Bhundal v. Pandol*, (1887) 12 Bom. 221; *Ramgopal v. Nur Muhammad*, (1892) 20 Cal. 446.

7. *Krishna v. Akilanda*, (1889) 13 Mad. 54.

8. *Muhammad Zaki v. Chatku*, (1884) 7 All. 120.

9. *Ram Pershad v. Kishen*, 4 P.R. 1894.

10. *Surendra Narain v. Bhailal*, (1895) 22 Cal. 752.

11. *Gholam Mohiuddin v. Parbati*, (1909) 36 Cal. 665; also see *Bungshadhur v. Mudhoo Modhuldar*, (1874) 21 W.R. 383.

12. (1905) 27 All. 462; also see *Madhavrao v. Kashibai*, (1909) 34 Bom. 287.

2148. There is a conflict of view on the question whether the term "immoveable property" in Art. 142, is wide enough to include "interest in immoveable property". In the Full Bench case of *Fadu Jhala v. Gour Mohun*,¹³ Prinsep and Pigott, JJ., took this view, that the Legislature did not by a difference in the wording of Arts. 142 and 144, intend to draw any distinction between different classes of property such as corporeal and incorporeal interests. The view has been accepted by Muthuswami Aiyar, J., in the Madras case of *Innasi v. Sivagnana*,¹⁴ that the term immoveable property includes incorporeal hereditaments. But, O'Kinealy, J., in *Fadu Jhalla v. Gour Mohun*,^{14-a} was of opinion that the term immoveable property does not include "interests in immoveable property," which expression refers to interests less than the fee simple and include incorporeal hereditaments. Mukerje, J., in *Lokenath v. Jahana Bibi*,¹⁵ takes a similar view. In *Narayan v. Vasudeo*,¹⁶ Telang, J., held that the right of a number of co-sharers in a certain kind of immoveable property to the exclusive management thereof is an interest in immoveable property, within Art. 144, Limitation Act. Similarly, Jardine, J., has held in *Bapu v. Dhondi*,¹⁷ that a suit to recover possession of mango trees growing on plaintiff's own land, was a claim regarding an interest in immoveable property, governed by the twelve years' rule of limitation prescribed by Art. 144, Limitation Act. But, Parsons, J., in the same case applied Art. 142 to the case.

2148-A. A suit to recover a right to an easement is a suit to recover an interest in immoveable property, and when acquired otherwise than under S. 26 of the Limitation Act, is governed by the twelve years' rule.¹⁸ In the division of property, under the General Clauses Act, into moveables and immoveables, easements with other incorporeal hereditaments have been held to fall under the category of immoveables.¹⁹

A distinction has been drawn between a right to the exclusive enjoyment of a jalkar (fishery) which is not a mere *profit a prendre* or easement, and is an interest in immoveable property, and can be acquired by

13. (1892) 19 Cal. 544 (F.B.); also see *Bapu v. Dhondi*, (1891) 16 Bom. 353; *Hemchandra v. Secretary of State*, (1914) 23 I.C. 136 (Cal.).

14. (1894) 5 M.L.J. 95.

14-a. 19 Cal. 544 (F.B.).

15. (1911) 14 C.L.J. 572 (Right of fishery is an interest in immoveable property).

16. (1890) 15 Bom. 247.

17. (1891) 16 Bom. 353.

18. *Karrupam Zamindar v. Merangi Zamindar*, (1882) 5 Mad. 253; also see *Mohunt Deo v. Mahomed Ismail*, (1875) 24 W.R. 300.

19. *Futteh Singh v. Desai Kulianrai*, (1873) 21 W.R. 178 (181) (P.C.).

twelve years' adverse possession involving an ouster of the rightful owner.²⁰ The Madras and Patna High Courts have held that an exclusive right of fishery is an interest in immoveable property, but if the right claimed is a mere right to fish not excluding the rightful owner, it would appear to be an easement, within the description of the word in the Limitation Act, which can be acquired by twenty years' uninterrupted enjoyment.²¹

2149. "WHILE IN POSSESSION."—We have seen that physical possession is a pure matter of fact, and constructive possession is in the eye of law as good as physical possession of the thing possessed. As observed in *Siva Subramanya v. Secretary of State*,²²

"when there is an intention to hold a thing as owner, it is not necessary that it should be enjoyed in any particular way, but it is sufficient that some overt act is done upon the thing in the execution of such intention". Nature of the possession must depend upon the character and condition of the land in dispute (*see S. 2145, ante*): and constructive possession, or possession in the contemplation of law is enough, where possession in fact is undetermined, or cannot be exercised from the nature of the property in question (*see S. 2141, ante*).

"By juridical possession, we understand that a person stands in such relation to a particular thing that he has in fact dominion over it, and when he and those under whom he claims have in fact exercised this dominion from time immemorial or for the period fixed by the law of prescription, he becomes the legal owner of the thing".²³

For instance,

"it may be that specific portions of the hills were not regularly cultivated, but such cultivation is not necessary when other acts of ownership are done upon them".²⁴

Art. 142 means that when a plaintiff's title is once established, his possession, however obtained, and whether actual or constructive, would be possession within the meaning of this article.²⁵

Where one co-sharer holds the share of another co-sharer who had *simply* ceased to hold actual possession, the holder's possession implies constructive possession by the proprietor. But, where the absentee has *abandoned* possession in the sense explained by Stogdon, J., in 85 P. R. 1892

20. *Parbati v. Mudho*, (1878) 3 Cal. 276; *Lukhmoni Dasi v. Koruna Kant*, (1877) 3 C.L.R. 509; also see *Bhundal v. Pandol*, (1887) 12 Bom. 221 and *Krishna v. Akilanda*, (1889) 13 Mad. 54.

21. *Secretary of State v. Dt. Board*, 1930 Mad. 679=125 I.C. 545; *Henry Hill & Co. v. Sheoraj Rai*, 1923 Pat. 58=(1922) 1 Pat. 674; also see *Kedarnath Goenka v. Amrit Mandal*, 1925 Pat. 568=88 I.C. 676; also see *Kumar Krishna v. Lokenath*, (1931) 35 C.W.N. 1256.

22. (1885) 9 Mad. 285.

23. *Siva Subramanya v. Secretary of State*, (1885) 9 Mad. 285.

24. *Ibid.*, 9 Mad. 285; s.c. on appeal (1891) 18 I.A. 149 (P.C.).

25. *Protap Chandra v. Durga Charan*, 9 C.W.N. 1061 (1064); also see *Suraya Jah v. Azim*, 29 P.R. 1910=5 I.C. 888.

(F.B.), it is impossible to talk of the co-sharer's possession of the remaining person's share as being possession on behalf of the latter.²⁶ Where the rightful owner of land is dispossessed by the trespasser, but succeeds in ousting the defendant without recourse to the law, and continues in possession until the latter regains possession in execution of a decree under S. 9 of the Specific Relief Act, the title of the lands being with the plaintiffs, their suit for recovery of possession within twelve years from their dispossession in execution of the said decree, but more than twelve years after the original dispossession, is not barred by limitation.²⁷ This is on the ground that the plaintiff's possession during the interval between the time when they ousted the defendants, and time when the latter recovered possession by virtue of the decree under S. 9 of the Specific Relief Act, should be regarded as the possession of the rightful owner, and not of a trespasser.²⁸ The rightful owner, when in possession however obtained, is considered to be in possession when he was dispossessed, or discontinued by the defendant.²⁹

2150-2154. DISPOSSESSION AND DISCONTINU- ANCE OF POSSESSION.—We have

Preliminary obser-
vations.

seen in S. 2143, *ante*, that there are two elements in the notion of possession—*viz.*, (1) physical and (2) mental. The physical element, *viz.*, "occupation," is to be distinguished from legal or juridical possession, which is the state of being constructively in possession in the eye of law. (S. 2145, *ante*.) It is not necessary, in order to retain possession, to prove an actual bodily continuous possession at every moment of time; but, that possession is lost when either of the two elements, corpus or animus, is wanting. (S. 2144, *ante*.)

It has been observed that for purposes of limitation, a rightful owner's possession does not cease or discontinue until another person takes possession of the property.³⁰ In the **Calcutta Full Bench** decision of *Mahomed Ali Khan v. Khaja Abdul Gunny*,³¹ rule was laid down that title *and seisin*, when once established, must be *presumed to continue*, at least in cases where there is *no direct*

26. *Suraya Jah v. Azim*, 29 P.R. 1910=5 I.C. 888 (See p. 2142, F.N. 10, *infra*).

27. *Protap Chandra v. Durga Charan*, (1905) 9 C.W.N. 1061; *Haridas v. Debendro Ram*, (1918) 45 I.C. 548.

28. *Jonab Sheikh v. Surjakanta*, (1906) 33 Cal. 821; also see *Mumtazuddin v. Barkatulla*, 2 C.L.J. 1 and *Waziruddin v. Deoki*, 6 C.L.J. 472.

29. *Lillu v. Annaji*, (1881) 5 Bom. 387 (391); also see *Haridas v. Debendro Ram*, (1918) 45 I.C. 548 (Cal.); *Grish Chandra v. Baikuntha Nath*, (1924) 81 I.C. 279 (Cal.); *Narayanan v. Kannammal*, (1904) 28 Mad. 338; *Rajagopala v. Somasundara*, (1906) 30 Mad. 316 and *Kaliaperumal v. Chidambaram*, (1915) 29 I.C. 10 (Mad.).

30. Mitra's Law of Limitation, Vol. I, pp. 103-105.

31. 9 Cal. 744=12 C.L.R. 257 (F.B.).

evidence of possession, and where such evidence is, from the nature of the case, either *difficult or impossible to obtain*. When possession has been once taken rightfully, such corporeal property, and mental intention to exclude others from it are taken to continue until they are respectively destroyed or lost by adverse power or contrary intention.³² Even where the true owner abandons his physical control, without abandoning his intention to deal with the property as he likes, limitation does not run against him until some other person takes possession of the property.³³ And, the true owner when restored to possession somehow, either by abandonment of possession by the intruder, or the determination of trespasser's possession by *vis major* (e.g. of floods) or even by force used by the rightful owner, is regarded in possession when the *physical* element is added to the *mental* element once again.³⁴ Possession follows the right to possess; and the true owner's entry in the assertion of a title to possess, even if forcible, does not make him a trespasser *ab initio*, and the law will still annex the right to the possession.³⁵

2151. The words "dispossession" and "discontinuance of possession" are borrowed from the English Law (S. 3 of Statute 3rd and 4th—Will. IV, c. 27). Under Art. 142 of the Limitation Act, both "dispossession" and "discontinuance of possession" for the prescribed period of twelve years, is sufficient to bar the plaintiff's suit for recovery of possession, and this read with S. 28 of the Limitation Act, extinguishes his title to the property, and vests it in the adverse claimant.

In *Rains v. Buxton*,³⁶ Fry, J., has explained the distinction between "dispossession", and "discontinuance of possession", observing:

English cases. "the one is where a person comes in and drives out the other from possession; the other case is where the person in possession goes out, and is followed into possession by other persons".

Lightwood in his *Time Limit on Actions*, at page 33, observes:

"but dispossession does not require the driving out of a possessor actually present on the land. Possession once acquired continues so long as it is supported by *indications* of occupation, although no person is on the land and the entry of a stranger during the possessor's absence is then a dispossession and not discontinuance of possession. Discontinuance of possession implies that all indications of occupation have been withdrawn".

32. See Stoke's Anglo-Indian Codes, Vol. I, at pp. 56, 57.

33. Mitra's Limitation Act, Vol. I, p. 141.

34. *Ibid.*; also see S. 2149, *ante*.

35. *Ibid.* p. 143; also see *Lillu v. Annaji*, 5 Bom. 387 (391).

36. (1880) 14 Ch.D. 539.

According to English Law, a person's withdrawal from possession is not by itself sufficient for the purpose of the statute, a new possession being essential to complete discontinuance of possession.³⁷ Even where the owner abandons possession, time will not run against him until some other person has entered into possession. Blackburn, J., held in *McDonnell v. McKinty*,³⁸

"the word discontinuance, I understand to mean an abandonment of possession by one person, *followed by the actual possession of another person*. This, I think, must be its meaning; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the Act could operate. To constitute discontinuance there must be both dereliction by the person who has the right and actual possession, whether adverse or not to be protected."

This was concurred in by Parke, B., in *Smith v. Lloyd*,³⁹ where it was observed:

"We are clearly of opinion that that Statute (Real Property Limitation Act, 1833) applies not to cases of *want of actual possession* by the plaintiff, but to cases where he has been out of and *another in possession* for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another whether adverse or not, to be protected to bring the case within the statute".

2152. In the leading Privy Council case of *Trustees Agency Company v. Short*,⁴⁰ the above decisions *Agency v. Short*, 13 A.C. 799. are treated as correctly decided, and the principle was laid down that in order to imperil the title, a discontinuance must be completed by an effective occupation by a stranger. This oft-quoted decision has the following significant passages in the judgment of their Lordships.

"For the present purpose the facts of the case may be stated very shortly. The land in dispute was, until recently, waste open bush. The plaintiffs at the trial proved a complete documentary title deduced from a Crown grant in 1810. But they failed to prove to the satisfaction of the learned Judge at the trial that they or any person through whom they claimed had been in actual occupation of the land at any time during the period of twenty years immediately preceding the commencement of the action. On the other hand the defendant, who claimed to have purchased the land within the last few years, did not prove to the satisfaction of the learned Judge that he and the person or persons through whom he claimed had been in continuous possession during the statutory period".

Their Lordships refer to the doctrine originating in the case of *Laing v. Baine*,⁴¹ "that if the statute once commenced to run it would not stop except by the owner going into possession and so

37. Dr. Pal's Limitation Act, p. 928.

38. (1847) 10 Ir. L. R. 526.

39. (1854) 9 Ex. 562.

40. (1888) 13 A.C. 799.

41. Knox's Rep. 264.

getting, as it were, a new departure"; and expressed their inability to concur in this view.

"They were of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the instruction took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. **No new departure is necessary. The possession of the intruder ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose.** It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant".

Their Lordships relied upon the decision in *McDonnell v. McKinty*,⁴² and *Smith v. Lloyd*,⁴²

"Their Lordships had only to add that in their opinion **there is no difference in principle as regards the application of the statute between the case of mines and the case of other lands** where the fact of possession is more open and notorious. It is obvious that, in the case of mines, the doctrine contended for might lead to startling results, and produce great injustice."

2153. (1) According to English Law, a person's withdrawal from possession is not by itself sufficient for the purpose of the statute. An adverse entry by some one is essential to complete discontinuance, and mere abandonment of possession does not start limitation against the rightful owner. It would appear that the same view is held by Indian Courts in this respect.

(i) English authorities followed. In *Sheikh Sobnur Ali v. Huttman*,⁴³ the Calcutta High Court relied upon the English decision in *Rains v. Buxton*,⁴⁴ for holding that Art. 142 of the Limitation Act refers to a case where the person in possession goes out and is succeeded in possession by another. The Madras High Court⁴⁵ adopts the meaning of the words discontinuance of possession as given in *McDonnell v. McKinty*.⁴⁶ The Privy Council observes that the Limitation Act does not define "dispossession, but its meaning is well-settled".⁴⁷

42. See S. 2151, *supra*.

43. (1896) 1 C.W.N. 277 (Where the plaintiff had, under a mistake, laid down certain boundary pillars leaving the disputed portion outside the pillars, but no one had entered into possession of the land thus left out until within 12 years of the suit); also see *Kuppaswamy v. Kusala Ramiah*, (1919) 49 I.C. 89 (Mad.); Relied on *Rains v. Buxton*, (1880) 14 Ch. D. 537.

44. (1880) 14 Ch. D. 537.

45. *Periya Jeeyangarswami v. Mahomed Esoof Saheb*, (1925) 87 I.C. 386=21 L.W. 398.

46. (1847) 10 Ir. L. R. 514.

47. *Basanta Kumar v. Secretary of State*, 44 Cal. 858 (P.C.).

2154. (2) In *Gobindlal Seal v. Debendronath*,⁴⁸ where the owner of property had allowed the defendant to remain in permissive occupation, it could not be said that he had "discontinued" the possession. Pontifex, J., refers to the fact that

(ii) Permissive possession or occupation not dispossession.

"the use of the word 'discontinued' in Art. 142 of the Limitation Act has evidently been copied from the third section of 3 and 4 Will. IV, c. 27. In that Act, however, the word 'discontinued' cannot be taken to apply to a tenancy-at-will or an occupation of a like nature, because the limitation applicable to a tenancy-at-will is expressly provided for by another section of that Act".⁴⁹

Garth, C.J., concurred and added

"that the words 'dispossession' and 'discontinuance' (which are borrowed from the English Limitation Act of William the IV) apply only to cases where the owner of land has, either by his own act, or that of another, been deprived altogether of his dominion over the land itself, or the receipt of its profits".⁵⁰

2155. (3) In *Brojendra Kishore Roy v. Bharat Chandra Roy*,¹ where following upon certain disputes as to possession of the property, the Magistrate had attached the property, the subject of dispute under S. 146 of the Code of Criminal Procedure, and the opposing parties had as plaintiffs sued for declaration of their title, and for recovery of possession, the Calcutta High Court held that Art. 142 of the Limitation Act was not applicable, as "the seisin or legal possession being, during the attachment, in the true owner, the attachment could not be deemed to amount to either dispossession of the owner or the discontinuance of his possession". It was observed that

(iii) Attachment by Magistrate not dispossession.

"dispossession implies the coming in of a person and the driving out of another from possession. Discontinuance implies the going out of the person in possession and his being followed into possession by another. These elementary principles are deducible from the decision of the Judicial Committee in *Trustees and Agency Company v. Short*,² and *Secretary of State v. Krishnamoni Gupta*.³ To the same effect is the observation of Baron Parke in *Smith v. Lloyd*,⁴ that to make the Statute of Limitation applicable there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected".

48. (1880) 6 Cal. 311; also see *Ibrahim v. Isa Rasul*, (1916) 41 Bom. 5 (12).

49. *Gobind Lall Seal v. Debendronath*, (1880) 6 Cal. 311 (314).

50. *Ibid.*, 6 Cal. 311 (315).

1. (1915) 31 I.C. 242=20 C.W.N. 481=22 C.L.J. 283; Followed in *Panchoo Kapali v. Jajneswar Majhi*, (1920) 58 I.C. 844=32 C.L.J. 9 (Suit to recover possession by lessee).

2. 13 App. Cas. 793=58 L.J.P.C. 4.

3. 29 I.A. 104=29 Cal. 518=6 C.W.N. 617=4 Bom.L.R. 537 (P.C.).

4. 9 Exch. 562=96 R.R. 837.

As observed by the **Calcutta High Court**,

"if the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrong-doer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revives in the eye of the law".⁵ "The intervention of the public authorities for the preservation of peace, operates in the same way as the *vis major* of a flood, and the constructive possession of the land is thereafter if any in the true owner".⁶

If a person enters upon the land of another, and holds possession for a time and then without having acquired title under the statute abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. The same principle applies where possession is taken out of him by a Magistrate acting under S. 146, Criminal Procedure Code.⁷ In the case of an attachment under S. 146, Criminal Procedure Code, the possession of the Magistrate merely amounts to that of a custody or detention on behalf of the rightful owner, and the legal possession being still with the true owner, there is no dispossession or discontinuance of possession within the meaning of Art. 142 of the Limitation Act⁸ unless, of course, the Magistrate delivers over possession to the opposite party.⁹

2156. (4) Where the Government, in the Revenue Department, has taken possession of land it is the duty of the Collector, after payment of Revenue, and the expenses of the collection, to pay over the surplus proceeds of the estate of the true owner. The Collector's possession does not become adverse to the owner, by reason of his making this payment to another claimant.¹⁰

2157. (5) Where disputes arise between claimants as to possession of immoveable property and the Receiver of Court is placed in the hands of a possession of rightful owner. Receiver by the Court pending the determination of the question of title, the Court takes possession through its receiver on behalf of the party who

5. *Sarat Chandra v. Bibhati Debi*, (1922) 66 I.C. 433=34 C.L.J. 302; Relied on *Trustees and Agency Company v. Short*, (1888) 13 A.C. 793; *Secretary of State v. Krishnamani Gupta*, 29 I.A. 104=29 Cal. 518=6 C.W.N. 617 (P.C.) and *Basanta Roy v. Secretary of State*, 40 I.C. 337=44 I.A. 104=44 Cal. 858 (P.C.).

6. *Ibid.*, (1922) 66 I.C. 433=34 C.L.J. 302.

7. *Pannalal Biswas v. Panchu Ruidas*, (1922) 65 I.C. 200=26 C.W.N. 432=49 Cal. 544=1922 Cal. 419.

8. *Venkatagiri v. Isakpalli*, 26 Mad. 410 (413, 415).

9. *Nasir Ali Sheikh v. Adeluddi Shana*, (1912) 16 I.C. 620 (Cal.).

10. *Karan Singh v. Bakar Ali Khan*, (1882) 5 All. 1 (P.C.).

may ultimately establish his title and from the moment the title is determined the possession must be deemed to have been the possession of the lawful owner whose title has been established. It does not make any difference whether the property is attached by the Magistrate under the provisions of the Code of Criminal Procedure or placed in the possession of a Receiver appointed by the Civil Court.¹¹ Where a Receiver holds possession of an estate no possession on the part of the wrong-doer can, by legal fiction, be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner.¹²

2158. (6) Both "*dispossession*" and "*discontinuance of possession*", imply adverse possession of some

(vi) Implies previous possession.

one against plaintiff previously in possession. In *Charu Chandra Pramanik v. Nahush Chandra Kundu*,¹³ Art. 142 was held inapplicable where the plaintiffs deriving their title from the will of the testator sought to recover possession on the allegation that upon establishment of the will the *debutter* took effect from the date of his death.

"The plaintiffs in the case were never in possession, and could not be said by any stretch of language to have been dispossessed or to have discontinued possession while they were in possession of the disputed property."

The meaning of the expressions "*dispossession*" and "*discontinuance*," were stated to be the same as explained by Fry, J., in *Rains v. Buxton*.¹⁴ Similarly, in *Panchoo v. Jajneswar*,¹⁵ where a suit was brought to recover possession of land claimed by the plaintiff as *raiyat* or *under-raiyat*, but, the plaintiff who had obtained a lease from the defendant had not obtained possession, it was held that Art. 142 implies that the plaintiff was previously in possession and that he had been deprived of possession by the defendant, and there was no dispossession or discontinuance within the meaning of Art. 142.

2159. (7) "**Dispossession**" implies ouster and the evidence

(vii) Implies actual physical ouster.

of ouster is that the person ousting is in actual occupation of the land.¹⁶ Dispossession contemplated by Art. 142 refers

11. *Bisheswar Pratap v. Chandreshwar Prasad*, (1928) 108 I.C. 89=7 Pat. 319=1928 Pat. 260.

12. *Ibid.*, 108 I.C. 89=7 Pat. 319; Followed: *Dwijendra v. Jogesh Chandra*, 79 I.C. 520=39 C.L.J. 40=1924 Cal. 600 (The possession of the Receiver is the possession of Court) and *Sarat Chandra v. Bibhati Debi*, 66 I.C. 433=34 C.L.J. 302.

13. 1923 Cal. 1=36 C.L.J. 35=50 Cal. 49=74 I.C. 630.

14. (1880) 14 Ch.D. 539 (S. 2151, *supra*).

15. (1920) 58 I.C. 844=32 C.L.J. 9.

16. *Bahadur Alikhan v. Secretary of State*, (1921) 61 I.C. 78=2 P.L.T. 133; Relied on *Smith v. Lloyd*, (1854) 9 Ex. 562.

to actual physical dispossession, and does not include mere resistance to attempts to obtain possession.¹⁷ To constitute dispossession there must be positive acts which can be referred only to the intention of obtaining exclusive control, and which are inconsistent with the purpose, to which the owner intends to devote the land.¹⁸ Nothing short of actual physical dispossession will be regarded in law as dispossession,¹⁹ and there must be evidence of positive acts which can be referred only to the intention of acquiring exclusive control.²⁰ A mere adverse decision of the dispute or the mere passing of an adverse order, and a mere entry in the Record of Rights as well as a mere order under S. 145, Criminal Procedure Code, do not necessarily constitute actual physical dispossession.²¹ Discontinuance implies the abandonment of possession followed by the actual possession of another person, and so dispossession implies an ouster from possession followed by the possession of another person. The owner must be considered in point of law as always in possession so long as there is no intrusion.²² There can be no discontinuance of possession by reason of the mere submergence of the land.²³

2160. When a tenant encroaches upon the lands of his landlord, but only in his character *as a tenant*, the landlord is not deprived of his proprietary possession by receipt of rent, but there is adverse possession of a limited right, and to that extent the landlord is dispossessed of actual or *khas* possession of the land.²⁴ While a tenant is bound to treat land which is an encroachment as held by him under his landlord, the landlord is not bound to treat the land as held under a tenancy, and, therefore, may in appropriate circumstances recover it. But, there is a limit to that right; for, if the tenant has been in possession for more than twelve years, he may gain an interest which is bar to landlord's claim for possession.²⁵ If a tenant during his tenancy encroaches upon the land of a third per-

17. *Gya Prosad v. Bakya Mani*, 119 I.C. 289=1929 Cal. 297=56 Cal. 914=33 C.W.N. 277 (A suit for joint possession by a co-sharer does not fall under Art. 142).

18. *Wali Ahmed v. Tota Meah*, (1903) 31 Cal. 397; *Munnalal v. Hamid Ali*, (1924) 79 I.C. 39 (Lah.).

19. *Lutchmeepat Singh v. Sadulla*, (1882) 9 Cal. 698.

20. *Sundara v. Govinda*, (1908) 31 Mad. 528=19 M.L.J. 309.

21. *Chandra Dip Rai v. Ramanand*, (1928) 110 I.C. 623=1928 Pat. 653.

22. *Madan Mohan Singh v. Braj Bihari Lal*, 1921 Pat. 36=57 I.C. 717; Relied on *McDonnell v. McKinty*, (1847) 10 Ir.L.R. 514; *Smith v. Lloyd*, (1854) 23 L.J.Ex. 194; *Agency v. Short*, (1888) 13 A.C. 793.

23. *Ram Pati v. Ramani*, 1930 P.C. 198=126 I.C. 81 (P.C.); also see *Basanta Kumar v. Secretary of State*, 44 Cal. 858 (871) (P.C.).

24. *Ishan v. Ramranjan*, 2 C.L.J. 125.

25. *Gopal Krishna v. Lakhiram*, (1912) 14 I.C. 212.

son, and holds it with his own tenure until the expiration of the tenancy, he is considered to have acted not for his own benefit, but for that of the landlord and the land is deemed to form part of his tenure.²⁶ If it could be distinctly proved that the tenant had made an encroachment adversely to his landlord, an adverse possession for 12 years might give the tenant a title by limitation.²⁷ When a tenant encroaches upon the land of his landlord he does not by such encroachment become the tenant in respect of the land against the will of his landlord.²⁸ If a tenant encroaches on the adjoining waste lands of the landlord, his possession of the lands encroached upon can only commence to be adverse when a title adverse to the landlord is asserted or the landlord becomes aware of the encroachment.²⁹

2161. ILLUSTRATIVE CASES.—

(1) The mere fact that a mine has not been
Non-working of a mine. worked does not amount to dispossession or discontinuance of possession within the meaning of Art. 142 of the Limitation Act.³⁰

(2) The mere fact that the owner living at some distance has allowed his
Non-cultivation of waste lands. lands to lie waste, cannot be regarded as a discontinuance of possession, within Art. 142 of the Limitation Act.³¹ As possession goes with title, the waste land allowed to remain so by the proprietor cannot be declared to be a discontinuance of possession.³² While either kind of possession, actual or constructive remains in the proprietor, time does not begin to run against him; but, the absentee may abandon possession by long silence and inaction.³³

(3) Mere non-residence in a house owing to its being in a state of repair does not constitute discontinuance of possession of the house in the absence of an intention on the owner's part to give up possession.³⁴ Mere delay in re-erecting a house, which has fallen down does not amount to abandonment.³⁵

26. *Nuddyar Chand v. Meajan*, (1884) 10 Cal. 820; Relied on *Goroodass v. Issur Chunder*, 22 W.R. 246; also see *Esubai v. Damodar*, (1891) 16 Bom. 552; and *Muthu Rakko Thevan v. Orr*, (1910) 35 Mad. 618.

27. *Ibid.*, 10 Cal. 820; Followed in *Krishna Gobinda v. Banka Behari*, (1909) 4 I.C. 526=13 C.W.N. 698.

28. *Ibid.*, 10 Cal. 820; Followed in *Prohlad Teor v. Kedarnath*, 25 Cal. 302.

29. *Wali Ahmed v. Tota Meah*, (1903) 31 Cal. 397.

30. *The Bengal Coal Company v. Monoranjan Bagchi*, (1918) 44 I.C. 297=22 C.W.N. 441.

31. *Muhd. Yar v. Ghulam*, 49 P.R. 1884.

32. *Mt. Narain Devi v. Billa*, (1914) 25 I.C. 82=106 P.W.R. 1914=204 P.L.R. 1914 (Art. 144 applied—Onus shifted on defendant to prove when his possession became adverse).

33. *Suraya Jah v. Azim*, 29 P.R. 1910; Relied on 85 P.R. 1892 (F.B.).

34. *Krishnammal v. Pichanna*, 7 M.L.J. 186.

35. *Lachmandas v. Narsingdas*, (1916) 36 I.C. 207 (Punj.).

(4) Where there is no motive for abandonment, nor evidence of intention to abandon, or of adverse possession for the statutory period, mere failure to cultivate land mostly unculturable cannot be held to be a discontinuance of possession.³⁶

(5) A suit for joint possession by a co-sharer does not fall within the purview of Art. 142 of the Limitation Act, merely because there is an allegation in the plaint that the defendants resisted the plaintiff's attempts to obtain separate possession of his share.³⁷

Suit for joint possession by a co-sharer.

(6) A mere denial of title of the plaintiff on the part of a defendant who is a co-sharer of the plaintiff, and whose possession may be regarded as plaintiff's possession, will not amount to plaintiff's dispossession, and the plaintiff's proper remedy will be by a suit for a declaration of title. Where the defendant's possession could be treated in law as the plaintiff's possession, but the defendant subsequently transfers to a party whose possession cannot be any longer treated in law as the possession of the plaintiff, the plaintiff will have to regard himself as dispossessed, and will have to bring his suit within 12 years of the transfer.³⁸

Transfer by a co-sharer to a stranger.

(7) Where immediately upon the death of a person, who was in possession of certain property, the right to possession vests in his heirs, and where subsequently, they fail in their attempt to realise rent, by reason of the successful intervention of another person, it must be taken that they were dispossessed.³⁹

• Interference by third party.

(8) If a proprietor who has been collecting rent from his tenants is prevented from doing so because a rival proprietor has successfully invoked the assistance of a Court of Justice, the injured proprietor is dispossessed from his property just as effectually as if he had been driven out by physical force.⁴⁰

Invoking assistance of Court.

(9) Where the plaintiffs, rightful owners ousted the tenant-defendants, without recourse to law, and the defendants recovered possession in execution of their decrees under S. 9 of the Specific Relief Act, limitation did not run against the plaintiffs until the dispossession of the plaintiffs in execution of decrees.⁴¹

Execution of decree under S. 9, Specific Relief Act.

(10) Where at the regular settlement, the plaintiffs' ancestors, *ex-mafidars* of a plot on which the rent-free tenure had been resumed declined to engage for revenue, and the plot was assessed along with the village in which it was; the village proprietors through the Lam-

Engagement for revenue.

36. *Shahabal Shah v. Ganeshdas*, 53 P.R. 1907; *Ramzan Ali v. Basha-rat Ali*, 105 P.R. 1901.

37. *Gya Prosad v. Bakya Mani Dasi*, 119 I.C. 289=1929 Cal. 297=56 Cal. 914=33 C.W.N. 277.

38. *Bindhyachal v. Ram Gharib*, 1934 All. 993 (1002) (F.B.)—Per Mukerji, J.

39. *Lalu Sahu v. Ghunaria Uradu*, (1909) 2 I.C. 381.

40. *Asiatullah v. Saadat-ullah*, (1915) 26 I.C. 368 (Cal.).

41. *Protap Chandra v. Durga Charan*, (1905) 9 C.W.N. 1061; *Jonab Sheikh v. Surja Kanta*, (1906) 33 Cal. 821; also see *Mamtazudin v. Barkatullah*, 2 C.L.J. 1.

bardars engaging for and obtaining the land, it was held that there had been a dispossession or discontinuance of possession, within the meaning of Art. 142, and that whether any proprietary right had existed or not in the plaintiff's ancestors, the twelve years' limitation ran from the date of the dispossession or discontinuance.⁴²

(11) Adverse possession by the defendant may in some cases imply dispossession of the plaintiff. Where the defendant company had been working in various parts of the mineral field under a village, openly boring pits anywhere in the village they chose, without any challenge from the plaintiff or his predecessors, it was held that the possession had by the company for a period of at least 12 years during their occupation was effective possession not only of the surface of the village, but of the whole mineral field underlying it, and that for such period the plaintiff had been dispossessed of the whole mineral field.⁴³

(12) If a trespasser admits that a portion of the land belongs to the owner when the owner challenges his possession but declines to vacate the land in spite of demands there is open dispossession and the owner must bring his suit within 12 years of dispossession.⁴⁴

(13) But, where the defendant used as a backyard a small piece of land situated between his house and that of the plaintiff, who was his brother, for a period of more than twelve years, but it was only within 12 years of the suit that the defendant began to build on it, it was held that the plaintiff's suit was within time under Art. 142.⁴⁵

2162. STARTING POINT OF LIMITATION.—The starting point for limitation under Art. 142 of the Limitation Act, is the date of dispossession or discontinuance. We have seen in Ss. 2150-2154, *ante*, that **dispossession** implies the coming in of a person and his driving out another from possession; and **discontinuance** implies the going out of the person in possession and his being followed into possession by another.⁴⁶ There is no definition of these words in the Limitation Act, but they have been borrowed from the English Statute of Limitation, and their meaning is taken in accordance with the sense in which they have been taken by the English authorities.⁴⁷ "There can be no discontinuance by the

42. *Mohd. Amanullah Khan v. Badan Singh*, (1889) 17 Cal. 137=23 P.R. 1890=16 I.A. 148 (P.C.).

43. *Nageshwar Bux Roy v. Bengal Coal Company*, 1931 P.C. 18=10 Pat. 407=12 P.L.T. 251=35 C.W.N. 265.

44. *Nutbihari Das v. Bisheshwari Debi*, 1933 Cal. 414=60 Cal. 404=144 I.C. 177.

45. *Chokkalinga v. Muthusami*, (1897) 21 Mad. 53.

46. *Vasudeo Atmaram v. Eknath Balkrishna*, (1910) 35 Bom. 79; *Brojendra Kishore v. Sarojini*, (1915) 20 C.W.N. 481=22 C.L.J. 283=31 I.C. 242; *Charu Chandra v. Nahush Chandra*, (1922) 50 Cal. 49 (63); *Madan Mohan v. Brij Behari*, 1921 Pat. 36=57 I.C. 717; *Krishnamma! v. Pichanna-vayyan*, (1897) 7 M.L.J. 186; *Kuppuswamy v. Kusala Ramaiah*, (1918) 49 I.C. 89 (Mad.); *Periya Jeeyangarswami v. Mahomed Esoof Sahib*, (1924) 21 I.W. 398=87 I.C. 386 (388); *Sheikh Sahnur Ali v. Huttman*, 1 C.W.N. 277; *Basanta Kumar v. Secretary of State*, 44 Cal. 858 (871) (P.C.).

47. *Rains v. Buxton*, (1880) 14 Ch. D. 539; *McDonnell v. McKinty*, (1847) 10 Ir. L. R. 526; and *Smith v. Llyod*, (1854) 9 Ex. 562; also see *Trustees Agency Company v. Short*, 13 A.C. 799 (See Ss. 2151 and 2152, *ante*).

absence of use and enjoyment when the land is not capable of use and enjoyment".⁴⁸ The **constructive possession** continues, until the lawful owner is dispossessed: and if the dispossession ceases before the lapse of statutory period, constructively it revives.⁴⁹ The **nature of possession** or dispossession must have regard to the nature of property, and the purpose for which the owner intended to use it.^{49-a} **Possession is not necessarily the same thing as actual user**, and the nature of the possession to be looked for, and the evidence of its continuance must depend upon the character and condition of the land in dispute.⁵⁰ Thus, during the times lands in dispute were under water, they would be deemed to have been in the possession of the party rightfully in possession of the same before they became submerged,¹ and similarly, in the case of jungle waste, or uncultivated lands, if the plaintiff proves his title, there is a presumption in his favour where having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment.² The **presumption** that possession of the lawful owner, continues as long as the land is incapable of actual possession, may be relied upon by the plaintiff in a suit under Art. 142 of the Limitation Act, if he proves that the land was incapable of actual possession within 12 years before suit.³ Where in a suit for recovery of possession of land, each of the parties to the suit sets up the exercise of some definite acts of ownership over the land, the Court must decide the case upon the evidence adduced by the parties without resorting to any presumption of title.⁴ There is no dispossession unless there is termination of the possession of the rightful owner followed by actual possession of another.⁵ Dispossession implies actual physical ouster.⁶ Discontinuance implies the abandonment of possession followed by the actual possession of another person⁷; and there can be no discontinuance as long as the land is by reason of submergence, or otherwise, not capable of

48. *Leigh v. Jack*, (1879) 5 Ex.D. 264 (274)—Per Cotton, L.J.

49. *Basanta Kumar Roy v. Secretary of State*, 44 Cal. 858 (871) (P.C.).

49-a. See Ss. 2140-2142, ante.

50. See S. 2141, ante.

1. *Ram Narain v. Deoki*, (1922) 20 A.L.J. 756 (759)=1923 All. 75=69 I.C. 912.

2. *Rakhal Chandra v. Durga Das*, (1922) 26 C.W.N. 724 (734)=1922 Cal. 557=67 I.C. 673; (also see S. 2142, ante).

3. *Suresh Chandra Mukerjee v. Shitikanta Banerjee*, 1924 Cal. 855=28 C.W.N. 637 (665)=51 Cal. 669=78 I.C. 679 (also see S. 2140, ante).

4. *Beharilal Nand v. Nrityananda Ghosh*, (1922) 67 I.C. 1005.

5. *Ibid.*, 67 I.C. 1005.

6. See S. 2159, ante; *Bahadur Ali Khan v. Secretary of State*, (1921) 61 I.C. 78=2 P.L.T. 133; *Gya Prosad v. Bakyamani*, 119 I.C. 289=1929 Cal. 297=56 Cal. 914=33 C.W.N. 277; *Wali Ahmed v. Tota Meah*, (1903) 31 Cal. 397.

7. *Madan Mohan Singh v. Brij Beharilal*, 1921 Pat. 36=57 I.C. 717.

enjoyment and user by another person⁸; and there can be no discontinuance without actual exclusion, or possession by another whether adverse or not to be protected.⁹ An owner of land who leaves his village with the intention of abandoning his land, does not lose his proprietary right in it,—the abandonment having taken place within twelve years immediately preceding the institution of the suit and not having been in favour of any specific person. Stogdon, J., explained that the meaning of the word “abandonment” as applied in the Punjab to absentee cases is an intentional quitting of possession by the proprietor, coupled with an intention not to resume it. If a divesture intention does not exist, there is no absolute quitting or relinquishment of possession. It was held that even where a person abandons his land with the intention of never resuming it, he has twelve years under Art. 142 of the Limitation Act within which to change his mind. Frizelle, J., and Bullock, J., agreed with this view, and were of opinion that in the absence of any thing that estops the owner, the mere fact of his having abandoned the land does not bar his claim, as long as his title is not determined within the prescribed period of twelve years for its extinguishment, and he can sue to recover it from whoever may have taken possession of it.¹⁰ A true owner’s possession however obtained must be considered as rightful possession within the meaning of Art. 142 (*see* S. 2149, *ante*): and, even where the true owner forcibly ousts a trespasser, the law will annex his right to the possession and the period during which the true owner is in possession will enure to his benefit and not to that of the trespasser.¹¹ Thus there is no “dispossession” of the true owner during the interval between the ousting of the defendant trespasser, and the latter obtaining a decree under S. 9 of the Specific Relief Act, and the limitation against the rightful owner, under Art. 142 of the Limitation Act will not commence earlier than his dispossession under the decree of Court, in execution proceedings taken out by the defendant.¹² In *Haridas v. Debendro Ram*,¹³ where the plain-

8. *See* Ss. 2140-2142, *ante*; and *Ram Pati v. Ramaya*, 1930 P.C. 198; also *Basant Kumar v. Secretary of State*, 44 Cal. 858 (871) (P.C.).

9. *Leigh v. Jack*, (1879) 5 Ex.D. 264 (272); *Basant Kumar v. Secretary of State*, (1917) 44 Cal. 858 (871) (P.C.); *Vasudeo Atmaram v. Eknath Balkrishna*, (1910) 35 Bom. 79; *Krishnammal v. Pichannarayyan*, 7 M.L.J. 186; *McDonnell v. McKinty*, (1847) 10 Ir.L.R. 514.

10. *Sain Ditta v. Ghulaman*, 85 P.R. 1892 (F.B.).

11. *Lillu v. Annaji*, (1881) 5 Bom. 387 (391); *Girish Chandra Pal v. Baikuntha Nath*, 81 I.C. 279 (Cal.).

12. *See* S. 2149, *ante*; *Protap v. Durga Charan*, (1905) 9 C.W.N. 1061; also *see* *Mamtazuddin v. Barkatullah*, (1905) 2 C.L.J. 1; *Jonab v. Surja Kanta*, (1906) 33 Cal. 821; *Haziruddin v. Deoki Nandan*, (1907) 6 C.L.J. 472.

13. (1918) 45 I.C. 548 (Cal.).

tiffs having been dispossessed by the defendants of certain lands belonging to them succeeded in ousting the latter therefrom and retained possession until they were evicted under a decree in a suit brought by the defendants under S. 9 of the Specific Relief Act, it was held that time began to run against the plaintiffs from the moment they were evicted in execution of the decree under the Specific Relief Act, and not before.¹⁴

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
143.	Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	Twelve years.	When the forfeiture is incurred or the condition is broken.

SYNOPSIS.

2163. Corresponding provisions.

2164. Scope and application.

(i) Not limited to parties committing breach.

(ii) Relationship of landlord and tenant.

(iii) Relief by possession, in respect of forfeiture or breach of condition.

2165-2166. Starting point of limitation.

2165. Forfeiture.

2166. Breach of condition.

2167. Special or local laws.

NOTES.

2163. CORRESPONDING PROVISIONS.—This article is same as Art. 143 of Sch. II, Act XV of 1877, and corresponds to Art. 144, Sch. II of Act IX of 1871. Under Act XIV of 1859, the provision in S. 1, cl. 12, applied to suits of this nature.

The analogous provision in English law is to be found in Real Property Limitation Act, 1833,—3 and 4 Will. IV, c. 72, Ss. 3 and 4.

2164. SCOPE AND APPLICATION.—This article relates to rights acquired by forfeiture or breach of condition, and based thereon. If the suit is based on any other ground, this article shall have no application, for example, in cases coming under S. 111 (g) of the Transfer of Property Act, where the plaintiff becomes entitled, not by reason of forfeiture or breach of condition, but by reason of the determination of the tenancy by the Act, the present article shall not apply (*see* Art. 139). In *Zamorin of Calicut v. Venkatagiri*,¹⁵ Phillips, J., had taken the view that Art. 143 of the Limitation Act only applies to suits to enforce reliefs

14. *Narayanan v. Kannammal*, (1904) 28 Mad. 338; *Rajagopala v. Somasundara*, (1906) 30 Mad. 316; *Kalia Perumal v. Chidambaram*, (1915) 29 I.C. 10 (Mad.).

15. (1926) 92 I.C. 245=23 L.W. 58 (Reversed in 58 M.L.J. 89=1930 Mad. 430).

claimable by reason of forfeiture or of breach of condition under a contract and can only apply to suits brought against parties who have incurred that forfeiture or committed the breach. Where, however, a person holding under a lease containing conditions of forfeiture has assigned his right to another person, a suit by the lessor against the assignee for recovery of property by reason of forfeiture or breach of conditions in the lease is not governed by Art. 143, and the proper article applicable is Art. 144 or 142, as the case may be. This view has been reversed on appeal, by Beasley, C.J. and Cornish, J.¹⁶ There are Madras decisions on Art. 143 of the Limitation Act, to which the alienee was a party and against whom relief was claimed.¹⁷ •The **Calcutta High Court**

(i) Not limited to parties committing the breach.

has applied Art. 143 in *Motilal Pal Choudhry v. Chandra Kumar Sen*,¹⁸ where a lease provided that the lessee was to enjoy the land from generation to generation for purposes of residence without any power of alienation, and that in the event of such alienation the lessor would be entitled to *khas* possession. In this case the lessee sold the land, and the lessor had sued to recover possession making the alienees parties to the suit. In the Madras **Letters Patent appeal**,¹⁹ it has been observed

“that the general scheme of the Act with regard to Arts. 140 to 144 does not place any limitation as to parties who have committed the breach of the condition which has entailed forfeiture but also includes those who are in possession by reason of the alienation which may entail forfeiture”.

However, the plaintiff's claim in the trial Court was based distinctly upon a forfeiture by reason of alienation, and the article applicable was Art. 143, the period of limitation commencing to run from the date of the alienation.

In *Bhairab Chandra Nasker v. Kadam Bewa*,²⁰ where the plaintiff sued the defendant for arrears of the rent, and on the latter's denial of relationship of landlord and tenant, the plaintiff's suit was dismissed, and a suit for recovery of possession

(ii) Relationship of landlord and tenant.

16. *Ayyaswami Pathar v. Manavikrama Zamorin*, 1930 Mad. 430 (2)=58 M.L.J. 89=30 M.L.W. 960=124 I.C. 273 (L.P.).

17. *Madhavan v. Athi Nangiyar*, (1892) 15 Mad. 123=2 M.L.J. 81; *Zamorin of Calicut v. Unikat Karnavan*, (1920) 38 M.L.J. 275=55 I.C. 380=27 M.L.T. 111.

18. (1920) 24 C.W.N. 1064=60 I.C. 312; Relied on *Gooli Sheikh v. Mathewson*, (1907) 11 C.W.N. 661 (Limitation commenced from the date when the forfeiture was incurred).

19. 1930 Mad. 430 (2)=58 M.L.J. 89=124 I.C. 273=30 M.L.W. 960 (L.P.).

20. (1914) 22 I.C. 28 (Cal.) (Art. 144 applied).

was brought after twelve years, it was held that Art. 143 of the Limitation Act did not apply because the relationship of landlord and tenant did not exist between the parties. This proposition has been adopted by another **Calcutta Division Bench** in *Abinash Chandra Ghosh v. Narhari Methar*,²¹ where it is observed that Art. 143 has no application where "the relationship of landlord and tenant does not exist and has not existed between the parties". But, in both the above cases, it would appear that the real ground for non-application of Art. 143 of the Limitation Act should have been that the relationship of landlord and tenant never having existed between the parties, there could be **no question of forfeiture** of a tenancy, and a suit under Art. 143, can only be based on a forfeiture or on a breach of the condition. Dr. Pal, in his work on Limitation, criticises both the above rulings as having wrongly limited the application of Art. 143 to existence of a relationship of landlord and tenant, observing that

"the language used in the article also does not warrant any such limited application".²²

In *Bibi Sohodra v. Rai Jang Bahadur*,²³ where a Hindu widow, under an arrangement with her deceased husband's cousin, was in possession for life of a share of ancestral property of her husband's family, in which he, jointly with the cousin, had held a share in his lifetime; and his share, which she had no power to alienate by the terms of arrangement contained in the *solehnama*, so as to prevent the cousin's succeeding after her death, was sold by her as if she had held an absolute estate, and a suit was brought by the cousin's heirs to recover the property purchased from the widow, more than twelve years after the sale, but less than twelve years after the widow's death, it was held that the alienation was good for the widow's lifetime, and that there was no condition against such an alienation; and, if there had been, there was neither any rule of law, nor any thing in the words used in the *solehnama*, attaching forfeiture to the breach of such a condition. Accordingly, that Art. 144 (now Art. 143) did not apply and the suit was not barred by limitation. Thus Art. 143 is not necessarily restricted to landlord and tenants. And in a recent ruling,²⁴ a view has been held to this effect, differing from *Bhairab Chandra v. Kadam*

21. 1930 Cal. 165=50 C.L.J. 260=57 Cal. 289=123 I.C. 144 (*Jack and Mitter, JJ.*).

22. See S. 3 of Statutes 3 and 4, Will IV, C. 27 (Which applies to every forfeiture or breach of condition, and not merely to case between landlord and tenant).

23. (1881) 8 Cal. 224 (P.C.) (*Onus* on plaintiff to show title to possession because of the breach of condition or forfeiture by the defendant).

24. *Jadunath Guha Roy v. Kasiswar*, 1935 Cal. 779 (N.F.); (1913) 22 I.C. 28=18 C.L.J. 553; and (1930) 123 I.C. 444=1930 Cal. 165=57 Cal. 289=50 C.L.J. 260.

*Bewa*²⁵ and *Abinash Chandra Ghosh v. Narhari Methar*.²⁶ It has been observed that Art. 143 is in general terms. By its terms it applies to all suits for possession, when the plaintiff becomes entitled to possession by reason of any forfeiture or breach of condition. . . . The forfeiture of an estate owned by a Hindu widow on re-marriage is an instance.²⁷ . . . It has also been applied to cases coming under the provisions of S. 119, Transfer of Property Act, on the footing that by that section a condition is imposed by law to exchanges of property for mutual return if one party is deprived of what he got by exchange.²⁸ . . . It has also been applied to a case where a purchaser agreed to put the vendor in possession of a part of the property purchased on his failure to pay the vendor certain annual fees.²⁹ The Nagpur Judicial Commissioner's Court has applied Arts. 141, 143 to a suit by a reversioner to set aside an alienation by the widow of her deceased husband's property brought more than twelve years after her re-marriage.³⁰

In a suit brought by a landlord against a tenant where the primary relief sought was a mandatory injunction directing the defendant to fill up a tank excavated by him in contravention of the terms of the tenancy, and to pay damages to the plaintiff for his wrongful act, and where the **secondary relief** sought was ejectment, it was held that Art. 32, and not Art. 143 applied to the case.³¹ Art. 143 is more general in its terms than Art. 32, and only applies to a case where the plaintiff is entitled to **possession by reason of forfeiture or breach of condition**, that is, a condition of the tenancy; but in the above case, the suit was framed in tort, not on breach of any contract, and the plaintiff would only be entitled to possession upon non-compliance by the defendant with the order of the Court as to filling up the tank and making compensation. In *Rajagopalan v. Somasundara*,³² Art. 143 of the Limitation Act was assumed to apply to a suit for possession on a breach

25. (1914) 22 I.C. 28 (Cal.).

26. 57 Cal. 289=123 I.C. 144=1930 Cal. 165.

27. *Tillottoma Dasi v. Madhu Sudan*, 1928 Cal. 714=117 I.C. 703.

28. *Raja Gopalan v. Kasivasi Somasundram*, (1907) 30 Mad. 316=17 M.L.J. 149; and *Sreenivasa Aiyangar v. Johusa Rowther*, 1920 Mad. 812=51 I.C. 939=42 Mad. 690.

29. *Bhojraj v. Gulshan Ali*, (1882) 4 All. 493=1882 A.W.N. 125.

30. *Nathu v. Naibabu*, (1915) 29 I.C. 612 (Nag.); also see and cf. 117 I.C. 703=1928 Cal. 714, *supra* (A case of alleged forfeiture by re-marriage in which it was not held definitely that Art. 143 was applicable).

31. *Sharoop Das Mondal v. Joggesur Roy*, (1899) 26 Cal. 564=3 C.W.N. 464 (F.B.); Approved *Soman Gope v. Rajhubir Ojha*, (1896) 24 Cal. 160.

32. (1906) 30 Mad. 316=17 M.L.J. 149; Referred to in *Secretary of State v. Zamindarani of Vegayammampeta*, (1921) 59 I.C. 98=12 L.W. 334.

of consideration of exchange of certain lands, which constituted the

Suit based on covenant of exchange. plaintiff's cause of action under S. 119 of the Transfer of Property Act. Similarly, where a deed of exchange executed between the plaintiff's father and some of the defendants contained a covenant, which only limited the option provided by S. 119 of the Transfer of Property Act, and was otherwise of the same nature as one that would be implied under that section, and plaintiff being dispossessed of the lands given by the defendants, sued to recover the lands given by his father under the exchange, it was held that Art. 143, and not Art. 113 of the Limitation Act applied to the case.³³ A suit by a lessor for ejectment on account of a breach of a condition in the lease falls under Art. 143 and not under Art. 139 of Limitation Act.³⁴ A suit by mortgagor for ejectment (on mortgagee's default to pay an annuity), was held to be governed by Art. 143.³⁵

2165-66. STARTING POINT OF LIMITATION.—

2165. Where lands in Malabar were demised on *anubhavam* tenure, and some of them were alienated by the tenant, but the landlord accepted rent, and more than twelve years after the alienation, the landlord sued to eject the tenant on the ground that the tenure was thereby forfeited, it was held that if the rights under the demise were forfeited by the alienations made by the defendants, the suit, so far as it was based on forfeiture was barred by limitation.³⁶ However, there is no custom in force in South Malabar entitling a landlord, in cases of *Karamkari* and *Adimayavana* tenures, to resume the holding on alienation thereof by the grantee³⁷ and forfeiture may be waived by acceptance of rent, with knowledge of facts entitling forfeiture.³⁸ The question whether *Adimayavana* tenure is inalienable by custom in South Malabar and the *Jenmi* is entitled to forfeit it on alienation was discussed in *Ayyaswami Pattar's case*.³⁹

33. *Sreenivasa Aiyangar v. Johusa Rowther*, (1919) 42 Mad. 690=51 I.C. 939.

34. *Goohi v. Mathewson*, 11 C.W.N. 661.

35. *Sadhu v. Mt. Bhagwanaji*, 7 All. H. C. 53 (*Held*, that although the defendant, a usufructuary mortgagee for a term of years had incurred a forfeiture of his rights by reason of his failure in the very first year, the stipulated annuity, each successive failure of payment gave to the mortgagor a new right to eject the mortgagee).

36. *Madavan v. Atti Nangiyar*, (1891) 15 Mad. 123 (124); Relied in *Ayyaswami v. Zamorin*, 1930 Mad. 430=124 I.C. 273.

37. *Zamorin of Calicut v. Unikat Karnavan*, (1920) 55 I.C. 380=38 M. L.J. 275=1922 Mad. 290.

38. *Ibid.*, 55 I.C. 380=1922 Mad. 290.

39. *Ayyaswami Pattar v. Zamorin of Calicut*, (1930) 124 I.C. 273=1930 Mad. 430 (433).

Where a clause in the village *wajib-ul-arz* ran as follows:—

Abandonment of cultivation. “If a resident of this village shall leave his residence (*abadi*) and go to and settle in another village (*abad hoga*) he shall not be entitled to a cultivation (*kasht*)

and possession”: it was held that assuming that the clause entitled the proprietors to resume possession of the land of a hereditary tenant, ceasing to reside in that village and settling in another, the limitation applicable in such a case was under Art. 143 of the Limitation Act, the period being twelve years from the time when the forfeiture was incurred for the condition was broken.⁴⁰ It is

Waiver of forfeiture. quite open to a landlord to condone the forfeiture of his tenant's right caused by the latter's denial of his proprietary title, and afterwards to bring a suit for possession within twelve years from the time, when a separate and entirely distinct act occasioning forfeiture occurred.⁴¹ The possession of a person holding under a permanent tenancy becomes adverse from the day when he denies his landlord's title, and a suit for possession on the basis of forfeiture by the tenant is governed by Art. 143 of the Limitation Act.⁴² Where in contravention of the terms of a lease, the lessee alienates the property held by him, a suit by the lessor to recover possession of the property must, under Art. 143 of Schedule to the Limitation Act, be brought within twelve years from the date of the alienation, and not from the date on which the lessee surrenders possession to his transferee.⁴³

2166. However, a lease which is subject to the provisions of S. 111 (*g*) of the Transfer of Property Act, is not determined by forfeiture immediately on the breach of a covenant contained therein; the breach must be followed by some overt act on the part of the lessor, the mere institution of a suit for ejectment is not a requisite act, because the forfeiture must be completed and the lease determined before the commencement of the action.⁴⁴ Where a lease did not specify expressly for ejectment of a tenant on failure to clear a defined area, it was held that assuming that the condition carried a penalty for its non-fulfilment which was not to be presumed or

40. *Dhian Singh v. Mehan Singh*, 180 P.R. 1883.

41. *Locha Ram v. Jindwadda Khan*, (1916) 35 I.C. 235=56 P.W.R. 1916=141 P.L.R. 1916 (*Also see and cf.* S. 4 of Statutes 3 and 4, Will IV, c. 27, which was enacted to give effect to the rule that no one is obliged to take advantage of a forfeiture).

42. *Locha Ram v. Jindwadda Khan*, (1916) 36 I.C. 565=76 P.L.R. 1917.

43. *Moti Lal Pal Choudhry v. Chandra Coomar Sen*, (1921) 60 I.C. 312=24 C.W.N. 1064.

44. *Ibid.*, 60 I.C. 312 (314, 315).

inferred when the deed itself was silent on the point, that the cause of action arose when the defendant did not clear the area in question, and the suit had to be brought within twelve years from that date.⁴⁵ A suit by a lessor for ejectment on account of a breach of condition of lease to settle rent, in the 7th year of reclamation, after holding the lands rent-free for six years, is governed by Art. 143, and not by Art. 139, but even if the suit is barred by time, the defendant is liable to pay rent, if the tenant in the written statement has not denied his liability to pay rent.⁴⁶

"A tenancy can be forfeited on the breach of a covenant in a lease providing in such cases for re-entry, or where the title of the landlord is repudiated; but other interest owned by persons other than tenants can be forfeited by rules of law, or by reason of breach of express conditions, and a person may also be entitled to a possession on certain conditions being not performed."⁴⁷

2167. Article I, Sch. III of the Bengal Tenancy Act (VIII of 1885) prescribes a period of one year for the landlord's suit for ejectment against a tenure-holder or a raiyat for the breach of a condition expressly providing that ejectment shall be the penalty for such a breach. Ejectment suits against trespassers will, however, not come under this article.⁴⁸ In order to be governed by a provision in special or local law, the case must come strictly within that provision.⁴⁹

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
144.	For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Twelve years.	When the possession of the defendant becomes adverse to the plaintiff.

SYNOPSIS.

TITLE I: HISTORICAL.

2168. Corresponding provisions.

2169. Analogous law—[Real Property Limitation Act].

TITLE II: SCOPE AND APPLICATION.

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46. *Goohi v. Mathewson*, 11 C.W.N. 661 (663).

47. *Jadunath v. Kasiwar*, 1935 Cal. 779 (782); N.F. 22 I.C. 28; 123 I.C. 444.

48. *Dwarikanath Roy v. Mathura Nath Roy*, 21 C.W.N. 117=34 I.C. 833.

49. *Saman Gope v. Raghubir*, (1896) 24 Cal. 160=1 C.W.N. 223; *Krishandas v. Mohendra Chandra*, (1921) 25 C.W.N. 930.

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2171. "Immoveable property"; or "any interest therein".

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2173-2185. **Adverse possession.**

2173. Possession, meaning of—Trespass and Permissive possession.

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2204. Co-sharers—Possession after partition—Effect of.

2205. Adverse possession of alienee from co-sharer.

2206. Co-heirs—Adverse title between.

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2210-2220. Mortgagor and mortgagee—Adverse possession between.

2210. **General rule.**

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2220. *Illustrations.*

2221. Exceptions, to general rule.

2222-2231. **Adverse possession between landlord and tenant.**

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2223. Estoppel of tenant.

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2231. Adverse possession by third party against landlord.

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2232. (1) Possession adverse to mortgagee: not necessarily adverse to mortgagor.

2233. (2) Equity of redemption whether capable of adverse possession.

2234. (3) Adverse possession of stranger against and simple mortgagor.

2235-38. **Adverse possession of debutter property.**

2235. Adverse possession by trustee.

2236. Adverse possession by alienee.

2237. Distinction between manager and beneficial owner.

2238. Starting point of limitation.

2239. Effect of symbolical possession.

2240-2250. *Onus probandi*.

NOTES.

2168-2169: TITLE I: HISTORICAL.

2168. CORRESPONDING PROVISION.—This article is same as Art. 144 of Sch. II of Act XV of 1877, and corresponds to Art. 145 of Sch. II of Act IX of 1871. Under the Act of 1871, the third column contained the words "*or of some person through whom he claims*", after the word "defendant", which, however, were dropped out of Art. 144, Sch. II of Act XV of 1877, in view of the definitions of the words "plaintiff", and "defendant", which rendered the retention of these words in the third column of the article a superfluity. *See* S. 3 of Act XV of 1877 and S. 2 (4) and (8) of the present Act.

Under Act XIV of 1859, suits of this character were dealt with by the general provision in S. 1, Cl. (12) of that Act, under which plaintiff had a period of 12 years from the date when the cause of action arose.

2169. ANALOGOUS LAW.—Prior to 1833, under the Statute of Limitation,^{49-a} the right of entry upon immoveable property accrued as soon as a possession inconsistent with the title of the true owner commenced, that is, as soon as adverse possession commenced. Possession was not considered adverse under certain circumstances and rules of law in this respect were abolished by the Real Property (Limitation) Act, 1833, 3 and 4 Will. IV, c. 27 which gave specific rules for ascertaining the date of accrual almost for all the cases covered by the statute.

Under English Law, after the enforcement of the Real Property Limitation Act, 1833, the old doctrine of adverse possession stands abolished, and its Ss. 3 (4), 7, and 8, enable a tenant to hold adversely to his landlord after the expiry of the tenancy; and under S. 12, possession of one of the several co-owners is no longer to be deemed to be the possession of the rest. By S. 13 of Real Property Limitation Act, the exception was abolished under

49-a. (1623) 21 Jac. 1, c. 16.

which the possession of the younger brother was taken to be the possession of the heir.

Although the old doctrine of **adverse possession** has been abolished,⁵⁰ still a possession in favour of which the statute is running is spoken of as adverse. Now in English Law, possession is adverse whenever it is held without title, or is incompatible with the claimant's title.¹ The statute applies to all cases of persons out of possession, entitled to recover possession by process of law, where there has been adverse possession in whose favour the statute runs from the date of the first accrual of the cause of action. The extinguishment of the title of the person dispossessed creates a new title of the adverse possessor but there must be some person² in *bona fide* possession or otherwise,³ in whose favour the statute can run. The statute ceases to run if there is either re-entry by the true owner, or abandonment of possession by the adverse possessor.⁴

2170-2172: TITLE II: SCOPE AND APPLICATION.

2170. SCOPE OF ART. 144.—(1) Articles 134 to 143, and Art. 146, are *special* provisions in Sch. I of the Limitation Act referring to suits for possession of immovable property. This Art. 144, is the *general* residuary article for suits for the *possession* of immovable property as is indicated by the words "*not hereby otherwise specially provided for*".⁵ This article does not apply where the suit is otherwise specially provided for by some other article referring to possessory suits in Sch. I of the Limitation Act.⁶ Art. 144, as to adverse possession only applies when there is no other article which specially provides for the case.⁷ Like Art. 142, it is restricted to suits for possession based on plaintiff's title,⁸ but unlike Art. 142, it does not apply where the plaintiff alleges that he has been in

50. *Nepean v. Doe*, (1837) 2 M. and W. 911; also see *Culley v. Tayler*, (1840) 11 A. and E. 1015.

1. *Des Barres v. Shey*, (1873) 29 L.T. 592 (P.C.); cited in Dr. Paul's Limitation Act, p. 926.

2. *Smith v. Lloyd*, (1854) 9 Ex. 562.

3. *Vare v. Vare*, (1873) 8 Ch. 397.

4. Lightwood, p. 16; Dr. Pal's Limitation Act, p. 927.

5. *Sesha Naidu v. Periasami*, (1921) 44 Mad. 951; *Ram Surat v. Badri Narain*, (1927) 102 I.C. 814 (All.).

6. *Bhagwant Singh v. Bholi Singh*, (1913) 35 All. 432 s.c. 15 I.C. 10; *Ranchordas v. Parbatibai*, (1899) 23 Bom. 725 (P.C.); *Subbi v. Ramkrishna*, (1917) 42 Bom. 69 (78); *Abbas Dhali v. Massabdi*, (1914) 24 I.C. 216 (Cal.); *Munia Goundan v. Ramasami Chetti*, (1918) 41 Mad. 650; *Ramaswamy v. Vanamalini*, (1915) 26 I.C. 873 (Mad.); *Rajai Tirumal v. Pandla Muthial*, (1910) 35 Mad. 114 (119).

7. *Mahammad Amanulla v. Badan Singh*, (1889) 17 Cal. 137 (P.C.).

8. *Achhar Singh v. Badhawa Singh*, 124 P.R. 1912.

possession and has been dispossessed or discontinued possession.⁹ It only applies where the case put forward is a title in the plaintiff as owner and defendant is alleged to be in wrongful possession of the same as trespasser.¹⁰ If on the allegations made in the plaint the suit falls under Art. 142, there is no justification for taking it out of that article and for applying Art. 144 on grounds which are not to be found mentioned in Art. 142 itself.¹¹ This Art. 144 is restricted to claims which are in terms and substance claims to possession not made necessary by reason of dispossession or discontinuance of possession.¹² Where in a suit for possession the plaint does not allege that the plaintiff was dispossessed, and there is assertion of title by plaintiff, met by defendant's denial of plaintiff's title, or at any rate loss of title by adverse possession, the suit is governed by Art. 144, Limitation Act.¹³ Where the plaintiff bases his claim on his title without regard to his possession or dispossession, the case falls under Art. 144. This article is applicable only to a possessory suit by the owner of the properties claimed against a person holding adversely to him without title.¹⁴

(2) It applies to suits for possession, not invariably mean-

ing a suit for actual physical possession. It only means a suit for such possession as the property is capable of.¹⁵ Where the property in suit is from its nature such that physical possession in the ordinary sense would not be possible and the plaintiff was not at

9. See notes under Art. 142, ante; also see *Subappa v. Venkappa*, (1915) 28 I.C. 24 (Bom.); *Muthia Chetty v. Seena Thevar*, (1920) 56 I.C. 951=12 Bur.L.T. 234; *Rajai Tirumal v. Pandla*, (1910) 35 Mad. 114; *Singnaji v. Gambhirji*, (1925) 87 I.C. 1023=1925 Nag. 370; *Sitaram v. Rajaram*, 48 I.C. 230 (Nag.); *Mahomed Mahmud v. Mahomed Afaq*, 1934 Oudh 21=147 I.C. 805=11 O.W.N. 104; *Suraj Bali v. Mahadeo*, 7 Luck. 250=137 I.C. 678=1932 Oudh 46; *Mahomed Azim Khan v. Saadat Ali*, 1931 Oudh 177=8 O.W.N. 349.

10. *Vasudeo Atmaram v. Eknath Balkrishna*, (1910) 35 Bom. 79; *Ganpatrao v. Vithobai*, 1934 Nag. 36=148 I.C. 62=30 N.L.R. 284; *Zahida Begum v. Mumtaz Ali Khan*, 1931 Oudh 382=8 O.W.N. 921=134 I.C. 599; *Mulla Ahmad v. Fazl Ahmad*, 1935 Pesh. 133=158 I.C. 968.

11. *Bindhyachal v. Ramgharib*, 1934 All. 993=152 I.C. 1=1934 A.L.J. 973 (F.B.).

12. *Vasudeo Atmaram v. Eknath*, (1910) 35 Bom. 79=12 Bom.L.R. 956; *Bibi Sahodra v. Raj Jang*, 8 Cal. 224 (225) (P.C.); *Peria Jeeyangar Swami v. Esoof Sahib*, 1925 Mad. 834; *Kuppuswami v. Chockalinga*, 1926 Mad. 181=49 M.L.J. 788.

13. *Dharichna Kuer v. Keshava Prasad*, (1926) 97 I.C. 135 (Pat.); *Nawazbai v. Ghulam Muhiuddin*, (1926) 98 I.C. 878=1927 Lah. 70; *Faqir Mohd. v. Ramzan*, (1927) 99 I.C. 642=1927 Lah. 171; *Mayyikara v. Kalandiakath*, (1927) 99 I.C. 971=38 M.L.T. 137.

14. *Ram Chhatra v. Mohanbikram Singh*, 58 I.A. 279=10 Pat. 851=133 I.C. 705=1931 P.C. 196 (P.C.).

15. *Narayan Balwant v. Dattatraya*, (1932) 34 Bom.L.R. 1469.

any time in actual possession thereof, in such cases Art. 144 applies, as the plaintiff has only to prove his title, and the defendant who is in possession will have to give affirmative evidence of his possession for a period of twelve years.¹⁶

(3) **It does not apply** to suits for ejectment from land recorded as thoroughfare or *shamilat* in which the plaintiff has no exclusive interest as owner or person entitled to possession.¹⁷ **Where the plaintiff is already in possession**, and the suit is not "*for possession*" of immovable property, but plaintiff asks for a declaration of his right to possession, the suit does not fall under this article, but under Art. 120 of the Limitation Act.¹⁸ A suit for confirmation of possession and correction of revenue records,¹⁹ or a suit for mere declaration that plaintiff is entitled to possession at some future time,²⁰ is not within the scope of this article.

(4) **Art. 144 contemplates that defendant's possession lawful in the beginning has afterwards become adverse.**²¹ Where in a suit by some of the proprietary body for ejectment of the defendants as tenants, the defendants denied the title of the plaintiffs, and claimed the land as theirs, Art. 144, and not Art. 142, would apply.²² If in a suit for possession the plaintiff claims title to the property alleging that it is being held by the defendant as his tenants, and it is found that the title of the plaintiff is established but that the tenancy is not proved, the proper article is Art. 144, Limitation Act.²³ A suit for possession on the allegation of tenancy, even if the tenancy is not proved is, in the absence of an allegation by the plaintiff or proof that he was ever dispossessed, or that he discontinued possession, governed by Art. 144.²⁴ In a suit for possession on the basis of tenancy, the question of title is of paramount importance. If the title vests in the plaintiff, he would still be entitled to succeed

16. *Kuar Sen v. Gulab*, 1935 Lah. 507=157 I.C. 399.

17. *Achhar Singh v. Badhawa Singh*, 124 P.R. 1912.

18. *Francis Legge v. Rambaran Singh*, (1897) 20 All. 35 (F.B.); Relied on *Moru v. Gopal*, 2 Bom. 120; and *Bhikaji v. Pandu*, 19 Bom. 43; *Mahomed Riasat Ali v. Hasin Banu*, 21 Cal. 157 (P.C.).

19. *Rajaninath v. Manaram Mandal*, (1919) 53 I.C. 968=23 C.W. N. 883.

20. *Krishnajee v. Amaji*, 54 Bom. 4=124 I.C. 773=1930 Bom. 61 (63).

21. *Ittappan v. Manavikrama*, (1897) 21 Mad. 153.

22. *Ali Akbar v. Rakha*, (1933) 144 I.C. 72 (Lah.).

23. *Sulaiman Rozether v. Darwood Khan*, 1935 Mad. 754=156 I.C. 581=1935 M.W.N. 740=42 L.W. 593; *Santa Singh v. Narain Singh*, 91 I.C. 1047=1927 Lah. 32; also see *Ahmad Sharif v. Umrao Beg*, (1926) 94 I.C. 779=1926 Oudh 353.

24. *Kaushi Ram v. Taja*, (1927) 100 I.C. 477=1927 Lah. 236.

even though he has failed to establish the alleged tenancy or license, unless the defendant is able to establish his adverse possession under Art. 144, Limitation Act.²⁵

(5) If defendants came into possession of the land really as trespassers, though professing to have come into possession as permanent lessees, no doubt Art. 144 would be applicable.²⁶ A suit by two joint-tenants against a third joint-tenant for their shares in the joint property, which the third joint tenant by his action in the mutation proceedings had shown that he claimed as his exclusive property, is governed by Art. 144.²⁷ This article applies to a suit for partition between tenants-in-common although a tenant has acquired his rights by purchase at a Court-auction.²⁸ Where a Mahomedan dies intestate, his estate vests in his heirs as tenants-in-common, and no one is charged by law with its distribution. Consequently, if a suit is brought by one of the heirs to recover his share, Art. 123 does not apply, and Art. 144 will apply in the case of immoveable property.²⁹

2170-A. ILLUSTRATIVE CASES.—

(1) A suit for recovery of possession of immoveable property after proceedings under Chap. VII, Presidency Small Causes Courts Act have failed is not a suit falling under Art. 11-A, but under Art. 144, Limitation Act.³⁰

(2) Where the plaintiff in a suit for possession of property sold in execution of a decree is the original owner of the property, and was not a party to the decree under which the sale took place, nor a representative of any of the parties, he is entitled to ignore the sale altogether, and his suit is governed by Art. 144, and not by Art. 12 of the Limitation Act.³¹ Similarly, where in execution of an order for payment of Court-fees certain immoveable property was sold as the property of the persons liable under such order, which in fact belonged to a third person who had no notice of the sale, it was held that the true owner of the property so sold was competent to treat the sale as a nullity, and to bring his suit for recovery of possession at any time within 12 years from the date when he lost possession.³²

25. *Hiralal v. Lalji*, 117 I.C. 384 (Lah.); *Nawar Bai v. Ghulam Mohi-ud-din*, 98 I.C. 878=1927 Lah. 70; also see *Secretary of State v. Chellikani*, 35 I.C. 902=39 Mad. 617 (631)=43 I.A. 192 (P.C.); and *Jaichand v. Girwar Singh*, (1919) 41 All. 669.

26. *Seshamma v. Chickaya*, (1902) 25 Mad. 507 (511).

27. *Mt. Jagrani Misrani v. Sheo Dulari*, (1921) 64 I.C. 462 (All.).

28. *Hassan Ammat Bibi v. Ismail Moiddeen*, (1915) 29 I.C. 976 (Mad.).

29. *Ghulam Mahomed v. Shaikh Ghulam Hussain*, 59 I.A. 74=136 I.C. 454=54 All. 93=1932 P.C. 81=62 M.L.J. 371 (P.C.); *Ramchandra Balwant v. Balaji Ganesh*, (1920) 45 Bom. 570; *Janki v. Rustam*, (1926) 97 I.C. 139; *Ramzan v. Madhoovan*, (1926) 98 I.C. 869 (Mad.).

30. *Hyderali Sahib v. Amiruddin Sahib*, 1929 Mad. 69=56 M.L.J. 199.

31. *Azim Khan v. Karim*, (1923) 71 I.C. 822 (Lah.); Followed *Saifuddin v. Hansraj*, 11 I.C. 76=15 P.R. 1912=203 P.L.R. 1911.

32. *Jowala Sahai v. Masia Khan*, (1904) 26 All. 346.

(3) A suit for recovery of possession of land based on an award would fall under Art. 144, Limitation Act.³³ It is not a suit for specific performance of a contract within Art. 113.³⁴ A suit to recover possession of land leased under an *arthamulgeni* lease is not based on the *contract* to deliver possession contained in the lease-deed, but on the completed *title* to possession under the lease, and the period of limitation applicable to such a suit is that provided in Art. 144, Limitation Act.³⁵ Where under an award of arbitrators the defendant had a possessory charge on a certain property for a specific sum, the plaintiff had 12 years from the date of the award to sue for its recovery.³⁶ Where a vendor delivers possession of only a part of the property sold, and vendee sues for recovery of possession of the remainder, the suit is governed by Art. 144 and not Art. 113.³⁷

(4) A suit by a widow for recovering her husband's properties from defendant in possession as alleged adopted son is not governed by Art. 116, but by Art. 144, Limitation Act.³⁸

(5) A suit by an adopted son, during the lifetime of a widow, to recover possession of immoveable property alienated by the widow, for a non-necessary purpose, falls within Art. 144 of the Limitation Act³⁹; and time does not run against the adopted son prior to the date of his adoption,⁴⁰ as the possession of the defendant does not become adverse to the plaintiff until the plaintiff became entitled to possession of the property upon his adoption.⁴¹ An adopted son is entitled under Art. 144, Limitation Act, to sue for possession of immoveable property within 12 years from the date of his adoption, inasmuch as like a reversioner his right is not lost to the property by adverse possession against his mother.⁴² A suit by the adopted son of the junior widow for possession of property against the adopted son of the senior widow, contesting the validity of the latter's adoption, falls under Art. 144, and not under Art. 119, Limitation Act.⁴³ Likewise, a suit for possession by an adopted son, against defendant who is in wrongful possession of the properties left by the plaintiff's adoptive father falls under Art. 144 and not Art. 119, even where plaintiff's adoption is denied.⁴⁴

(6) Where a non-proprietor made a gift of the house occupied by him in favour of his sister, a suit for his ejectment brought by some of the proprietors, being in essence one for possession was held governed by Art. 144, and not Art. 120.⁴⁵

(7) A suit by a Muhammadan co-heir against another co-heir for possession of his legal share is governed by Art. 144, and not by Art. 123 of the

33. *Bhojattari v. Beharilal*, 33 Cal. 881=4 C.L.J. 162; citing 23 Mad. 593; 23 All. 285, etc.

34. *Govindlal v. Manet Chowk*, 1934 Bom. 140 (141)=36 Bom.L.R. 174 (F.B.).

35. *Mogera Nandi v. Parameswara*, (1907) 31 Mad. 51.

36. *Surat Singh v. Umrao Singh*, (1923) 77 I.C. 113=1922 All. 410.

37. *Bhanjan v. Sohaura*, 18 P.R. 1911=9 I.C. 238 (2).

38. *Padmalav v. Fakira Debya*, (1931) 60 M.L.J. 619=1931 P.C. 84.

39. *Sreeramulu v. Kristamma*, (1902) 26 Mad. 143; *Ramakrishna v. Tripurabai*, (1908) 33 Bom. 88.

40. *Sitaram Sheokaran v. Rajaram Latuji*, (1918) 48 I.C. 230 (Nag.).

41. *Moro Narayan v. Balaji Raghunath*, (1894) 19 Bom. 809 (816).

42. *Venkataratnam v. Venkataramiah*, (1914) 25 I.C. 692=27 M.L.J. 569.

43. *Padajirav v. Ramrav*, 13 Bom. 160.

44. *Chandamia v. Salig Ram*, 26 All. 40 (47).

45. *Abdul Rahman v. Mt. Chhajji*, (1931) 134 I.C. 119.

Limitation Act.⁴⁶

(8) Where a lunatic's wife sold her husband's estate without being his natural guardian or on his committee, it was held that a suit by the reversioners after her death against the defendant-alienee was governed by Art. 144, and not by Art. 125 of the Limitation Act.⁴⁷

(9) Where on the death of a Hindu who held an estate on behalf of himself and other tenants-in-common, the estate was held exclusively by his widow or daughter as his heir, claiming it as his separate property, adversely to the other tenants-in-common for more than twelve years, the rights of the latter to recover the estate as tenants-in-common are barred under Art. 144, and Art. 127 does not apply.⁴⁸ A suit for recovery of possession by right of survivorship, by one of two sisters who inherited their father's property, against the alienee from the other sister, is governed by Art. 144 and not Art. 127 of the Limitation Act.⁴⁹ Similarly, a suit by a separated member of a joint Hindu family, to recover his share of property against another member, would fall under Art. 144, and not under Art. 127, Limitation Act.⁵⁰

(10) A suit to recover possession of lands which the plaintiff had purchased from the Government, and which was in possession of *ijaradars* whose term of the *ijara* had expired, but who had refused to give up possession thereof to plaintiff, was held governed either by Art. 139 or Art. 144, Limitation Act, the plaintiff's cause of action having arisen on the expiration of the *ijara*.¹ Where the *mukarrari istimrari* granted to the original *mukarraridars* conveyed only a life interest, but it was claimed by their representatives that the interest which the *mukarrari istimrari* lease conveyed was of a permanent character, and the defendants expressly claimed to hold as permanent *mukarraridars*, it was held that the suit was not governed by Art. 139, but by Art. 144, as the defendants had made a definite assertion of an adverse right more than twelve years before the suit.²

(11) Art. 144 has been held to apply to a suit for declaration that a certain pathway is a public one, and no one can obstruct it.³ Similarly, a suit which in essence is one for declaration of title and recovery of possession is governed by Art. 144, and not Art. 148, Limitation Act.⁴

(12) Where the plaintiff sued for a share of certain property against the defendant, occupied by tenants some of whom attorned to the plaintiff, and the others to the defendant, but partition when demanded by the plaintiff was refused by the defendant, who pleaded exclusive possession through tenants attorning to him, it was held that Art. 144, and not Art. 142, applied to the suit.⁵

46. *Rustam Khan v. Mt. Janki*, (1928) 111 I.C. 809 (All.); Folld. in *Ma Bi v. Makhatoon*, 7 Rang. 744=121 I.C. 785=1930 Rang. 72 (73).

47. *Sitaramaraju v. Subbaraju*, (1921) 45 Mad. 361=42 M.L.J. 262.

48. *Venkatapayya v. Venkataranga Row*, (1919) 43 Mad. 288=38 M.L.J. 149.

49. *Atchamma v. Papiah*, 44 Mad. 131 (138).

50. *Govindrao v. Rajabai*, 1931 P.C. 48=130 I.C. 673=27 N.L.R. 131 (P.C.).

1. *Krishna Gobind v. Hari Churn*, (1882) 9 Cal. 367.

2. *Ram Rachhya Singh v. Kamakhya Narain Singh*, (1925) 4 Pat. 139=1925 Pat. 216.

3. *Harish Chandra v. Premnath*, (1921) 69 I.C. 910=26 C.W.N. 587.

4. *Keshablal Goswami v. Bholanath Gangopadhya*, (1925) 94 I.C. 342=1926 Cal. 910.

5. *Iftapan v. Manavikrama*, (1897) 21 Mad. 153.

(13) Where *R* and *D* obtained a decree for possession against *A*, which could not be enforced by execution by reason of bar by limitation, and *A* was then wrongfully deprived of the possession of property by *V*, who sold it to *B*, it was held that the right established by the decree remained, and the decree-holders could enter by ousting any trespasser, including *A*, and consequently, Art. 144 applied to the suit against persons in wrongful possession.⁶

(14) Where, in 1863, *A*, in execution of his decree purchased and obtained symbolical possession of a certain share, the property of his judgment-debtor with certain lessees, under a mortgage to *B*; and, later *A*, *C* and *D* included this share in a partition as members of a joint Hindu family, and *D*, sold his share of it to *B*, who purchased it benami in the name of *E*; and later obtained a mortgage-decree against *F*, the heir of his mortgagor in 1875; and subsequently *A*, *C* and *E*, brought a suit for possession against *M*, who had wrongfully taken possession of the property soon after the expiration of lease to *B*; and before this suit was finally decided, *B* had contrived to take possession of the whole share in 1883, and then executed his mortgage-decree attaching the share, exclusive of that which stood in the name of his benamidar *E*; and *Z*, the heir of *A*, having failed to make good his claim to a share of the property in the execution proceedings brought a suit for possession against *B* in 1884; it was held that the suit having been brought within twelve years from the date of the fraudulent possession by *B*, was in time, and fell under Art. 144, Limitation Act.⁷

2171. IMMOVEABLE PROPERTY: "OR ANY INTEREST THEREIN".—See notes under Art. 142: Ss. 2146-2148. We have noticed already that Art. 144 refers to suits for immovable property, or *any interest therein*, while Art. 142 is worded as applicable to suits for immovable property, with no mention of "any interest therein", although it has been held in some cases that the term "*immovable property*" is wide enough to include a suit

for an interest in immovable property.⁸
What are interests in immovable property. A right of fishery has been held to be an interest in immovable property, as it

"possesses the qualities both of immobility and of indefinite duration and also issues out of immovable property".⁹

Under the Act of 1871, it was held to be an interest in immovable property and not an easement, and therefore adverse possession of twelve years was sufficient for the acquisition of the right.¹⁰ Under the Acts of 1877 and 1908, there is a definite clause of easement, and a *jalkar* has been considered as a *profit a prendre*, in some

6. *Vasudeo Atmaram v. Ekndth Bal Krishna*, (1910) 35 Bom. 79.

7. *Ramkishore v. Bandi Karatan Tewari*, (1886) 13 Cal. 203.

8. *Fadu Jhalla v. Gour Mohun*, (1892) 19 Cal. 544 (F.B.) (Right of fishery in a *khal*, the soil whereof does not belong to the plaintiff, held not immovable property within S. 9, Specific Relief Act, 1877).

9. *Lokenath v. Jahania Bibi*, 14 C.L.J. 572=12 I.C. 305; *Madhab Chandra Mandal v. Nagendra Nath Sen*, (1916) 34 I.C. 841 (Cal.); *Baker Husain v. Ranjit Koer*, (1917) 39 I.C. 777 (Pat.) (Right to catch fish, a benefit derived from the ownership of land); also see *Kumar Krishna v. Lokenath*, (1931) 35 C.W.N. 1256.

10. *Parbati v. Mudho*, (1878) 3 Cal. 276; *Lukhimoni v. Karunec*, (1878) 3 C.L.R. 509.

cases, requiring twenty years' enjoyment under S. 26 to acquire the easement of fishery.¹¹ According to the **Calcutta and Patna High Courts**, a right of fishery, when it is not an exclusive right to the fishing, would clearly come within the expression "easement," as defined in S. 2 (5) of the Limitation Act. But if it is an exclusive right excluding even lawful owner, it would amount to an interest in immoveable property within Art. 144, and adverse possession of such a right for twelve years, would, by operation of S. 28, extinguish the rights of the lawful owner. Even if S. 26 should be applicable, this would not bar the operation of Art. 144 and S. 28 if the right came under both descriptions.¹² Adverse possession of fishery rights can be established in a public navigable river if exclusive acts of possession are shown for the statutory period.¹³ The **Madras High Court** also takes the view that an exclusive right of fishery in a locality in the sense that even the lawful owner is excluded from its enjoyment is not a mere *profits a prendre*, but is a heritable and transferable interest in immoveable property, which can be acquired by twelve years' adverse possession as against the lawful owner.¹⁴ In a recent case, their Lordships of the Privy Council have held that fishery rights in navigable river can be acquired by adverse possession of sixty years against the Government, as evidenced by the granting of leases or licenses of the fishery by the plaintiffs, which was a usurpation of the distinctive rights of the Government.¹⁵ In *Bapu v. Dhondi*,¹⁶ where the plaintiff had brought a **suit to recover possession of mango trees** growing on his own lands, it was held that the claim was for possession of an interest in immoveable property within the meaning of Art. 144, and the defendant could establish adverse possession by taking fruits thereof, during twelve years preceding the suit. See also *Narayana v. Ramasami*.¹⁷ **A right to an easement is an interest in immoveable property.**

"The period for the acquisition of easement is provided for in the body of the Limitation Act, and suits for easements acquired otherwise than in accordance with Ss. 26-28 do not seem to be excluded."¹⁸

11. *Chunder Churn Roy v. Shib Chunder Mundul*, (1880) 5 Cal. 945; *Luchmeeput Singh v. Saadulla*, 9 Cal. 698.

12. *Hill & Co. v. Sheoraj*, 1 Pat. 674=67 I.C. 954=1923 Pat. 58; s.c. 64 I.C. 346 (At an earlier stage); *Kedur v. Amrit*, 1925 Pat. 568=88 I.C. 676; *Krishnanandi v. Lokenath*, 1932 Cal. 300=35 C.W.N. 1256.

13. *Debendra Lal Khan v. Secretary of State*, 1927 Cal. 403=31 C.W.N. 473=103 I.C. 13=46 C.L.J. 322 (Adverse possession against Government).

14. *Secretary of State v. Dt. Board of Tanjore*, 1930 Mad. 679=1930 M.W.N. 328=31 L.W. 508=125 I.C. 545; also see *Krishna v. Akilanda*, (1889) 13 Mad. 54.

15. *Secretary of State v. Debendrolal Khan*, 61 I.A. 78=61 Cal. 262=147 I.C. 545=1934 P.C. 23=66 M.L.J. 134 (P.C.).

16. (1891) 16 Bom. 353.

17. 8 M.H.C.R. 100.

18. *Kurupam Zamindar v. Merangi Zamindar*, (1881) 5 Mad. 253 (255).

Thus, it was held in a case under Act of 1871 that a claim to an easement is one relating to an interest in land, and is governed by the limitation of twelve years.¹⁹ **A right to possession and management of saranjam lands**, which are ordinarily impartible and descendible entire to the eldest representative of the past holder, is an interest in immoveable property within the meaning of Art. 144 of the Limitation Act: and such an interest may be enjoyed adversely to the plaintiff's right of sole management.²⁰ **The right to collect the assessment of lands endowed in favour of a shrine** and in the possession of occupancy tenants must be regarded as immoveable property or an interest in immoveable property within the meaning of Art. 144.²¹ In *Pandurang Balaji v. Dnyanu*,²² where a suit was brought to recover possession of property dedicated to an idol, it was held that the defendant's possession which was adverse to the idol, was also adverse to the plaintiff who sought to recover the plot land as manager of the idol's property. This view is supportable by reference to the decision of their Lordships of the Privy Council in *Balwant Rao v. Puran Mal*,²³ where the possession of the defendant having been adverse for more than twelve years, the suit of plaintiff to enforce his own personal right to manage an endowment, dedicated to religious purposes, was held barred by time. **The right to levy summary cess**, whether it originated in agreement or in unlawful exaction, is an interest in immoveable property and is governed by twelve years' limitation under Art. 144 of the Limitation Act.²⁴ **A right to officiate as priest** at funeral ceremonies of Hindus is in the nature of immoveable property or an interest therein according to Hindu Law, and adopting the principle of construction laid down by their Lordships of the Privy Council in *Futtehsinghji v. Kallian Raiji*,²⁵ a suit to establish such right was held to fall under Art. 148, and not under Art. 145 of Act XV of 1877.²⁶ **The right to an office** in a temple and endowments attached thereto, can be acquired by adverse possession as such a right is treated like the right of the manager of a temple or an *uraima* right as a personal right. Where

19. *Mohunt Deo Surun Poory v. Mahomed Ismail*, (1875) 24 W.R. 300.

20. *Narayan Jagannath v. Vasudeo*, (1890) 15 Bom. 247; also see *Pandurang Balaji v. Dnyanu*, (1911) 36 Bom. 135; *Balwant Rao v. Puran Mal*, (1883) 6 All. 1=10 I.A. 90 (P.C.); cf. *Arunachellam v. Venkatachalapathi*, (1919) 46 I.A. 204=43 Mad. 253=37 M.L.J. 460 (P.C.).

21. *Narayan Balwant v. Dattatraya*, (1932) 34 Bom. L. R. 1469.

22. (1911) 36 Bom. 135 (137).

23. (1883) 6 All. 1 (P.C.).

24. *Ranmal Singh v. Mahashankar*, (1911) 36 Bom. 174; cf. *Jotirmoy Moulik v. Khudiram*, (1919) 50 I.C. 908 (Art. 144 not applied to a suit for assessment of fair and equitable rent).

25. 1 I.A. 34=13 B.L.R. 254 (P.C.).

26. *Raghoo Pandey v. Kassy Parey*, (1883) 10 Cal. 73; also see *Kuppuswami v. Samia Pillai*, 1921 M.W.N. 870.

there is no question of the malversation of the trust property.²⁷ The **right to collect market dues** upon a given piece of land is a benefit to arise out of land.²⁸ The grant of an allowance for the support of Hindu temple is an interest in immoveable property.²⁹ The **right of a landlord to demand and receive dues**, e.g., *parjot*, *chrai*, and *charasi*, from persons who occupy or use land in the village in one way or another must be deemed to be an interest in immoveable property within the meaning of Art. 144; and a stranger may be in adverse possession where he is collecting these dues exclusively.³⁰ A **gift of mukarrari rent** payable by defendant, is a gift of an interest in immoveable property, and a suit to set aside such gift made by the plaintiff's predecessor-in-title is governed by Art. 144 of the Limitation Act.³¹ However, this article has no application to a suit for assessment of fair and equitable rent.³² The **equity of redemption** of a mortgagor is immoveable property or an interest therein.³³ It has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders. . . . See *Casborne v. Scarfe*³⁴ and *Heath v. Pugh*³⁵; also see *Umes Chunder v. Zahur Fatima*.³⁶ In *Kanti Ram v. Kutub-ud-din*,³⁷ it was observed that the words "immoveable property" in S. 58 of the Transfer of Property Act denote, having regard to the definition of "immoveable property" in S. 2, cl. 5 of the General Clauses Act (I of 1868), not only the property itself as distinguished from any equity of redemption which the mortgagor might possess in the property, but include the rights of the mortgagor in the property mortgaged at the time of the second mortgage, or in other words, his equity of redemption in such property. The mortgage of the **superstructure of a house exclusive of the land beneath** creates an interest in immoveable property, as the apparent intention is to mortgage the house and not merely the materials.³⁸ The **right taken by a widow under the bequest** of her husband to receive the rents and income of certain

27. *Alagirisami v. Sundareswara*, (1898) 21 Mad. 278 (287).

28. *Sikandar v. Bahadur*, (1905) 27 All. 462.

29. *The Collector of Thana v. Hari Sitaram*, (1882) 6 Bom. 546 (F.B.); also see *Krishnaji v. Gajanan*, (1909) 33 Bom. 373 (F.B.).

30. *Sheoraj Singh v. Debi Baksh Singh*, (1918) 46 I.C. 439=22 O.C. 119.

31. *Gopalcharjya v. Bhim Kali*, (1926) 97 I.C. 637=1927 Pat. 49=8 P.L.T. 87.

32. *Jotirmoy v. Khudiram*, (1919) 50 I.C. 908 (Cal.).

33. *Parashram Harlal v. Govind Ganesh*, (1895) 21 Bom. 226.

34. 1 Atk. 603.

35. 6 Q.B.D. 339 (360).

36. (1890) 18 Cal. 164 (180, 181) (P.C.).

37. (1894) 22 Cal. 33.

38. *Narayan v. Ramaswamy*, 8 M.H.C.R. 100.

property with obligation of maintaining, educating and bringing up the children is an interest in immoveable property.³⁹ Similarly, a grant to a temple of an annuity, of cash and produce, derivable from extra assessment upon several mahals, was held to be a grant of immoveable property or an interest on immoveable property, and as such subject to the twelve years' period of limitation provided by cl. 12 of S. 1 of Limitation Act of 1859, corresponding to the present article.⁴⁰ A **right to take out lac from trees** standing on a jungle is a right to enjoy, and an interest in immoveable property.⁴¹ A **right to malikana** has been held to be an interest in immoveable property.⁴²

2172. An agreement to grant a lease cannot be said to create an interest in immoveable property, nor can a suit upon it be said to be one for the recovery of such property or of an interest in it. Such a suit was governed, not by the 12th, but by the 16th clause of S. 1 of Act XIV of 1859 (Art. 120 of the present Limitation Act).⁴³ A **right of worshipping an idol** is not in the nature of "an interest in immoveable property".⁴⁴ A claim to recover rent or revenue payable out of the land, by the trustees of a mosque against the Jenmies in possession of the land, is in the nature of a money claim charged on land (Art. 132), which is a recurring right under Art. 131 of the Limitation Act, but it is not recoverable as an interest in immoveable property.⁴⁵ A **right to be placed on the revenue register** is not an interest in immoveable property and Art. 144 does not apply to a suit by a purchaser of lands to obtain a declaration of their right to have the land registered in their name in the revenue records.⁴⁶ A **suit to recover** a sum of money due by custom as **an emolument of an hereditary office** is not for possession of an interest in immoveable property within the meaning of Art. 144 of the Limitation Act.⁴⁷ A **right to take water from a well**, is an easement liable to be extinguished by non-user for more than twenty years under S. 47 of the Easements Act, but, the right in question was held not an interest in immoveable property which would only be

39. *Natha Kerra v. Dhunbaiji*, (1898) 23 Bom. 1.

40. *The Collector of Thana v. Krishnanath*, (1880) 5 Bom. 322.

41. *Parmanand v. Birkhu*, (1909) 1 I.C. 903=5 N.L.R. 21; Ref. *Hiria v. Mahomed*, 4 N.L.R. 184 (Explains nature of lac).

42. *Moheshri Prosad v. Baijnath*, (1913) 21 Cal. 779 (Cal.); cf. *Mt. Juggobai v. Utsavalal*, (1929) 56 I.A. 267=51 All. 439=57 M.L.J. 160 (P.C.).

43. *Ram Sahoy Lall v. Bibee Chowbain*, (1874) 22 W.R. 287.

44. *Eshan Chunder Roy v. Monmohini Dasi*, (1878) 4 Cal. 683 (685).

45. *Alubi v. Kunhi Bi*, (1886) 10 Mad. 115.

46. *Bhikaji Baji v. Pandu*, (1893) 19 Bom. 43.

47. *Rathna Mudaliar v. Tiruvenkata Chariar*, (1899) 22 Mad. 351; Refd. *Raoji v. Bala*, 15 Bom. 135.

liable to be lost by proof of twelve years' adverse possession against the defendants, under Art. 144 of the Limitation Act.⁴⁸ The projection of the eaves over the land of another resulting in discharge of rain-water is only an easement; and it is difficult to hold that a column of air occupied by a projection over the land of a neighbour is immoveable property or any interest therein within the meaning of Art. 144, unless it is covered by the words "benefits to arise out of land", within the meaning of S. 3 (25) of the General Clauses Act, X, of 1897.⁴⁹ The theory of occupation of column of air by eaves and projecting beams has not been extended to overhanging branches of a tree over the neighbour's land.⁵⁰ In *Bahadarmal v. Mohanlal*,¹ a single Judge of the **Bombay High Court** held that if a person opens the shutters of his windows and projects weather frames over them for more than twelve years on the land of another, he acquires a right to maintain them by adverse possession. This judgment is inconsistent with two Division Bench decisions of the same Court in *Chotalal Hirachand v. Manilal Gaghbai*² and *Kashibhai v. Vallabh*,³ in which the possession of eaves has been held to be only in the nature of an easement for the discharge of water, but it is not an occupation of another person's property, giving a title to the land.

2173-2185. TITLE III: WHAT IS ADVERSE POSSESSION.

2173. POSSESSION, MEANING OF.—It was observed by Romilly, M.R., in *Lake v. Dean*,⁴ that possession is a flexible term not necessarily meaning occupation. "There is perhaps, no legal conception more open to a variety of meaning than 'possession'" said Lord Justice Fry, in *Lyell v. Kennedy*.⁵ We have noticed in S. 2143 *ante*, that a legal conception of possession involves two elements, (1) the physical, and (2) the mental; and legal or juridical possession is to be distinguished from actual physical occupation, and is the state of things of being in possession in the eye of law. It includes cases of "constructive possession," "wrongful possession" and "lawful possession".

"Possession" is the occupation of anything with the intention of exercising the right of ownership in respect of it, and it must be accompanied by an intention to possess, since possession involves an *animus possidendi*,

48. *Ananta v. Ganu*, (1920) 45 Bom. 80=1921 Bom. 417.

49. *Chhaganlal Fulchand v. Hemchand Tapidas*, (1932) 138 I.C. 458=34 Bom. L. R. 395=1932 Bom. 224.

50. *Hari Krishna Joshi v. Shankar Vithal*, 19 Bom. 420.

1. 1925 Bom. 335=87 I.C. 1008=27 Bom. L. R. 536 (*Per Taraporewala, J.*).

2. 20 I.C. 246=37 Bom. 491=15 Bom. L. R. 557.

3. 67 I.C. 356=24 Bom. L. R. 305=1922 Bom. 83=46 Bom. 827.

4. 28 Beav. 607.

5. (1887) 18 Q.B.D. 796 (813).

i.e., occupation with the intention of excluding the owner as well as other people."⁶

Possession of an exclusive character is necessary in order to establish a prescriptive right⁷; but possession by receipt of rent as well as actual occupation is possession within Art. 144.⁸

(2) Trespass is not possession, because it is without the right to possess,⁹ and whoever is in *de facto* possession, the person who has title is, in the eye of law, in possession.

"Where possession *in fact* is undetermined, possession *in law* follows the right to possess."¹⁰

But, trespass acquiesced in, becomes possession, even if the mere physical possession of land by a trespasser is not juridical possession.¹¹ A casual act of trespass would not have the effect of permanently disturbing or discontinuing another's possession.¹² However, if what the trespasser does amounts to putting the true owner out of possession, and the person taking wrongful possession of the land remains in *de facto* possession for twelve years, the true owner is barred by time from asserting his title or right to be in possession of the property.¹³

"A person who has acquired possession *precaris*, is not deemed to have juristic possession. He is liable to be condemned to deliver up such possession to his opponent as soon as the latter is ready and willing to restore what he holds to the other. The possessory relation in such circumstances is imperfect. It is vitiated by the duty to restore, and must, therefore, be deemed as equivalent to permissive possession."¹⁴

(3) Permissive possession does not rest barely on an expressed agreement by means of which one party permits another to take possession of his property. It is a question of legal

6. Mitra's Limitation Act, Vol. I, p. 139; Vol. II, p. 1687, citing *Littledale v. Liverdale College*, (1899) 1 Ch. 19 (23).

7. *Lord Advocate v. Young*, (1887) 12 A.C. 544 (545); *Tarubai v. Venkatrao*, (1902) 27 Bom. 43; *Debi Prasad v. Badri Prasad*, (1918) 40 All. 461; also see *Bhaskarappa v. Collector*, 3 Bom. 452 (The essential elements of possession are a fixed, definable, and exclusive occupation present to the perception of the parties).

8. *Asiatullah v. Sadatullah*, (1914) 26 I.C. 368 (Cal.); *Madhab Chandra v. Nagendranath Sen*, (1916) 34 I.C. 841 and *Hardut Rai v. Ujir Shaikh*, (1928) 48 C.L.J. 364.

9. *Browne v. Dawson*, 12 Ad. & E. 624 (629) (Per Lord Denman).

10. *Jones v. Chapman*, 2 Ex. 821; Pollock on Possession, p. 24.

11. *Dadabhai v. The Sub-Collector*, 7 Bom. H. C. R. 82; also see *Kailas v. Jugal*, 1 C.L.J. 104 (107).

12. *Kalichurn v. Secretary of State*, 8 C.L.R. 90 (98)=6 Cal. 725 (735).

13. *Ibid.*, 8 C.L.R. 90 (98).

14. *Maqbul Ahmad v. Farhat Ali*, (1922) 66 I.C. 461 (464); see Sohm's Roman Law, pp. 354 and 355.

inference from the circumstances of a particular case.¹⁵ This characteristic of possession is equally a part of the English system of jurisprudence.¹⁶ The English law on the point is thus summed up in Addison's Law of Torts:—

"A land-owner who accommodates a poor relation with a cottage, and garden, does not necessarily part with the possession of the property occupied by such poor relation. The latter may have the mere custody of the property; his possession such as it is, may be the possession of the landowner, and the latter may retain and continue to exercise his proprietary and possessory rights so as to rebut the presumption that he has parted with the possession of the property, and prevent the statute of limitation."¹⁷

Where the owner in the exercise of his proprietary right, *permits* some other person to occupy his land or to receive his rents, then the possession of the owner is not discontinued, because under such circumstances the possession of the occupier is the possession of the owner.¹⁸ A permissive occupant may, however, prove that the character of his possession has changed, and has become adverse.¹⁹ One who enters as tenant is not, merely because of that fact, precluded from subsequently holding adversely to his landlord. But, to enable him to do so, it is necessary for him to renounce the idea of holding as tenant and to set up and assert an exclusive right in himself.²⁰ The principle of law that possession *prima facie* may be considered adverse cannot apply to a case where the possession of the defendant in its inception is of a permissive nature.²¹ Where the occupation is permissive, the defendant's possession is not to be considered adverse.²² And, the plaintiff is to be taken as in constructive possession of the same.²³ Where possession of a portion of land is shown to be permissive and not adverse, the Courts may presume that the possession of the rest of the properties was also permissive, in the absence of evidence to the con-

15. *Maqbul Ahmad v. Farhat Ali*, (1922) 66 I.C. 461 (464).

16. *Adnam v. Earl of Sandwich*, (1877) 2 Q.B.D. 485; 46 L.J.Q.B. 612.

17. *Bertie v. Beaumont*, 6 East 33; *Hunt v. Colson*, 3 M. & Sc. 791; *Doe v. Stanton*, 2 B. & Ald. 371; *Mayhew v. Suttle*, 4 El. & Bl. 353.

18. *Gobind Lal v. Debendranath*, (1880) 6 Cal. 311 (315).

19. *Ramdhan v. Nobin*, (1869) 12 W.R. 250.

20. *Giris Chandra v. Krishna De Nag*, (1923) 75 I.C. 325=38 C.L.J. 206=1924 Cal. 168; also see and cf. *Kumar Gowda v. Bhimaji*, 23 Bom. 602 (606, 607) (Lands held as remuneration for services; omission to render service *plus* active assertion of adverse right).

21. *Ahmad Sharif v. Mirza Umrao Beg*, (1926) 94 I.C. 779=3 O.W. N. 460=1926 Oudh 353; also see *Ejaz Ali v. Court of Wards*, 1930 Oudh 510=6 Luck. 106=130 I.C. 65 (2).

22. *The Gujrat G. & M. Co. v. Motilal Hirabhai S. & W. & M. Co.*, 123 I.C. 481=53 Bom. 792=1930 Bom. 84=31 Bom. L. R. 1310,

23. *Ibrahim Bhura v. Isa Rasul*, (1916) 41 Bom. 5,

trary.²⁴ When the commencement and continuance of possession is legal and proper (*e.g.*, when it can be referred to a contract, express or implied, between the parties), it cannot be presumed adverse.²⁵ *A* should not be considered to be in "adverse possession" of property, belonging to *B*, when he does not deny the ownership of the latter but merely claims a lien over it and refuses to allow *B* to enter into possession, until repayment of a charge held over it by him and expressing his willingness to give up possession on payment of the said charge.²⁶

2174. ADVERSE POSSESSION: MEANING OF.—In *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*,²⁷ Markby, J., observed as follows:—

"By adverse possession I understand to be meant possession by a person holding the land, on his own behalf, (or on behalf) of some person other than the true owner, the true owner having the right to immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the true owner is extinguished, and the person in possession becomes the owner."

On another occasion, Markby, J., said that by possession adverse to the plaintiff is meant "possession of that which the plaintiff is entitled to possess, held, not on behalf of the plaintiff, but on behalf of some other person."²⁸

It seems to follow from this that adverse possession is a possession inconsistent with the title of the true owner, and adverse possession commences as soon as there is right of entry by the true owner. Adverse possession implies that it commenced in wrong and is maintained against right. According to Angell, an adverse holding is an *actual and exclusive appropriation* of land commenced and continued under a claim of right, either an *openly avowed* claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him who was in possession.²⁹

"By adverse possession is meant possession which is hostile under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive, and continuous."³⁰

24. *Ram Abhilak v. Chaurasi*, (1927) 101 I.C. 730=1927 Oudh 582=13 O.L.J. 839.

25. *Dadoba v. Krishna*, (1879) 7 Bom. 34; *Tarubai v. Venkatrao*, (1902) 27 Bom. 43; *Ram Parson Upadhia v. Kulab Husain*, (1916) 36 I.C. 100 (All.).

26. *Mahomed Ali v. Mahomed Khan*, 1931 Lah. 313=134 I.C. 493.

27. 4 Cal. 327 (329); Reld. in *Maqbul Ahmad v. Farhat Ali*, (1922) 66 I.C. 461 (464); also see *Ismdar Khan v. Ahmad Husain*, (1907) 30 All. 119 (122).

28. *Kherodemoney v. Doorgamoney*, (1878) 4 Cal. 455.

29. Angell on Limitations, pp. 390, 398; Dr. Pal's Limitation, p. 994.

30. Dr. Pal's Limitation, p. 994, citing *Kuthali Muthavar v. Kun Harankutti*, (1921) 48 I.A. 395=26 C.W.N. 666 (P.C.),

2175. The classical definition of adverse possession, by Markby, J., in *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*,^{30-a} was accepted by the Full Bench decision of the **Bombay High Court** in *Bhavrao v. Rakhmin*.³¹ It is essential the true owner has the right to immediate possession, for otherwise it is immaterial to him who is in possession. Having no right himself to possession he cannot eject the person in possession.³² The maxim applies, "*contra non volentem agere non currit praescriptio*". A claim, not divulged or communicated or manifested by overt acts affecting existing rights, gives no apparent cause of action, and no article of the Limitation Act appears to apply before a right to sue accrues.³³ The judgment in *Chinto v. Janki*,³⁴ alludes to the fact that the plaintiff was not entitled to immediate possession at the date of the defendant's taking possession; and his opinion was approved in the later case of *Vinayak Janardhan v. Mainai*.³⁵ This is also the reason why during the subsistence of a tenancy there is no adverse possession against the landlord, who has no immediate right of possession.³⁶ Where there subsists any contract, express or implied, between the parties in and out of possession, to which the possession may be referred, as legal and proper, it cannot be pronounced adverse,³⁷ e.g., where a tenant pays no rent,³⁸ or, where possession can be referred to a lawful title in its commencement.³⁹ See S. 2181, as to "**Nature of Claim**".

Notice of adverse act.

2176. In *Tarubai v. Venkatrao*⁴⁰ Batty, J., has stated the legal position thus:—

"When the possessor is himself prevented from dealing with the land, i.e., when there is *dejectio*, there can be no doubt about his knowledge of its loss. But, actual knowledge is not necessarily in all cases material if there be the means of such knowledge.⁴⁰ **Actual knowledge is not necessary, and it**

30-a. 4 Cal. 327 (329), *supra*.

31. (1898) 23 Bom. 137 (141).

32. *Tarubai v. Venkatrao*, (1902) 27 Bom. 43 (51, 52); *Malkarjun v. Amrita*, 42 Bom. 714 (718)=47 I.C. 153.

33. *Ibid.*, 27 Bom. 43 (51, 52).

34. (1892) 18 Bom. 51.

35. (1894) 19 Bom. 138.

36. *Krishna Gobinda v. Harichurn*, (1882) 9 Cal. 367; *Sharat Sundari v. Bhobo Prasad*, (1886) 13 Cal. 101.

37. Dr. Pal's Limitation Act p. 995; citing *Do dem Colelough v. Hulse*, 3 B. and Cr. 757.

38. *Dadoba v. Krishna*, (1879) 7 Bom. 34.

39. *Lallubhai v. Mankuvarbai*, (1876) 2 Bom. 388; also see *Lyell v. Kennedy*, 14 A.C. 437; *Doe v. Brightwen*, 10 East 583; *Thomas v. Thomas*, 2 K. and J. 799; cited in Dr. Pal's Limitation Act, p. 995; also see *Bhairabendra v. Rajendra*, (1923) 74 I.C. 193 (Cal.).

40. (1902) 27 Bom. 43 (52); Relied on *Womesh Chunder Goopta v. Raj Narain Roy*, (1868) 10 W.R. 15 (16, 17) and *Bejoy Chunder v.*

may be *presumed* from an open and notorious act of taking possession.⁴¹ But although there may be adverse possession notwithstanding the fact that the owner discontinuing possession is unaware of the possession taken by another, yet the possession must have been used *openly* and, without any effort made or step taken to produce concealment.⁴² There must be an adverse act,⁴³ and nothing that would lead the owner to suppose that the right remains intact.⁴⁴ **The possession taken of must not be clandestine.** For possession, in order to ripen into a prescriptive title, must be juridical, and have none of the *vitia possessionis* as *claim vi aut precario*. And if in its inception it is vitiated by its clandestine, violent or permissive character, it must lose that character and become open, peaceable and as of right before it can cause time to run.⁴⁵ And it is fully established that when there is no act of taking possession, something more than a mere adverse *claim* is necessary to make possession adverse. Thus 'one who holds possession on behalf of another does not, by a mere denial of that others' title, make his possession adverse, so as to give himself the benefit of the Statute of Limitations'.⁴⁶ **There must be some 'adverse act'**, so that if the possession has commenced and continued in accordance with 'any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper it cannot be presumed adverse'⁴⁷. That is to say, if there be no adverse act, nothing overt and no unmistakable ouster, or taking of possession and all that is done is referable to, or consistent with and susceptible of explanation by, some title which does not impugn but recognise the right of the person seeking to recover possession, then there can be no possession adverse to that person without notice or intimation to him of some kind, that an adverse claim has been set up in opposition to his right theretofore recognised.⁴⁸ 'The party claiming to hold adversely must at least go on to prove that it was in denial of the other's title that he excluded him from enjoyment of the property. According to English cases there must be **something amounting to ouster** of the person against whom adverse possession is claimed'.⁴⁹ The case of *Ramchandra Yeshwant v. Sadashiv Abaji*,^{49-a} is to similar effect: 'As long as possession can be referred to a right consistent with the subsistence of ownership in being at its commencement, so long must

Kally Prasunno, (1878) 4 Cal. 327; also see *Gaya Prasad v. Bakyamani*, 56 Cal. 914=33 C.W.N. 277 (279) (*Held*, that possession, of which plaintiff was not aware until a recent date, is not adverse possession).

41. *Girischandra v. Krishna De Nag*, (1923) 75 I.C. 325=1924 Cal. 168; Refer and cf. *Suraj Bali v. Mahadeo Pershad*, (1931) 8 O.W.N. 1153.

42. *Rains v. Buxton*, (1880) 14 Ch. D. 533 (540, 541).

43. *Scarley v. Tottenham*, (1868) L.R. 5 Eq. 409 (412).

44. *Adnam v. Earl of Sandwich*, (1877) 2 Q.B.D. 485 (490).

45. *Bejoy Chunder Banerjee v. Kally Prasunno*, (1878) 4 Cal. 329.

46. *Dadoba v. Krishna*, (1879) 7 Bom. 34 (39); also see *Komargowda v. Bhimaji*, 23 Bom. 602 (606, 607).

47. *Rains v. Buxton*, (1880) 14 Ch.D. 533 (540) (Possession, in order to be adverse, must have been used *openly*, and without any effort made or step taken to effect concealment).

48. *Ittapan v. Manavikrama*, (1897) 21 Mad. 153 (159).

49. *Ibid.*; also see *Babu v. Thakur Deen*, (1931) 8 O.W.N. 140=131 I.C. 400=14 O.L.J. 290=1931 Oudh 144 (1) (Mere possession without payment of any rent, and *bila faisla*, not sufficient to establish title by adverse possession).

49-a. (1886) 11 Bom. 423.

the possession be referred to that right, rather than to a right which contradicts the ownership'. And as shown in several cases,⁵⁰ even where there is an act of taking possession, the possession will not be adverse as against any person who is not for the time being entitled to possession and who is therefore neither interested in, nor capable of, ejecting the person who has taken possession. There must be some adverse act sufficient to give the person to be affected by it an opportunity of knowing that his rights are being infringed and that occasion has arisen for action by him to protect them.¹ Thus, a tenant or a lessee does not, merely, by ceasing to continue possession on behalf of the owner, necessarily create a possession adverse to the latter". Where lands are held as remuneration for services, the fact that no services have been performed does not of itself make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service.²

2177. EVIDENCE AND PROOF OF TITLE BY ADVERSE POSSESSION.—

In all cases of this sort, the nature of the claim has to be seen and it has to be decided whether the exercise of the rights by the strangers was, in the nature of things, irreconcilable with those claimed.³ In other words, to use the language of Bramwell, L.J., in *Leigh v. Jack*,^{3-a} "in order to defeat a title by dispossessing the owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it". Where land bordered by estates of each of the parties contesting its ownership was registered in the Collectorate, and shown in Revenue Survey maps, as a separate *mouza*, and in the absence of other evidence of title, possession was all that could be resorted to as the ultimate test of right, their Lordships of the Privy Council

Adverse possession
—**Requisites of.**

laid down the rule, that the adverse possession asserted by the plaintiff, who had settled tenants on the disputed ground must have been a possession adequate in continuity, in publicity, and in extent of area; and where the defendant was shown to have occupied, during that period, a part of the land by tenants, which as a proof of possession on his part, applied not only to the plots actually tenanted under him, but was contradictory to the whole theory of the plaintiff's claim, it was held that the plaintiff's case was deficient evidence of possession on paper (leases and

50. *Woomesh Chunder Goopto v. Raj Narain Roy*, (1869) 10 W.R. 15; *Bejoy Chunder Banerji v. Kolly Prosunno Mookerjee*, (1878) 4 Cal. 327; *Sharat Sundari v. Bhobe Pershad*, (1886) 13 Cal. 101; *Vinayak Janardan v. Mainai*, (1894) 19 Bom. 138; and *Krishna Gobind v. Hari Churn*, (1882) 9 Cal. 367.

1. *Dewan Manwar Ali v. Unnoda Pershad*, (1879) L.R. 7 I.A. 1 (P.C.); *Mt. Bebee Sahodra v. Roy Jung Bahadur*, (1881) L.R. 8 I.A. 240 (P.C.).

2. *Komargowda v. Bhimaji*, 23 Bom. 602 (606, 607); also see *Sami Ayyangar v. Venkataramana Ayyangar*, 1934 Mad. 381=39 L.W. 513=150 I.C. 156 (A dismissed archaka continuing in possession, holds adversely).

3. *Birjoo v. Bhikhu*, (1921) 64 I.C. 876 (878) (Lah.).

3-a. (1879) 5 Ex.D. 264.

documents of various kinds was not held sufficient, and the suit failed.⁴ This principle was applied again, by their Lordships, in the Madras case of *Kuthali Moothavar v. Kunhanan Kutty*,⁵ that adverse possession in order to bar by limitation a suit for possession of land

"must be adequate in continuity, in publicity and extent, so as to show that it is possession adverse to the competitor".

When a person establishes his title to land and proves that he has been exercising, during the currency of his title, various acts of possession, then the quality of those acts, even though they might have failed to constitute adverse possession against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is required from any person challenging by possession the rightful title.⁶ For adverse possession it is sufficient that the possession is overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. It is not necessary in order to establish adverse possession that the proof of acts of possession should cover every moment of the requisite period.⁷

The Indian High Courts have consistently held, following the above Privy Council views, that the adverse possession must be actual, visible, exclusive, hostile and continuing during the time necessary to create a bar under the statute of limitation.⁸ The **Calcutta High Court** has held in *Jogendra Nath v. Jagadindra Nath Das*,⁹ that the possession in order that it may bar the recovery,

4. *Radhamoni Debi v. The Collector of Khulna*, (1900) 27 Cal. 943 = 27 I.A. 136 (P.C.); also see *Armstrong v. Monill*, (1871) 14 Wallace, 145 and *Doswell v. Delo Lauza*, (1857) 20 Howard, 32; cited in *Jogendra Nath Rai v. Baladeo*, 35 Cal. 961 (1911); also see *Barjir Singh v. Sidhnath*, (1926) 98 I.C. 704 = 1927 Oudh 141 = 1 Luck. 441 = 29 O.C. 395.

5. (1921) 44 Mad. 883 = 48 I.A. 395 (P.C.); Relied on *Secretary of State v. Chellikani*, (1916) 39 Mad. 617 = 43 I.A. 192 (P.C.); also see *Mt. Allah Rakhi v. Shah Mohd. Abdur Rahim*, (1934) 56 All. 111 = 1934 P.C. 77 (P.C.); Relied on 27 Cal. 943 = 27 I.A. 136 (P.C.).

6. *Ibid.*, (1921) 44 Mad. 883 (P.C.).

7. *Secretary of State v. Debendra*, 1934 P.C. 23 = 147 I.C. 545 = 61 I.A. 78 = 61 Cal. 262 (P.C.).

8. *Vithaldas v. Secretary of State*, (1901) 26 Bom. 410; *Nawab of Murshidabad v. Gopinath Mandal*, (1910) 6 I.C. 392 = 13 C.L.J. 625; *Baroda Prosad v. Annoda*, (1910) 6 I.C. 359 (Cal.); *Jogendra Nath v. Jagadindra Nath*, 1921 Cal. 577 = 34 C.L.J. 133 = 67 I.C. 170; *Abboy Sankar v. Satyendra Prasanna Bose*, (1925) 85 I.C. 594 (Cal.); *Prahlad Singh v. Abdul Aziz Khan*, (1918) 47 I.C. 892 (Nag.); *Mt. Bhagbhari v. Mt. Khatun*, (1924) 80 I.C. 118 = 16 S.L.R. 25; *Imdad Husain v. Haidari Khanam*, (1927) 102 I.C. 207 (Oudh).

9. 1921 Cal. 577 = 34 C.L.J. 133 = 67 I.C. 170; also see *Wali Ahmed v. Tota Meah*, (1903) 31 Cal. 397 (Acts indicative of possession must vary according to the nature of the property over which possession is exercised).

must be continuous and uninterrupted, as well as open and notorious, actual, exclusive, and adverse. The **Bombay High Court** has held that there ought to be nothing equivocal in the possession which is relied upon as a bar.^{9-a} This is specially necessary in a case between landlord and tenant, because the tenant's possession of the land encroached upon can commence to be adverse only when the title adverse to the landlord is asserted, or the landlord becomes aware of the encroachment; this is essential to enable the tenant to acquire title to a limited interest by adverse possession thereof.¹⁰ To establish a case of adverse possession against the landlord by the transferee of a non-transferable occupancy holding it must be shown that the possession was adequate in continuity, publicity and extent.¹¹ Similarly, the possession required in an adverse possession of waste lands sufficient to take the title out of the true owner must be adequate in continuity, in publicity, and in extent of area to extinguish the title of the rightful owner.¹² Where neither party has had complete possession over a disputed land, the possession in the eye of law must be with rightful owner.¹³ And, it may be observed that though possession may have been hostile when it commenced, still such possession would not *continue* to be hostile on the accrual of a peaceful title before the completion of the adverse possession.¹⁴

The very legal sense of possession imports exclusiveness, inasmuch as only one person can be said to be in possession of the same thing at the same time: and, an adverse possession must be a complete possession exclusive of the possession of another person.¹⁵ However, what is sufficient evidence of exclusion must depend on the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but non-participation, or non-possession may, in the circumstances of a particular case amount to an adverse possession. Regard must be had to all the circumstances, and a most important element is the length of time.¹⁶

9-a. *Bavrao v. Rakhmin*, (1898) 23 Bom. 137.

10. *Jogendranath Rai v. Baladeo Das*, 35 Cal. 961 (971); ; also see *Jagjivandas v. Bai Amba*, (1900) 25 Bom. 362 (Possession to be adverse must be shown to be continuous, public and adequate to the circumstances of the case).

11. *Mamulla Kohu v. Prasanna Kumar Sarkar*, (1920) 56 I.C. 811 (Cal.).

12. *Secretary of State v. Wazed Ali Khan*, (1921) 65 I.C. 866=34 C.L.J. 141=1921 Cal. 687.

13. *Secretary of State v. Kalika Prosad Mookerjee*, (1912) 14 I.C. 609 (Cal.).

14. *Velayutham Pillai v. Subbaraya Pillai*, (1914) 39 Mad. 879.

15. *Radhamoni Debi v. The Collector of Khulna*, (1900) 27 I.A. 136=27 Cal. 943=4 C.W.N. 597 (P.C.).

16. *Mt. Bhagbhari v. Mt. Khatun*, (1924) 80 I.C. 118=16 S.L.R. 25.

2178. A wrong-doer cannot be held to have acquired a title by adverse possession unless that possession was exclusive, and continuous, and if there were intervals during which they were not in actual possession, it is the true owners and not they who are wrong-doers, that should be held constructively to have been in possession during those intervals.¹⁷

Constructive possession does not help the wrong-doer.

The law on this point is well-settled. Lord Macnaghten in the case of *Trustees and Agency Co. v. Short*,¹⁸ quoted with approval the statement of Baron Parke in *Smith v. Llyods*,¹⁹ concurring in the judgment of Blackburn, C.J., in *McDonnell v. McKinty*,²⁰ and the principle on which it was founded that

"in order to bring a case within the statute of limitation there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected to bring the case within the statute";

and, observed that

"if a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place".

In *Secretary of State v. Krishnamoni Gupta*,²¹ the Judicial Committee of the Privy Council observed that

"in order to sustain a claim to land by limitation under the Indian Act there must in their opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him,"

And their Lordships held that

"the possession of the Government was in fact determined by the submergence of the land which then became derelict and so long as it remained in that state no title could be acquired against the true owner".

In *Basanta Kumar Roy v. Secretary of State*,²² the Judicial Committee observed that there could be no continuance of adverse possession when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation, and that the real owner does not discontinue his possession so long as the land is diluviated. Thus, as observed by the **Calcutta High Court**, in *Abhoy Sankar v. Satyendra Prasanna*,²³

17. *Abhoy Sankar v. Satyendra*, (1925) 85 I.C. 594 (595) (Cal.).

18. (1888) 13 A.C. 793=58 L.J.P.C. 4=59 L.T. 677.

19. (1854) 9 Ex. 562=156 E.R. 240=96 R.R. 837.

20. 10 Ir. L. R. 514.

21. 29 Cal. 518=6 C.W.N. 617=29 I.A. 104 (P.C.); Refd. in *Secti Kutti v. Kunbi Pathuma*, (1915) 40 Mad. 1040 (1059) (F.B.) (The principle that there can be no presumption of possession in favour of a wrong-doer).

22. 44 Cal. 858=40 I.C. 337=32 M.L.J. 505=44 I.A. 104 (P.C.).

23. (1925) 85 I.C. 594 (596) (Cal.); also see *Baroda Prosad Roy v. Annoda Mohun Roy*, (1910) 6 I.C. 359 (Cal.); *Ananda Hari Basak v. Secretary of State*, 3 C.L.J. 316 and *Muzashamsher v. Munshi Kunjbehari*, 12 C.W.N. 273.

"there can be no question that adverse possession to be effective must be possession adequate in continuity, in publicity, and in extent of area, and must be actual, visible, exclusive and hostile also, that the doctrine of constructive possession cannot be applied in favour of a wrongdoer whose possession is confined to the area of which he is in actual possession.²⁴ A series of isolated acts of trespass with no continuity of possession would fall short of the requisite, and if in fact, there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right. It must also be actual as opposed to ideal possession".²⁵

A title by adverse possession is displaced by evidence of partial possession by the party against whom the title by adverse possession is claimed.

"In order to constitute possession, it must be a complete possession exclusive of the possession of any other person."²⁶ [*Per Cairns, L.C., in Lows v. Telford*, (1876) 1 A.C. 415 (423)]. "If there are two persons in a field, each asserting that the field is his and each doing some act in the assertion of the right of possession, and if the question is which of these too is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."^{26-a}

The principle is recognised in several cases that the doctrine of constructive possession applies only in favour of a rightful owner, and must not, as a rule, be extended in favour of a wrong-doer, whose possession must be confined to lands of which he is in actual possession.²⁷ That this doctrine is well-founded on reason and principle is manifest, for as was observed by Mr. Justice Strong in *Hunnicut v. Peyton*,²⁸

"one, who enters upon the land of another, though under colour of title, gives no notice to that other of any claim, except to the extent of his actual occupancy; the true owner may not know the extent of the defective title asserted against him, and, if, while he is in actual possession of part of the land, claiming title to the whole, mere constructive possession of another, of which he has notice, can oust him from that part, of which he is not

24. *Radhamoni Debi v. Collector of Khulna*, 27 Cal. 943=27 I.A. 136 (P.C.); *Nawab Bahadur of Murshidabad v. Gopinath Mandal*, 6 I.C. 392=13 C.L.J. 625; *Wali Ahmed v. Tota Meah*, 31 Cal. 397 and *Jogendranath Roy v. Baladeodas*, 35 Cal. 961=6 C.L.J. 735=12 C.W.N. 127.

25. *Clark v. Elphinstone*, (1881) 6 A.C. 164=50 L.J.P.C. 22; also see *Wali Ahmed v. Tota Meah*, 31 Cal. 397 (405); *Lutchmeeput v. Sada-ulla*, 9 Cal. 698 and *Kedarnath v. Amrit*, 1925 Pat. 568=88 I.C. 676 (No title by adverse possession can be presumed from a few acts of trespass committed only occasionally).

26. *Vithaldas v. Secretary of State*, (1901) 26 Bom. 410 (416).

26-a. *Per Lord Selborne* in (1876) 1 A.C. 415.

27. *Mohini Mohan Roy v. Promada Nath Roy*, (1896) 24 Cal. 256=1 C.W.N. 304; *Reld. in Jogendra Nath Roy v. Baldeo Das*, (1907) 35 Cal. 961 (972); also see *Radha Gobind Roy v. Inglis*, (1880) 7 C.L.R. 364; *Udit Narain Singh v. Golabchand Sahu*, (1899) 27 Cal. 221 (P.C.); *Ananda Hari Basak v. Secretary of State*, (1906) 3 C.L.J. 316; *Vithaldas Kanjishet v. Secretary of State*, (1901) 26 Bom. 410 and *Nawab Bahadur of Murshidabad v. Gopinath Mandal*, (1910) 6 I.C. 392=13 C.L.J. 625.

28. (1880) 102 U.S. 333.

in actual possession, a good title is no better than one, which is a mere pretence."

Occupation by a wrong-doer of a portion of land only cannot be held to constitute constructive possession of the whole, so as to enable him to obtain a title by limitation.²⁹ Again, that constructive possession in favour of a wrong-doer cannot be implied so as to enable him to obtain thereby a title by limitation.³⁰

2179. Entry upon land in order to be an assertion of hostile title must be an entry as owner.³¹ As observed in *Siva Subramanya v. Secretary of State*,³²

"physical possession is a pure matter of fact, and there is nothing peculiar about it, but in order that it may generate ownership, it is necessary that the possessor should hold the thing exclusively, and for himself as owner".

A defendant in order successfully to set up a title by adverse possession, must show that he was in possession of land in such a manner as to indicate that he was claiming to be in possession as an owner, and was intending to oust the plaintiff.^{32-a} Where there was nothing to show that the plaintiff was, until a recent date, even aware of the entry of the defendants upon the land, and even when the plaintiff came to know that the defendants were holding the land, it was quite possible that they were taken to be holding only under plaintiff's co-sharers, there was no such adverse possession established as could defeat the lawful claim of the plaintiff to a declaration of share in the property. Where the possession of the defendant, is not under a derivative title, but as in his own right, with all the incidents of possession, and the person claiming to be the owner has stood by while others continued to possess *nec vi, nec clam, nec precario*, in practical contravention of the owner's alleged rights, the possession of the defendants must be held to be adverse.

"The law does not require that the claimant to ownership must, in such circumstances, be shown to have protested that his rights were being violated, and that the possession went on adversely to his protests."³³

There cannot be one principle applicable in the case of jungle land and another principle applicable in the case of other lands.

29. *Wali Ahmed v. Tota Meah*, (1903) 31 Cal. 397 (404); Reld. on *Mohini Mohan Roy v. Promada Nath Roy*, (1896) 24 Cal. 256; also see *Mangal Singh v. Ali Sher*, (1929) 120 I.C. 792; *Sadik Husain v. Etisad*, 13 O.L.J. 798=1927 Oudh 209=101 I.C. 714; *Narayan Singh v. Nawab Saiyid Dildar Ali Khan*, 1925 Pat. 210=3 Pat. 915 (928); *Kumar Premathath v. Meik*, (1920) 56 I.C. 184 (Pat.).

30. *Lutchmееput Singh v. Sadaulla Nushyo*, (1882) 9 Cal. 698.

31. *Gaya Prosad Karan v. Bakya Mani Dasi*, (1929) 119 I.C. 289=1929 Cal. 297=56 Cal. 914=33 C.W.N. 277.

32. (1884) 9 Mad. 285 (303).

32-a. *Ram Shankar v. Sheo Dutt*, 1933 Oudh 462.

33. *Arunachellam Chetty v. Venkatachalapathi*, (1919) 43 Mad. 253 (269) (P.C.).

The owner of jungle land is as much bound as the owner of any other kind of land to watch his property, and if he omits to take the necessary precautions and a person enters and holds possession of a piece of jungle for 12 years, the latter has obtained a title by prescription.....The ignorance of the owner would not prevent the accrual of a title by prescription.³⁴ In principle, an act done is one of ownership or evidence of an easement according as the person doing it asserts general ownership, or a particular right in another's property.³⁵ The enjoyment of any right of ownership over the soil is, *prima facie*, proof of ownership of the soil. Where a tract of land with a defined boundary has been throughout claimed by a person as owner and acts of ownership have been done on various portions of it, such acts may be accepted as evidence of possession of the whole tract.³⁶

Exclusive holding as owner.

2180. The Madras High Court has observed in *Siva Subramanya v. Secretary of State*,³⁷ that

"the exclusive holding is a physical fact, and when it is united with the intention to hold for himself as owner, it becomes such as will generate a title by prescription. When we speak of **actual possession**, we refer to the fact as in union with the intention to hold as owner.³⁷ It should also be observed that, when there is an intention to hold a thing as owner, it is not necessary that it should be enjoyed in any particular way, but it is sufficient that some overt act is done upon the thing in the execution of such intention.³⁸ In *Clark v. Elphinstone*,³⁹ it was observed by the Privy Council that it was not necessary that some act should always be done upon the spot in dispute itself, but that it was enough if some overt *acts of ownership* were done in relation to that spot, as, for instance, enclosing it."⁴⁰

Where a widow entitled to a life estate was in possession, although her possession was wrongful against the adopted son, but both plaintiff and the defendant believed that she was entitled to possession for life, such possession could not be treated as adverse to the plaintiff adopted son, as the intention to hold adversely in order to obtain an absolute estate was wanting.⁴¹ Beaman, J., observed that "I cannot conceive any circumstances in which a person could

34. *Secretary of State v. Vira Rayan*, (1885) 9 Mad. 175; Reld. on *Kalychurn Sahoo v. Secretary of State*, (1881) 6 Cal. 725.

35. *Sivasubramanya v. Secretary of State*, (1884) 9 Mad. 285 (303).

36. *Ibid.*, 9 Mad. 285 (303); also see *Indar Gir v. Court of Wards*, 8 O.W.N. 1275=15 R.D. 745 (Where possession by a person not the owner is an open, visible and notorious character, the Court may presume it to be adverse).

37. *Sivasubramanya v. Secretary of State*, (1884) 9 Mad. 285 (303).

38. *Ibid.*

39. (1881) 6 App. Cas. 164.

40. *Sivasubramanya v. Secretary of State*, (1884) 9 Mad. 285 (303).

41. *Pir Sab Kasimsab v. Gurappa Basappa*, (1914) 24 I.C. 716=38 Bom. 227=16 Bom. L. R. 111.

set out consciously to acquire a limited within a larger estate by adverse possession, the natural legal consequences of which would be to confer the latter, *i.e.*, full ownership upon him."⁴²

Two factors are necessary to constitute adverse possession, *viz.*, (1) actual possession, and not a mere assertion that he has been in possession⁴³; and (2) not mere possession, but a claim of title, which is adverse in nature to the owner's title.⁴⁴ A person who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse, so as to give himself the benefit of the statute of limitation.⁴⁵ A licensee cannot claim title only from possession, however long, unless it is proved that the possession was adverse to that of the licensor to his knowledge, and with his acquiescence.⁴⁶ Similarly, it is not correct as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title, can by a mere assertion in a judicial proceeding and a lapse of 6 or 12 years without that assertion having been successfully challenged obtain a title as an under-proprietor to the lands.⁴⁷

2181. Whether a possession is adverse or not, depends on the nature of the claim made by the person in possession, not upon the assent or dissent of the rightful owner. If the possession is held by a title independent of and not derived from, the rightful owner it is adverse whether the rightful owner acquiesces or not. So much so that the possession of a grantee under a void grant is adverse to the grantor, though in that case there is much more than mere acquiescence.⁴⁸ The test is, can the real owner sue for immediate possession; if he can, he must, or time runs against him.⁴⁹ To bar the title of the

42. *Pir Sab Kasimsab v. Gurappa Basappa*, 24 I.C. 716 (Bom.).

43. *Raja Sahib Perhlad Sein v. Rajendra Kishore*, (1869) 12 M.I.A. 292 (334); *Udit Narain Singh v. Golab Chand*, (1899) 26 I.A. 236=27 Cal. 221 (P.C.); *Secretary of State v. Krishnamoni Gupta*, (1902) 29 I.A. 104=29 Cal. 518 (P.C.) and *Vyapuri v. Sonamma*, (1915) 29 M.L.J. 645 (648) (F.B.).

44. *Sohela v. Bagger Singh*, (1926) 98 I.C. 870 (Lah.).

45. *Bejoy v. Kally*, (1878) 4 Cal. 327.

46. *Kadoth v. Secretary of State*, (1924) 80 I.C. 835=1924 P.C. 150=47 Mad. 572 (P.C.).

47. *Mahomed Mumtazali v. Mohan Singh*, 1923 P.C. 118=50 I.A. 202=45 All. 419 (P.C.); also see *Mahomed Mumtazali v. Dhana Singh*, (1929) 58 M.L.J. 226 (P.C.).

48. *Vundravandas v. Cursondas*, (1897) 21 Bom. 646 (661) (Arguments of Counsel; Angell, on Limitations, S. 404; *Magadalein Hospital v. Knotts*, 4 App. Cas. 324; *Churcher v. Martin*, 42 Ch.D. 312.

49. *Ibid.*, 21 Bom. 646 (661); also see S. 2175, *ante*; also see *Kali Ram v. Dularam*, 1933 Cal. 544=142 I.C. 582.

owner, there must be absence of possession by the owner, and exclusive possession by another, under claim or colour of title, and not permissively under the owners, *i.e.*, entry as owner, and exclusive holding as owner.⁵⁰ However if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute of limitation, abandons possession, the rightful owner, on the abandonment is in the same position in all respects as he was before the intrusion took place.¹ The owner must be considered in point of law as always in possession, so long as another is not in occupation of the land²; and even where there is trespass, if in fact there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right.³ As noticed in S. 2177, *ante*, the possessor to gain benefit of adverse possession, must be holding under a claim of title, hostile to the true owner, and must be in actual and exclusive possession which is open, notorious, continuous and un-

***Bona fides* of adverse possession not considered.**

interrupted.⁴ However, the statute of limitation does not consider the *bona fides* of the adverse possessor,⁵ and, it is also immaterial whether the owner is aware of his right or its infringement.⁶ An intention to hold on one's own behalf, even with full knowledge that he is not the true owner is sufficient to establish adverse possession.⁷ A person coming in under a defective title, which he knows to be defective is not deprived of the benefit of the law of limitation.⁸ But a user of a

50. See Ss. 2179 and 2180, *ante*; also see *Kaliram Majumdar v. Dulabram Choudhry*, 1933 Cal. 544=142 I.C. 582 (It would not do if the possession is merely permissive).

1. *Hearsey v. Karam Singh*, (1917) 37 I.C. 715 (Oudh).

2. *Madan Mohan Singh v. Brij Bihari*, (1920) 57 I.C. 717 (Pat.); *Bahadur Ali v. Secretary of State*, (1921) 61 I.C. 78 (Pat.).

3. *Abhoy Sankar v. Satyendra*, (1925) 85 I.C. 594 (Cal.).

4. *Radhamoni v. The Collector*, (1900) 27 Cal. 943=27 I.A. 136 (P.C.) and *Kuthali v. Kunharan*, (1921) 44 Mad. 883 (P.C.); *Kali Ram v. Dularam*, 1933 Cal. 544.

5. *Allahdad v. Fazaldad*, (1918) 46 I.C. 964; see Lightwood, p. 10; Dr. Pal's Limitation Act, p. 997; Mitra's Limitation Act, p. 1734.

6. *Rains v. Buxton*, (1880) 14 Ch.D. 537; *Dawkins v. Lord Pembyn*, (1877) 6 Ch.D. 318 (324); *Satyanarain v. Ramlal*, (1924) 4 Pat. 244=52 I.A. 109 (P.C.); *Dwarkanath v. Atul*, (1913) 17 C.W.N. 595; *Sachi Prasad v. Amarnath*, (1918) 45 I.C. 864 (Cal.); *Jamiruddee v. Basanta*, (1927) 105 I.C. 85 (Cal.); *Tarubai v. Venkatrao*, (1902) 27 Bom. 43; *Sampat Ram v. Ganga Datt*, (1922) 69 I.C. 427; *Muthurakko v. Orr*, (1911) 35 Mad. 618; *Secretary of State v. Venkata Narasimha*, (1919) 58 I.C. 689 (696).

7. *Ismdar v. Ahmed*, (1907) 30 All. 119; *Babaji v. Dattu*, (1912) 37 Bom. 64; *Malkarjun v. Amrita*, (1918) 47 I.C. 153 (Bom.); *Harikanta v. Bibi Nurunnessa*, (1919) 53 I.C. 625 (Cal.); *Girdharilal v. Umdajan*, (1921) 3 L.L.J. 215; *Singaravelu v. Chokkalinga*, (1922) 46 Mad. 525 (531).

8. *Bejoy v. Kali*, (1878) 4 Cal. 327; *Bhavrao v. Rakhmin*, (1898) 23 Bom. 137.

vacant or waste land, for various temporary purposes, without any intention of setting up a claim to ownership of the land is not taken as a claim by adverse possession.⁹

Character of the land.

2182. We have noticed above, in S. 2177, *ante*, that adverse possession is required to be

"adequate in continuity, in publicity and in extent of area to show that it is adverse to the competitor".¹⁰

The rule is laid down that

"when a person establishes his title to land and proves that he has been exercising during the currency of his title various acts of possession, then the quality of those acts, even though they might have failed to constitute adverse possession against another, may be abundantly sufficient to destroy that adequacy, and interrupt that exclusiveness and continuity which is required from any person challenging by possession the rightful title".¹¹

This rule applies to all lands, and in case of waste lands, or submerged lands, constructive possession remains with the person having title as true owner, and does not help the wrong-doer (S. 2178, *ante*).¹² Upon this subject of adverse possession much importance therefore, naturally attaches to the nature of the property, and evidence necessary to prove adverse possession varies with the character of the land.¹³ In considering the question of possession the Court will have to consider the nature of the property. How far the property is capable of being possessed directly will have to be considered. If for instance, the property is land covered all over with water, wood, etc., even if the man in possession proved a clearer possession than the man with the title the adverse possessor may not succeed.¹⁴ Adverse possession may be pleaded to bar a claim as regards uncultivated lands in the same manner and to the same extent as regards cultivated lands.¹⁵ An inference of adverse possession may be drawn from circumstances, such as long posses-

9. *Pranji v. Goculdas*, (1892) 16 Bom. 338; *Chokalinga v. Muthusami*, (1897) 21 Mad. 53; *Rulia v. Nur Muhd.*, 1926 Lah. 615; *Lajpatrai v. Sahna*, 1929 Lah. 432 and *Kadar v. Shib Ram*, 98 I.C. 880=27 P.L.R. 762.

10. *Radhamoni v. The Collector of Khulna*, (1900) 27 Cal. 943 (P.C.).

11. *Kuthali Moothavar v. Peringati Kunharan Kutty*, (1921) 44 Mad. 883=1922 P.C. 181=48 I.A. 395 (P.C.).

12. See S. 2178, *ante*; *Abhoy Sankar v. Satyananda*, (1925) 85 I.C. 594 (595) (Cal.) and *Secretary of State v. Wasedali Khan*, 1921 Cal. 687=34 C.L.J. 141=65 I.C. 866; also see *Nawab Bahadur of Murshidabad v. Gopinath Mandal*, (1910) 6 I.C. 392=13 C.L.J. 625 (Wrong doer's possession held confined to actual possession) and *Kaly Churn v. Secretary of State*, (1881) 6 Cal. 725.

13. *Secretary of State v. Debendralal*, 1934 P.C. 23=61 Cal. 262=38 C.W.N. 285 (P.C.).

14. *Ali Hammad v. Ghurpattar Singh*, (1925) 47 All. 389=1925 All. 454; Relied on 44 Mad. 883=85 I.C. 578 (P.C.), *supra*.

15. *Watson & Co. v. The Government*, (1865) 3 W.R. 73.

sion and the absence of any proof of licence or agreement between the person in possession and the landlord, even in a village which is largely agricultural, or even where the disputed land is situated within the municipal area.¹⁶ A temporary accommodation or user of land by a neighbour which might well pass entirely unobserved by the owner of the land, the position and nature of the land being such, is not adverse possession.¹⁷ In determining the question of possession the nature of the land, which is wholly or partially subject to inundation must be first considered.¹⁸ Storing fodder and tethering and grazing cattle on a piece of waste land does not amount to adverse possession as user of this sort being common excites no particular attention.¹⁹ The erection of a *khurli* or a mud trough for feeding cattle cannot give rise to a claim by adverse possession. User of such sort is neither intended to denote a claim of ownership of land under it nor understood as denoting that.²⁰ Where land in suit had been lying unoccupied for many years, and the municipal Board had been using it for depositing refuse, there was no adverse possession until the land was made *pacca*.²¹ Right to take wood from trees when fallen or cut recurring at uncertain intervals was not sufficient to acquire title by adverse possession.²² In the District of Manbhum, the *ghatwal* tenure is not heritable, and his appointment depends upon the will and pleasure of the Government.²³

2183. In *Clark v. Elphinstone*,²⁴ it was observed by the Privy Council that it was not necessary that some act should always be done upon the subject in dispute itself, but that it was enough if some overt acts of ownership were done in relation to that spot, as, for instance, enclosing it. The Judicial Committee observed that there was no doubt that in many cases acts done upon parts of a tract of land may be evidence of the possession of the whole, that if a large field were surrounded by hedges, acts done in one part of it would be evidence of the possession of the whole.

"This is an authority in support of the view that when a tract of land with a defined boundary has been throughout claimed as owner, and acts

16. *Alopi v. Gajadhar*, 130 I.C. 296=1931 All. 323.

17. *Chokkalinga v. Muthusami*, (1897) 21 Mad. 53; *Framji Cursetji v. Goculdas*, (1892) 16 Bom. 338.

18. *Khedonlal v. Rajendra Narain Singh*, (1919) 51 I.C. 70=29 C.L.J. 259.

19. *Mansa v. Khushali Ram*, (1922) 69 I.C. 4 (Lah.).

20. *Nawab Khan v. Abdulla Khan*, (1931) 134 I.C. 294=32 P.L.R. 467=1931 Lah. 489.

21. *Maqbul Husain v. Ahmad Husain*, (1923) 74 I.C. 251=1923 All. 557.

22. *Debi Prasad v. Badri Prasad*, (1918) 40 All. 461.

23. *Midnapore Zamindary Company v. Pandey Sardar*, (1917) 41 I.C. 114 (Pat.).

24. L.R. 6 App. Cas. 164.

of ownership have been done upon various portions of it, such acts of enjoyment may be accepted as evidence of the possession of the whole. It is also an authority for the opinion that there may be private ownership in forest-land and that it may be lost by virtue of adverse possession for the period fixed by the law of prescription."²⁵

Accordingly, where it was proved that the plaintiff, and his ancestor had cut wood, pastured cattle, and gathered forest produce in certain forests, under the belief and assertion that the said tracts formed portion of the Zamindari, and that the plaintiff and his ancestors were owners of the said tracts, were evidence of adverse possession, such that the Court was bound to find a title to the soil established.²⁶ As held in *Wali Ahmed v. Tota Meah*,²⁷

"Acts indicative of possession must vary according to the nature of the property over which possession is exercised, and in the case of waste lands, the cutting of grass and grazing of cattle are ordinarily acts by which possession is asserted. But when such acts are done by a tenant on the waste lands of his landlord, the principle can only apply, if the acts done amount to an assertion of possession adverse to the landlord and are not acts presumably done with his permission or consent."

In this connection, it is also to be observed that acts at different times by a fluctuating body of persons do not amount to adverse possession, to constitute which, the possession must be adequate in continuity, publicity and extent.²⁸ In *mirasi* tracts, the gathering of wild flowers, and fruits from poramboke lands and the gathering of fish from small tanks will not indicate ownership, as such acts are permitted by the Government. It is otherwise when large sums are spent on tanks by mirasidars in clearing silt and in constructing masonry dams, which are acts clearly indicative of ownership.²⁹ A *patindar* can, by adverse possession, acquire title to a tank covered by the *patni* of another *patnidar* under the same *Zamindar*, and such title is good and valid against the *Zamindar* when he acquires the *patni* interest of the latter by a private conveyance.³⁰ Mookerjee, J., observed that though mere appropriation of fish from a tank may not necessarily constitute adverse possession of the tank, a very different interpretation must be placed upon acts of an obviously proprietary character, such as the subletting, mortgaging or re-excavation of the tank or the expenditure of large sums in clearing silt out of it.³¹ In *Secretary of State v. Debendral Lal Khan*,³²

25. *Sivasubramanya v. Secretary of State*, (1884) 9 Mad. 285 (305).

26. *Ibid.*, (1884) 9 Mad. 285 (307).

27. (1903) 31 Cal. 397.

28. *Ibid.*

29. *Venkatarama Iyer v. Secretary of State*, (1909) 33 Mad. 362=20 M.L.J. 74=5 I.C. 118.

30. *Bijoy Chand v. Iswar Chandra Das*, (1916) 35 I.C. 60=21 C.W.N. 199.

31. *Ibid.*, 35 I.C. 60 (Cal.); Relied on *Venkatarama Aiyar v. Secretary of State*, 33 Mad. 362=20 M.L.J. 74=5 I.C. 118.

32. 1934 P.C. 23=61 Cal. 262=38 C.W.N. 285 (P.C.).

it has been held that nature of possession depends upon subject to be possessed, and in the case of fishery belonging to Crown, if the plaintiff can establish that he and those from or through whom he derives right have for 60 years been in possession adverse to the Crown of the fishery, any right of the Crown thereto is extinguished and the plaintiff is entitled to succeed in his claim.

2184. We have seen in S. 2178, *ante*, that constructive possession does not help the wrong-doer, who if he relies on adverse possession, can succeed only as regards the portion of land in suit of which he proves actual possession for the statutory period.³³

Possession of portion in case of intruder.

Pollock, in his work on Possession observes that possession of part constructively extends to the whole, if the whole is otherwise vacant and the person in possession has title. Constructive possession, in other words, is an incident of ownership, and cannot be applicable to the case of a wrong-doer who has no title.³⁴

As observed in *Suresh Chandra Mukerjee v. Shitikanta Banerjee*,³⁵ by Cuming, J.

"No doubt, acts of possession over a part of immovable property may in certain cases be evidence of the *de facto* possession of the whole. This rule, however, operates with full force in favour only of the true owner and should be applied with caution, if at all, in favour of the wrong-doer. The possession of the wrong-doer should be held to be confined to what he is in actual possession of."³⁶

Thus, possession of a portion of the land in the case of an intruder cannot be treated as constructive possession of the whole.³⁷ It is impossible for a trespasser to obtain by prescription anything more than the land actually occupied by him adversely and continuously for the full prescribed period.³⁸ The only exception is in special cases where there is a connecting link such as close connection and interdescendence between the part actually possessed and the

33. *Wali Ahmed v. Tota Meah*, 31 Cal. 397; *Nawab Bahadur v. Gopinath*, 6 I.C. 392=13 C.L.J. 625; *Mohini Mohan Roy v. Promodanath*, (1896) 24 Cal. 256.

34. *Secretary of State v. Krishnamoni Gupta*, (1902) 29 I.A. 104=29 Cal. 518 (P.C.); *Udit Narain v. Golab Chand*, (1899) 26 I.A. 236=27 Cal. 221; *Basanta Kumar Roy v. Secretary of State*, (1917) 44 I.A. 104=44 Cal. 858 (P.C.).

35. (1924) 78 I.C. 679=28 C.W.N. 637=39 C.L.J. 389; Relied on *Mohini Mohan Roy v. Promodanath Roy*, 24 Cal. 256=1 C.W.N. 304.

36. *Ibid.*, (1924) 78 I.C. 679 (691); Relied on *Mirza Shamser Bahadur v. Kunj Behari*, 29 Cal. 518=29 I.A. 104 (P.C.) and *Secretary of State v. Krishnamoni Gupta*, 6 I.C. 359=13 C.L.J. 30.

37. *Mangal Singh v. Alisher*, (1929) 120 I.C. 792=1930 Lah. 303; also see *Sadik Husain v. Etizad*, 13 O.L.J. 798=1927 Oudh 209=101 I.C. 714.

38. *Chunu v. Subhetti*, 1927 Nag. 67=98 I.C. 540=22 N.L.R. 181.

whole of which it is claimed to be a part. Thus, in the case of a wrong-doer claiming to possess the whole, by reason of possessing a part, it is often difficult to say, in the absence of the connecting link of title how far the whole extends.³⁹ A person who loses his right in a proprietary holding by adverse possession should also be taken to lose his right in *Shamilat* appurtenant thereto.⁴⁰

2185. ILLUSTRATIVE CASES.—

(1) Where evidence showed that fishermen caught fish in a certain tank, and gave a share of them to a certain person, it was held that this did not amount to proof of adverse possession by the latter over the tank.⁴¹

(2) Where the land was originally waste, and continued to be so for many years, and was used as a place of nature by the neighbours, and the first substantial use made by the defendants was within 12 years of the suit, and there were no positive acts beyond 12 years showing an intention to acquire the exclusive control of the disputed land, held that there were no acts which could be regarded as adverse to the existing title.⁴²

(3) The erection of huts on a portion of the disputed land or projection of the eaves over a certain length of it are insufficient to prove title by adverse possession.⁴³

(4) The Zamindar of a village will be presumed to be in possession of the *abadi*, the ordinary presumption being that possession goes with title, and it is for defendants to prove adverse possession under Art. 144 of the Limitation Act.⁴⁴

(5) A person cannot acquire a title by adverse possession, who is not himself in possession, but the land being in possession of the mortgagees, has merely got his name recorded in the village papers in place of the name of the mortgagor.⁴⁵ Entries in the record of rights no doubt carry a presumption of correctness attached to them, but in case of *banjar* land, incapable of physical possession, title of the original owner would be considered good, notwithstanding the erroneous entries, unless overt acts of adverse possession extending for a period longer than 12 years are established.⁴⁶

(6) Where the father of plaintiffs obtained leave from the collector to plant trees alongside a road on land belonging to Government, at his own

39. *Suresh Chandra v. Shitikanta*, (1924) 51 Cal. 669 (679)=78 I.C. 679=1924 Cal. 855; also see *Nutbihari v. Bishweshwari*, 1933 Cal. 414=144 I.C. 177=60 Cal. 404 (Trespasser claiming a title less than the whole, but in exclusive possession of the whole land).

40. *Karamdad v. Rehmat*, 134 I.C. 1106 (2)=32 P.L.R. 634=1931 Lah. 648 (2).

41. *Bejoy Chand v. Sarat Kumar Roy*, (1925) 86 I.C. 767=1925 Cal. 1253.

42. *Jogendranath Rai v. Baladeo Das*, (1907) 35 Cal. 961 (971).

43. *Ram Chandra Sil v. Ramanmani Dasi*, (1916) 36 I.C. 890=20 C.W.N. 773.

44. *Imdad Husain Khan v. Haidari Khanum*, (1927) 102 I.C. 207 (Oudh).

45. *Kunwar Sen v. Darbari*, 38 All. 411 (414, 415).

46. *Nur Muhammad v. Baim*, (1928) 110 I.C. 857=1928 Lah. 306=29 P.L.R. 381=10 L.L.J. 63.

expense, in consideration of being allowed to get the fallen dry wood from the trees, and subsequently the defendant who purchased the village got the proceeds of the sale of such wood on a few occasions, and not uninterruptedly, and continuously every year or at stated times, and their right was disputed although the plaintiffs were unsuccessful in spite of their asserting a claim to wood or the price thereof, held that the defendants had not acquired a title by adverse possession.⁴⁷

(7) Where a wife, during the prolonged absence of her husband, who was erroneously supposed to be dead, acting in excess of the limited powers of a wife in possession of her absent husband's property, made a *mourasi* grant of a portion of her husband's estate, and the grantee entered into and remained in possession for upwards of 12 years, it was held that the position of the grantee was not that of a lessee, but that of a trespasser whose title had been perfected by 12 years' adverse possession.⁴⁸

(8) In *Kolada Prosad Tewari v. Sadhu Charan*,⁴⁹ where the lands were of such a nature that they were capable of cultivation once in three or four years and as between two periods of successive cultivation they were used as grazing lands by strangers, it was held that when such lands were taken exclusive possession of and the owner was ousted, the mere fact that strangers grazed cattle during the period that the land lay fallow would not interrupt the operation of adverse possession.

(9) In *Nageswar v. Bengal Coal Company*,⁵⁰ where the subject-matter of the dispute was mineral right in a certain village their Lordships of the Privy Council while conceding that the maxim *tantum prescriptum quantum possession* was rigorously applicable to such a case, and that in the case of mines there was no presumption in law that a possession of a part of a seam infers possession of a whole seam, held that, having regard to the inaccessibility of minerals in the earth, it was not possible to take actual physical possession at once of a whole mineral field as it could be occupied only by extracting the minerals and until the whole minerals were exhausted the physical occupation must necessarily be partial; and, their Lordships consequently held that the fact that one pit in a mineral field is discontinued and another opened in a different part of the field and that bores are sunk in likely places is excellent proof of possession of the whole area.

(10) The possession of a vacant site will be presumed to be with its rightful owner and an adjoining owner cannot establish adverse possession of it merely by the fact that he had erected a cowshed over a portion of the same, and had been using the site for more than twelve years.¹ Tethering of cattle, keeping dung cakes, building a *khurli*, passing over and similar acts of a fugitive nature cannot either singly or collectively, extin-

47. *Debi Prasad v. Badri Prasad*, (1918) 40 All. 461.

48. *Bejoy Chunder Banerjee v. Kolly Prossonno Mookerjee*, (1878) 4 Cal. 327.

49. (1912) 20 C.L.J. 32=27 I.C. 412.

50. (1930) 58 I.A. 29=30 C.W.N. 265=1931 P.C. 186 (P.C.); also see and cf. *Bhupendra v. Rajeshwar*, (1931) 58 I.A. 228=132 I.C. 610=1931 P.C. 162=61 M.L.J. 632 (P.C.) (Upon a grant of the surface rights by a Zemindar, he remains in possession of a sub-soil, though it may be only constructive possession and cases of adverse possession of mineral rights fall under Art. 144).

1. *Rulia v. Nur Muhammad*, (1926) 97 I.C. 705=8 L.L.J. 400=1926 Lah. 615=27 P.L.R. 561.

guish the owner's rights, by adverse possession.² So also, the use of a few square yards of vacant land as vacant house-site or backyard in a town,³ is not adverse possession. Similarly, structures of a purely temporary nature, made by a tenant for the convenience of his house, do not constitute such an assertion of right on the part of the tenant as would justify the conclusion that he meant by erecting such structures to set up a claim to the ownership of the soil, and can, therefore, be no evidence of adverse possession.⁴

(11) Where a piece of *Natham Poramboke* land in a village had been used by the villagers as a threshing floor in time of harvest, for stocking manure, and green leaves, for drying paddy, and other communal purposes connected with agricultural operations, it was held that the enjoyment of the land by the villagers was of too fugitive and permissive a character to afford support to the acquisition of any prescriptive or customary right.⁵

(12) Where plaintiffs sued to recover possession of certain house from the defendants, resting their claim on a document executed by defendant's father admitting that the house belonged to plaintiff's father, and promising to vacate it at the end of two years from the date of execution, and the document being presented for registration, its execution was denied, but after enquiry it was registered compulsorily, it was held that by the agreement the tenancy or permissive occupation was to last for two years, and under Art. 144, the plaintiff had 12 years from that date within which to sue.⁶

(13) Where the plaintiff's title to the property claimed has been established and also that the defendant has been in occupation of that property by permission of the plaintiff, the plaintiff would be entitled to a decree for possession in spite of the fact that he may have failed to establish the contract of tenancy set up by him as the basis of his claim.⁷

(14) Where the daughter-in-law of a Hindu came into possession of some of his properties after his death under an arrangement with one of the reversioners that she should remain in possession for her lifetime without power of alienation, and that after her death the reversioners were to take the property, it was held that the defendant's possession was under the circumstances merely permissive, and she did not consequently acquire any title by adverse possession against any of the reversioners.⁸

(15) Where possession of land has been held under a mistake, an essential element of possession, *viz.*, the intention to claim adversely is wanting, but if the person in possession of wrong land claims it in his own right and exclusively on his own behalf, the possession is adverse to the true owner, who has the right of immediate possession. In *Purshottam Krishnaji v. Sagaji*,⁹ where there was mortgage by persons other than the

2. *Lajpatrai v. Sohna*, (1929) 115 I.C. 71=1929 Lah. 432=30 P.L.R. 296; *Niadar v. Shib Ram*, (1926) 98 I.C. 880=8 L.L.J. 535=27 P.L.R. 762; *Mt. Aisha v. Allah Baksh*, 1934 Lah. 684.

3. *Chokkalinga v. Muthusami Naicken*, (1897) 21 Mad. 53 (55).

4. *Bechu v. Lachmi Kuar*, (1910) 8 I.C. 708 (Oudh.).

5. *The Taluk Board v. Venkatarama*, (1923) 75 I.C. 38=1924 Mad. 197=46 Mad. 866.

6. *Shivrudrappa v. Balappa*, (1898) 23 Bom. 283.

7. *Ahmad Sharif v. Umrao Beg*, (1926) 94 I.C. 779=1926 Oudh 353.

8. *Ram Abhilak v. Mt. Chaurasi*, (1927) 101 I.C. 730=1927 Oudh 582=13 O.L.J. 839.

9. (1903) 28 Bom. 87.

real owner, with the acquiescence of the real owner, the mortgagee's possession was held adverse to the real owner, inspite of the fact that the mortgagee took possession under a mistake common to all as to mortgagor's right. In *Goura Chandra v. Secretary of State*,¹⁰ acts of ownership done in the belief that the Maliahs formed part of the *Zamindari* were held evidence of adverse possession.

(16) Where plaintiffs sued for possession of land alleging that defendants were only *malikan qabza*, and for some years past had occupied some village *shamilat* which occupation had become known to plaintiffs only recently, and it was found that the defendants had been in possession for over twenty years on the understanding that they were co-sharers in the *shamilat*, it was held that the defendants had established a title by adverse possession and the plaintiffs could not succeed.¹¹

2186-2250: TITLE IV: ADVERSE POSSESSION *INTER SE*.

2186. ADVERSE POSSESSION BETWEEN RELATIVES.—Acts which are alleged to create adverse possession must be scrutinized in the light of the relationship that exists between the parties who assert against each other the title by adverse possession.¹² The principle is established that if the person possessed of legal title to an estate is also in the enjoyment of the profits of that estate more or less, his title cannot be held to have been extinguished by reason of the physical possession of the estate held by another person who has no title to it.¹³ A leading English authority has held in *Corea v. Appuhamy*,¹⁴ that it is not possible for the manager of the family to put an end to the possession by any secret intention in his mind. There must be an ouster or equivalent to an ouster. This has been applied in cases where one member of a family gets into possession of certain lands on behalf of the whole family, and his possession enures for the benefit of all the members of the family and he cannot make it adverse to them.¹⁵ Where possession has commenced lawfully, *e.g.*, by an agreement as to the management of the property, the Court would be slow to hold that it has subsequently become adverse to the rightful owner unless the evidence clearly and unequivocally establishes ouster.¹⁶ Where a female lives with her male relatives, the ordinary presumption is that they manage her property for her, and do not hold it adversely.¹⁷ In dealing with the question of possession as

10. (1905) 32 I.A. 53=28 Mad. 130 (P.C.).

11. *Allahdad v. Fazaldad*, (1918) 46 I.C. 964 (Punjab).

12. *Thangavelu Chetty v. Mangathaye Ammal*, (1913) 21 I.C. 21=1913 M.W.N. 674; also see *Ejaz Ali Kidwai v. Court of Wards*, 1930 Oudh 510=7 O.W.N. 988 (*Illustrations* 1 and 2).

13. *Nirman Singh v. Rudra Partab*, (1926) 98 I.C. 1013=53 I.A. 220=48 All. 529=29 O.C. 316=1926 P.C. 100 (P.C.).

14. 1912 A.C. 230.

15. *Hidayat Ali Khan v. Khadar Khan*, (1915) 30 I.C. 586 (Mad.).

16. *Laxmipat Rao v. Venkatesh*, (1916) 41 Bom. 315 (345)=19 Bom. L. R. 23 (45).

17. *Asad Ali Mirdha v. Toyfan Bibi*, (1883) 13 C.L.R. 328; *Inayat Husain v. Aziz Banno*, (1911) 10 I.C. 413 (All.).

between brothers and sisters, in native families, regard must be had to the conditions of life under which such families live, and the fact that in such families the management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. In the case of such families slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession.¹⁸ Where on the death of a Muhammadan, the only male member of the family assumes management of the estate, there being other females entitled to shares therein, the natural presumption is that he enters upon the estate as agent, or manager for them, and not on his own behalf exclusively.¹⁹ In the case of joint co-owners, like a son and his mother, or a brother and his sister, living jointly, and maintaining themselves out of the common fund derived from the joint property, the possession of one cannot become adverse to the other, unless there is an express ouster or a repudiation of the title of one by the other within the knowledge of the former.²⁰

The principle is well-established that the sole possession by one of two or more joint owners is not adverse to the other until the owner in possession has done some act to the knowledge of the others which amounts to a denial of the latter's right.²¹ Accordingly, if a brother in possession on behalf of himself and his sisters executes a deed of gift in favour of his sons without the knowledge of his sisters, and there is nothing to put the sisters on enquiry, the possession of the brother does not become adverse to the sisters.²² In the case of a joint family, where no partition was proved, the mere fact that two of the brothers went to live in a neighbouring village, would not make the possession of another brother who continued to live in the village necessarily adverse.²³ However, where a joint Hindu family comes to an end, in the sense that only one of its male members survives, and the joint family property vests in him as sole owner, and he deals with the separate property of a

18. *Inayat Husain v. Ali Husen*, (1897) 20 All. 182; Reld. on *Fazal Karim v. Umdabibi*, A.W.N. (1884) 171.

19. *Mt. Bhagbhari v. Mt. Khatun*, (1924) 80 I.C. 118=16 S.L.R. 25 (Property of a Pardanashin woman managed by her stepson); *Haider Khan v. Chand Khan*, 50 I.C. 691 (All.); also see *Kalappa Malappa v. Kalappa Ningappa*, 1924 Bom. 469=26 Bom. L. R. 494=87 I.C. 705 (Brother's widow).

20. *Asghar Husain v. Akbar Husain*, (1916) 36 I.C. 743; Reld. on *Faiz-ud-Din v. Reju Akab*, 28 I.C. 22=21 C.L.J. 192.

21. *Shakur v. Husaini Bibi*, (1923) 71 I.C. 653=1923 All. 447; Reld. upon *Chandbhai v. Hasanbhai*, 64 I.C. 205=46 Bom. 213=1922 Bom. 150 and *Ahmad Raza Khan v. Ramlal*, 26 I.C. 922=37 All. 203=13 A.L.J. 204.

22. *Shakur v. Husaini Bibi*, (1923) 71 I.C. 653=1923 All. 447.

23. *Jagjivandas v. Bai Amba*, (1900) 25 Bom. 362 (365)=3 Bom. L. R. 47.

deceased member of the joint family as his own, this may amount to adverse possession, and the heirs of the deceased member can claim that property.²⁴ Similarly, co-heirs under Muhammadan Law are in the position of tenants-in-common and the entry and possession of one of such co-heirs must be deemed to be on behalf of all the co-heirs.²⁵ Where the other heirs are in entire charge of the property, the heir sought to be excluded is not bound to assure himself that he is not excluded from inheritance, and that his interests will not be looked after by them.²⁶ But, as joint family is not an institution of Mahomedan Law, it has been held by the **Lahore High Court** that there is no presumption that on the death of a Muhammadan the male heirs hold the shares of the female heirs on behalf of the latter as managers of a joint family.²⁷

It cannot be held that when parties are relatives (**cousins**) the presumption of permission always arises, but on the facts of a particular case, it may be a matter of inference justified by the evidence that the possession was permissive in its nature and not adverse.²⁸ No question of adverse possession can ordinarily arise between a **husband and wife**, if they are in joint possession of any property.²⁹

2186-A. ILLUSTRATIONS.—

(1) In *Thangavelu Chetty v. Mangathaye Ammal*,³⁰ the plaintiff was a woman, and his nephews' acts in repairing the property, payments of taxes, and prior mortgage transactions, were susceptible of explanation as acts done by the plaintiff's reversioners, and were not conclusive evidence of adverse possession.

(2) Where property governed by the rules of primogeniture had come into ownership of a Mahomedan boy of tender years living with his uncle, and other members of the family, and by family custom, the senior most member managed the family property, it was held that uncle's possession was not adverse and hostile to the legal title of his nephew, and its continuance for over twelve years had not the effect of extinguishing the title.³¹

24. *Mt. Mahadei Kunwar v. Mt. Bahu Rani*, (1919) 50 I.C. 180 (Oudh).

25. *Asiruddin Mondal v. Latifulnissa*, (1925) 85 I.C. 763 (Cal.); *Ram Parson v. Kalab Husain*, (1916) 36 I.C. 100 (All.); *Haider Khan v. Chand Khan*, (1919) 50 I.C. 691 (All.).

26. *Marian Beeviammal v. Kader Meera Sahib*, (1915) 29 I.C. 275 (Mad.).

27. *Mt. Zainab v. Ghulam Rasul*, (1923) 73 I.C. 425=1923 Lah. 519; s.c. 4 Lah. 402.

28. *Champalal v. Mangal Chand*, (1917) 40 I.C. 420 (All.).

29. *Mayadad Khan v. Hazari Lal*, (1928) 108 I.C. 435 (Nag.); also see *Sooda Ram v. Joogul Kishore*, (1875) 24 W.R. 274; *Ibrahim Bhura v. Isa Rasul*, (1916) 41 Bom. 5; *Dina v. Bishambar*, 31 I.C. 464 (Nag.).

30. (1913) 21 I.C. 21 (22)=1913 M.W.N. 674.

31. *Ejaz Ali Kidwai v. Court of Wards*, 1930 Oudh 510=7 O.W.N. 988.

(3) In *Chokkalinga v. Muthusami*,³² where the suit was for possession of a few square yards of vacant land used as vacant house-site or backyard in a town, the use of the land by the defendant as such, was not held sufficient to constitute adverse possession, especially when it was remembered that the parties were brothers.

Brothers.

(4) In a Muhammadan family the possession of a brother should be deemed to be the possession of his sisters also, unless the brother repudiates their claim, and asserts a right in himself. Where a Muhammadan brother and sister inherited together property left by their deceased father, and the sister was a minor at the time of her father's death, and lived in the same house with her brother, it could not be said that she was excluded from her legal share, and that her brother was in adverse possession, although the sister's name was not recorded in the revenue papers to the extent of the share legally inherited by her, nor did she get profits proportionate to that share.³³

Brother and sister.

(5) In a Hindu family governed by Dayabhaga, one of several brothers died leaving a widow and a daughter. The widow continued to be in possession of her share of the property till her death. After her death the male members of her husband's family remained in possession of the property and the daughter remained with her husband: it was held that the possession of the male members of the propositus family must be presumed to be on behalf of his daughter. No adverse possession could be presumed until ouster was proved.³⁴

Male members and daughter of deceased.

(6) Where husband and wife are living together, and the wife has property of her own which the husband is in possession of and manages, his possession must be considered to be his wife's: and he has no right to part with such property without her consent.³⁵ Where the plaintiff's husband sold to her certain property and remained in possession for some years, it was held that the possession of the husband being permissive, the wife was in constructive possession of it.³⁶ The fact that a wife living with her husband allowed her properties to be mutated in the name of her husband does not lead to the inference of an oral gift to the husband.³⁷

Husband and wife.

(7) Where on the death of a Hindu his widow continued to live with his brother, who also obtained possession of the property of the deceased; and the widow subsequently made an adoption, and the adopted son sued to recover the property from the brother of the deceased, it was held that under the circumstances it must be presumed that the defendant managed

32. (1897) 21 Mad. 53 (54).

33. *Inayat Husain v. Aziz Bano*, (1911) 10 I.C. 413 (All.); also see *Haider Khan v. Chand Khan*, (1919) 50 I.C. 691 (All.); *Shurfunnissa v. Kylash Chunder*, 25 W.R. 53; cf. *Chand Bibi v. Lal Mahomed*, (1918) 48 I.C. 692 (Cal.) (The possession of the brother held adverse to sister, even where there was no demand refused by the former).

34. *Jogu Mandal v. Madhab Mandal*, (1917) 41 I.C. 39 (Pat.); cf. *Varada Pillai v. Jeevarathnammal*, (1919) 43 I.C. 244 (P.C.) (Where there was ouster and adverse possession proved on the facts and circumstances of the case).

35. *Sooda Ram Dass v. Joogul Kishore*, (1875) 24 W.R. 274.

36. *Ibrahim Bhura v. Isa Rasul*, (1916) 41 Bom. 5=18 Bom.L.R. 810.

37. *Mayadad Khan v. Hazarilal*, (1928) 108 I.C. 435 (Nag.).

the property on behalf of his brother's widow intending merely to help her, and that his possession was not adverse either to the widow, or to the plaintiff.³⁸

(8) A Buddhist father on his re-marriage made over the land in suit to his four children by the first wife by a registered deed towards their mother's share of inheritance in full satisfaction. He continued to be in possession but managed the land for the joint benefit of the co-owners. The husband of one of the daughters subsequently sued for his wife's share and mesne profits after more than twelve years of the execution of the deed, and his suit was held within time under Art. 144, as limitation does not begin to run until possession becomes adverse to the plaintiff.³⁹

(9) In a case where a woman's name is entered in village record, because the male owner is away, the woman would be considered to be in possession on behalf of the man and not adversely.⁴⁰

(10) In *Ma Ngwa Naing v. Maung Tha Maung*,⁴¹ where a deed of partition was executed by a Burmese in favour of his daughter by first wife, he being heavily indebted, and paternal grandfather appointed guardian of daughter successfully objected to creditor's attaching the property, which remained in father's possession while the daughter was living with her maternal uncle, and father always assured daughter that her property would be restored to her, it was held that the father could not acquire title by adverse possession as he admitted his daughter's title.

(11) Where a Muhammadan died in 1907, and his daughters who were living in their respective husband's houses frequently visited their brother's house and received gifts from him often, and there was nothing to show that the brother or his widow who remained in possession of the deceased's estate ever asserted exclusive title to the knowledge of the daughters till 1923 or 1924 when disputes arose, and the daughters filed a suit for partition, it was held that the suit was not barred under Art. 144, Limitation Act.⁴²

(12) Where an adoption by a widow has secretly taken place without the knowledge or assent of the brothers of her husband who since the alleged adoption have remained in absolute and exclusive possession of the property, the adopted son cannot be taken to be in constructive possession of the property in suit through his uncles.⁴³

(13) The mere fact that after the death of a Mahomedan the mutation takes place in the name of the son does not by itself show that he asserted his exclusive title in opposition to the claim of his step-mother especially when the mother and son lived amicably and in one house.⁴⁴

2187. POSSESSION OF AGENTS, SERVANTS, ETC.—

(1) According to English law,

38. *Kalappa Malappa v. Kalappa Ningappa*, (1925) 87 I.C. 705=26 Bom.L.R. 494=1924 Bom. 469.

39. *Maung Aung Tun v. Maung San Nyun*, 1928 Rang. 13=5 Rang. 576=105 I.C. 598.

40. *Zorawar Singh v. Dip Chand*, 1929 All. 331=119 I.C. 502.

41. 1929 P.C. 55=7 Rang. 4=144 I.C. 595=56 M.L.J. 244.

42. *Baijivi v. Bai Bibanboo*, (1929) 118 I.C. 785=31 Bom.L.R. 199=1929 Bom. 141.

43. *Mulchand v. Thakurdas*, (1931) 133 I.C. 899=1932 All. 61.

44. *Mt. Yakut v. Inayatullah*, 148 I.C. 926=1934 Pesh. 7.

English Law.

"if a landowner allows his gardener or servant, or workman employed upon his estate, to live in a cottage thereon rent-free, the possession of the servant is the possession of the master, and the servant has no greater interest in the land than a coachman, who occupies part of his master's coach-house, sleeps over his master's stables; and no title can be gained by such an occupation and enjoyment of master's property, however long it may be continued".⁴⁵

Where the possession of the actual occupier is not independent of the true owner, but only in his capacity of a servant, or agent, for the purpose of performing his duties as such servant or agent, the employer or owner is in *virtual* possession through the occupier⁴⁶; and the servant or agent is not in adverse possession as against the master or principal,⁴⁷ but his title, in presumption of law, is in amity with, and in subservience to the true title.⁴⁸

(2) The possession of an agent, or servant, is a type of **permissive possession** known to Indian Law: It has a very considerable resemblance to a tenancy-at-will of English Law.

"But, where the owner, in the exercise of his own proprietary right, permits some other person to occupy his land or to receive his rents, then, whether the relation of landlord and tenant exists between the parties or not, the possession of the owner is not discontinued, because, under such circumstances, the possession of the occupier is the possession of the owner."⁴⁹

Where the relationship between the parties is one of a **fiduciary character**, the possessor cannot be said to be holding adversely to the owner. In *Mulji Bhulabhai v. Manohar Ganesh*,⁵⁰ the contention of the *Shevaks*, or ministers of a temple, that they had been in exclusive and uninterrupted possession of land attached to the temple for more than twelve years, and that by reason of such user they had acquired a *quasi*-proprietary title at least against the manager of the temple, was negatived, and it was observed by West, J., that

"it is opposed to the principle *Nemo potest possessionis suae naturam mutare*. Having come in as servants or representatives of the deity, they could not by a wish or volition change the nature of their possession, if possession it was to be called. They held for the deity, however; the manager held for the same deity. In that ideal personage the two rights

45. *Turner v. Doe*, 9 M. & W. 645; cited in Addison's Law of Torts; Dr. Pal's Limitation, p. 949.

46. Rustomji, p. 849, citing (1842) 5 Ir. L. R. 402; (1845) 5 Ir. L. R. 449; 4 Ir. L. R. 254; Darby, p. 354.

47. Rustomji, p. 849; Brown, p. 116.

48. Rustomji, pp. 849, 850; Wood, 4th Ed., p. 1235.

49. Per Garth, C.J., in *Gobind Lall Seal v. Debendronath Mullick*, (1880) 7 C.L.R. 189=6 Cal. 311.

50. (1887) 12 Bom. 322.

concurrent, and one could not therefore really be adverse to the other, so as to give rise to a title by prescription."¹

While there subsists any contract, express or implied, between the parties in and out of possession to which the possession may be referred as legal and proper, it cannot be pronounced adverse.² A possession by the manager of minor's property cannot become adverse, until the manager distinctly repudiates the agreement.³

"In order to sustain a claim to land by limitation under the Indian Act, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him."⁴

It is well settled, that a man who possessed himself of property in one character, cannot himself alter that character and begin to possess it in another character.⁵ If possession has been obtained as agent, there must be an open and notorious disavowal of agency before a new right is prescribed⁶ and Courts require the strongest proof on the part of the agent who sets up a title adverse to the principal; but, it cannot be said that under no circumstances can an agent prescribe for the rights of the principal.⁷ Where an agent disavows the idea of holding as such, and asserts an exclusive right in himself either with the principal's actual knowledge or so openly or notoriously that the principal must know of it, his possession then becomes adverse.⁸

"Thus, the agent, tenant, or other person holding on behalf of the owner, is a means of securing and continuing his possession (*i.e.*, the power of dealing at will with the subject-matter)."⁹ "As long as the subject-matter is so protected, and the means of protection is still within the control of the owner, . . . the owner would have the power of reproducing at will his enjoyment of the subject-matter, unless and until on his having occasion to make use of it he found that he was resisted by the protecting agency itself."¹⁰

Before the possession of an agent, manager, tenant, trustee or bailee can become adverse, the original relation existing between the parties must be put an end to by open repudiation of the title of

1. (1887) 12 Bom. 322 (324).

2. *Doe dem Colclough v. Hulse*, 3 B. & Cr. 757: cited in *Dadoba v. Krishna*, (1879) 7 Bom. 34 (39).

3. *Nabab Mir Sayad Alam Khan v. Yasin Khan*, (1892) 17 Bom. 755 (758).

4. *Secretary of State v. Krishnamoni Gupta*, (1902) 29 Cal. 518 (P.C.).

5. *Official Assignee v. Moorli Das*, (1914) 22 I.C. 271 (Mad.).

6. *Corea v. Appuhamy*, 1912 A.C. 230=81 L.J.P.C. 151; *Lyell v. Kennedy*, (1889) 14 A.C. 437=59 L.J.Q.B. 268.

7. *Rama Somayajipad v. Kunhu Kutti*, (1918) 44 I.C. 630 (637) (Mad.).

8. *Rustomji's Limitation*, p. 850, citing 1 R.C.L., p. 754; also see *Lakshminarayana Navada v. Madappayya*, 1931 M.W.N. 856.

9. *Tarubai v. Venkatrav*, (1902) 27 Bom. 43 (54).

10. *Ibid.*, 27 Bom. 43 (55).

the owner; and, the onus lies heavily on the person whose possession was admittedly permissive at the commencement, to show that its character has changed.¹¹ The character of the possession cannot be changed by any act or default of such person, unless it is sufficient to give the person to be affected by it an opportunity of knowing that his rights are being infringed and that occasion has arisen for action by him to protect them.¹²

2187-A. ILLUSTRATIONS.—

(1) An insolvent, who has obtained merely a personal discharge, can make subsequent acquisitions only as the agent of the official assignee. A claim, therefore, by the official assignee to such after acquisitions, even after twelve years' possession by the insolvent, is not barred by limitation. The possession of the insolvent in such a case is not adverse against the official assignee.¹³

(2) In *Krishna Dixit v. Bal Dixit*,¹⁴ the plaintiff as agent of the defendant leased some lands belonging to the defendant to tenants and collected rents on behalf of the defendants. After expiry of the lease the tenants began to pay rent to the defendants direct, when plaintiff brought the suit claiming adverse possession. It was held that the fact that the rents previously paid by the tenants had been retained by the plaintiffs, who had asserted an adverse title did not affect the rights of the defendant.

(3) A person who gets possession of lands as emoluments for a service to be performed by him, cannot be allowed to treat the lands as his own by merely denying his liability to do service or by neglecting to do that service. He should first surrender the lands to his master and again take possession thereof adversely to his master and enjoy them for twelve years after so re-taking possession, before he could set up title by adverse possession.¹⁵

(4) The possession or enjoyment of the *pujari* of a religious endowment, for the time being cannot become adverse to the worshipper.¹⁶

(5) Where plaintiff who was a minor at the time of the settlement, was then recorded as owner of the land in suit, with a note added that he and his mother had gone over to live in a different village, and that the defendants, certain collateral relations of his held the land as *sarbarahs*, it was found that the *sarbarahs* had not paid any *malikana* to the plaintiff; however, it was held that the possession having commenced with the consent of the plaintiff and being therefore permissive, it could continue to be of that character until something occurred to make it adverse: that the defendants having contended that it had ceased to be permissive, it was for them to show when it had

11. *Ramdhan Satra v. Nobin Chunder Choudhry*, 12 W.R. 250; *Jagjivan v. Bai Amba*, (1900) 25 Bom. 362; *Chokkalinga v. Muthusami*, (1897) 21 Mad. 23.

12. *Dewan Manwar Ali v. Unnoda Pershad Roy*, (1879) 7 I.A. 1 (P.C.); *Mt. Bebe Sahodra v. Roy Jung Bahadur*, (1881) 8 I.A. 210 (P.C.); *Tarubai v. Venkatrao*, (1902) 27 Bom. 43 (54).

13. *Official Assignee v. Moorli Doss*, (1914) 22 I.C. 271 (Mad.); s.c. on appeal (1915) 29 I.C. 168 (Mad.).

14. (1913) 38 Bom. 53.

15. *Tamirsi Venkatasami v. Yivalla Ammannna*, (1921) 62 I.C. 771 (Mad.).

16. *Kadambi Srinivasacharlu v. Durlabha Subuddhi*, (1912) 17 I.C. 589=23 M.L.J. 348.

ceased to be so, and this they had failed to do. Also the mere fact that the plaintiff attained his majority some seventeen years before the institution of the suit cannot be deemed to be sufficient of itself to convert the defendants' previously permissive possession into an adverse one.¹⁷

2188. POSSESSION AS LICENSEE, ETC.—A licensee holds property only on sufferance, a license being defined to be

"a right to do or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property".¹⁸

In the words of Fry, L.J., in *Heap v. Hartley*,¹⁹

"it is a license to do a thing and a contract not to give leave to anybody else to do the same thing. But it confers, like any other license, no interest or property in the thing".²⁰

Where a *raiya* of a village obtains possession of land as a licensee, the terms of the license being that so long as he is a cultivator and resides in the village he has a right to occupy the land for his own use, to construct buildings upon it, to dwell therein, and to enjoy the user but with no right in the soil, there can be no question of adverse possession on his behalf as against the licensor. The fact that he has improved buildings on the land or has replaced erections would not confer such a title upon him.²¹ A suit for the recovery of immoveable property against a person who had originally been in mere permissive occupation or possession accorded on the ground of charity, or relationship, is governed by Art. 144 and not by Art. 142 of the Limitation Act.²² The terms "*dispossession*" or "*discontinuance of possession*" cannot apply to a case of permissive occupation by another, or an occupation which recognises the proprietary right of another, and is with a view of holding in lieu of that other for a stated period, when it is contemplated that possession will be restored to the original owner.²³ Where the defendants were in permissive occupation with the consent of the plaintiffs, accepting the position of licensee under the plaintiff's tenants, there could be no adverse possession to the plaintiff, until there was an open assertion of a hostile title.²⁴ The same principle applies to the case of a guest, or relative allowed to reside in a house, as a contribution to his support, while the owner himself pays the rates and taxes, and executes the repairs.²⁵ If a person actually in

17. *Bela Singh v. Buta*, 94 P.R. 1884.

18. S. 52, Indian Easements Act (V of 1882).

19. 42 Ch. D. 461.

20. *Heiniger v. Dross*, 25 Bom. 433 (447).

21. *Rameshwar Baksh Singh v. Dwarka*, (1920) 54 I.C. 261.

22. *Gobind Lal Seal v. Debendronath*, (1880) 6 Cal. 311.

23. *Sundar v. Mt. Rohonsu*, 104 P.R. 1893.

24. *Prohlad Chandra Modak v. Mohendra Chandra Roy*, (1926) 98 I.C. 94 (Cal.).

25. Lightwood, p. 30; Rustomji, p. 851; citing (1895) 2 Ir. Rep. 359.

possession can be shown to have held *under* the plaintiff the possession of the former might be regarded as the possession of the plaintiff: and, although the defendant has been in possession for twelve years as apparent owner, yet the rightful owner may show that the possession was not such as the statute will give effect to, *e.g.*, where the real owner came now and then and lived with the defendant.²⁶ Where a person has obtained permissive possession of the land of another, agreeing to pay him certain dues in recognition of his right as the proprietor, the relation of landlord and tenant which would arise from such an agreement, would not be necessarily determined by the mere non-payment of the dues, nor even by the mere repudiation of the title of the landlord, unless under circumstances showing that the landlord had acquiesced in the act of repudiation. In the latter course it would be acquiescence of the landlord, and not the mere denial of his title by the tenant, which would put an end to the original relation of the parties.²⁷ A tenant cannot establish a title to the land, adverse to his landlord, unless there is some distinct claim of which the landlord is aware.²⁸ Mere non-payment of rent or discontinuance of payment of rent for twelve years by a tenant would not create adverse possession against the owner; nor would the carrying out of any alterations in the house by the tenant to suit his convenience be evidence of adverse possession.²⁹ The fact that a tenant-at-will has made structural alterations on the land of his tenancy to the knowledge of the owner does not convert the possession of the tenant into adverse possession, inasmuch as such construction or alterations by even a tenant-at-will is not necessarily wholly incompatible with his position as a tenant.³⁰ In the case of a permissive tenancy or a tenancy-at-will, it is an ingredient of the tenancy that it is terminable on the will either of the landlord or the tenant and in such a case the possession of the tenant becomes adverse to the landlord when he sets up a title of ownership in the property.³¹ To such cases the period of limitation is that provided in Art. 144 of the Limitation Act, and the starting point of limitation is the date when the possession of the defendant becomes adverse to the plaintiff.³² Where the defendant is proved to have come into possession as a licensee, it must be proved that prior to 12 years of the

26. Sugden (Statutes), pp. 26, 76; Rustomji's Limitation, p. 851.

27. *Tota v. Sakotia*, 18 P.R. 1888.

28. *Honda v. Bhakku*, 65 P.R. 1901.

29. *Mahomed Faruq v. Sidik*, (1924) 79 I.C. 59 (Sind); Reld. on *Jagdeo Narain Saig v. Baldeo Sing*, 71 I.C. 984=49 I.A. 399=1922 P.C. 272=2 Pat. 38 (P.C.); *Prem Sukhdas v. Bhupia*, 2 All. 517; *Rungolall v. Abdul Guffoor*, 4 Cal. 314=3 C.L.R. 119 and *Dadoba v. Krishna*, 7 Bom. 34.

30. *Sidiq Haji Yaqub v. Mahomed Faruq*, (1925) 90 I.C. 1007 (Sind).

31. *Ibid.*, (1925) 90 I.C. 1007 (1010).

32. *Ibid.*, (1925) 90 I.C. 1007 (1008).

filing of the suit, the defendant at any time asserted a title hostile to the true owners.³³

2189. GUARDIAN AND WARD.—Where a guardian takes possession of property owned or partly owned by his wards, a very strong presumption arises that possession in such a case is taken on behalf of the wards, but it is not an irrebuttable presumption.³⁴ In *Vasudeo Atmaram v. Eknath Balkrishna*,³⁵ where the owner of property died leaving a mistress and she took possession of his property, it was held that, even though she was not guardian, she should be held to have taken possession on behalf of the minor sons of the man whose mistress she had been. In that case there was no proof of clear assumption by the woman on her own behalf. In the Privy Council case of *Corea v. Appuhamy*,³⁶ Lord Macnaghten stated that the principle recognised by Wood, V.C., in *Thomas v. Thomas*,³⁷ holds good.

“Possession is never considered adverse if it can be referred to a lawful title.”

A person entering under a lawful title, cannot divest himself of lawful title by pretending that he had no title at all. It follows from

Possession of guardian not adverse to minor.

the above principles that so long as a person is in charge of a minor's property as Guardian that person is only an agent or trustee and cannot set up adverse possession.³⁸

Similarly, a person entering on the lands of a lunatic with know-

Lunatic's property: no adverse possession.

ledge of the lunatic's rights and of the lunacy is in the position of a bailiff or trustee for the lunatic, and can obtain no benefit

for himself personally by occupation of the land.³⁹ If adverse possession has started, and time begins to run against a lunatic or a minor, an extended period of limitation is given, and he will be entitled to file a suit within three years after he becomes sane.⁴⁰ Section 6 of the Limitation Act does not prevent possession being adverse or

33. *Kanhailall v. Bhaiyalal*, 16 N.L.R. 248.

34. *Rudra Pratap Narain Singh v. Nirman Prasada Singh*, (1923) 74 I.C. 225 (241)=1923 Oudh 61=9 O.L.J. 552.

35. 8 I.C. 639=35 Bom. 79=12 Bom. L. R. 956.

36. 1912 A.C. 230.

37. (1855) 2 K. & K. 79=69 E.R. 701=110 R.R. 107.

38. *Mahalakshamma v. Suryanarayana*, 1928 Mad. 1113 (1117)=51 Mad. 977=55 M.L.J. 733=28 L.W. 919; Reld. on *Harward v. Earl of Shrewsbury*, (1874) 17 Eq. 378.

39. *Seetharamaraju v. Subbaraju*, (1922) 45 Mad. 361=1922 Mad. 12=42 M.L.J. 262; also see *Smyth v. Byrne*, (1914) 1 Ir. R. 53 (As to position of lunatic).

40. *Ibid.*, 45 Mad. 361=1922 Mad. 12=70 I.C. 678; cf. *Mahalakshamma v. Suryanarayana*, 1928 Mad. 1113 (1118); also see and cf. *Shidilingava v. Rajava*, 1932 Bom. 23=33 Bom. L. R. 603=134 I.C. 366 (Possession could be adverse even as against the minors: Art. 144 applied).

the running of limitation against a minor, or a person under a legal disability. It only gives an extension of limitation in favour of the minor after the cessation of the disability or the death of the person subject to it.⁴¹ But, of course the disability provisions are not applicable nor in fact required when possession is not adverse at all, where, for example, the possession is that of a guardian.⁴²

In *re Hobbs v. Wade*,⁴³ a presumption was raised that possession of a guardian is on behalf of the infant or lunatic, and it continues so even after the ward attains majority until something has been done to alter the character of that possession. Thus, it has been held by the **Madras High Court**, in *Sriramulu Naidu v. Andalammal*,⁴⁴ that possession of the ward's property by a guardian will be presumed to be on behalf of the ward and will not, in the absence of evidence to the contrary, be held to be adverse to the ward. In *Basanta Kumar Roy v. Secretary of State for India*,⁴⁵ the **Calcutta High Court** held that the possession of the Revenue authorities could not be availed of against the plaintiffs by reason of their being at the time minors under the guardianship of the Court of Wards. In *Ma Ngwe Naing v. Maung Tha Maung*,⁴⁶ where father had executed a deed of partition in favour of his daughter by first wife, and he continued in possession of property but contributed for his daughter's support who was living all the while with her maternal uncle, it was held by their Lordships of the **Privy Council**, that

"the retaining of the possession and management by the father in the circumstances of the daughter being an infant, and the guardian of the property being the paternal grandmother, appears entirely consistent with the possession and management being conducted in accordance with the legal title that is for and on account of the daughter".⁴⁷

In this case, in view of the father's admission, it being found that his possession was in accordance with the legal purport of the deed, no title could be acquired by the father under the law of limitation. Also see *Uma Bai v. Vithal*,⁴⁸ where the possession was found "quite consistent with management as guardian or as senior member of the family without any adverse possession".

41. *Mt. Ram Dulari v. Sher Bahadur Singh*, (1928) 113 I.C. 258=1928 Oudh 481=5 O.W.N. 832.

42. Bann., 155; Rustomji, p. 852; *Umabai v. Vithal*, 33 Bom. 293; s.c. 11 Bom. L. R. 34.

43. (1883) 36 Ch. D. 553.

44. (1906) 30 Mad. 145; Reld. on *Thomas v. Thomas*, (1855) 25 L. J. Eq. 159 and *Wall v. Stanwick*, 36 Ch. D. 763.

45. (1917) 44 Cal. 858 (875) (P.C.); see *Thomas v. Thomas*, (1855) 2 K. & J. 79; Smith's L. C., 11th Ed., Vol. II, pp. 651, 652 (Arguments of counsel at p. 863).

46. 1929 P.C. 55=56 M.L.J. 244=7 Rang. 4 (P.C.).

47. *Ma Ngwe Naing v. Maung Tha Maung*, 1929 P.C. 55 (57)=56 M.L.J. 244=7 Rang. 4 (P.C.).

48. (1908) 33 Bom. 293 (305).

The period for recovering possession by the minors would not run until the possession by the manager became adverse, and that would not be until the manager distinctly repudiated the management.⁴⁹ Where certain property was allotted to a minor at partition of the joint family, but the minor's uncle continued in possession after the partition, it was held that the presumption was that the uncle held possession for his minor nephew, and that the *onus* lay on the uncle to prove that his possession was adverse.⁵⁰

Possession of a
stranger against minor
or lunatic.

2190. In *Morgan v. Morgan*,¹ Lord
Hardwicke said:—

“Where any person, whether a father, or a stranger, enters upon an infant's property, and continues in possession, the Court will consider such person entering as a guardian to the infant”.

This view was adopted in *Howard v. Shrewsbury*,² by Jessel, M. R. who said:

“The result, therefore, is that an infant is entitled to treat a stranger (who takes possession of his property) as his bailiff or agent.”

This rule, was cited in *Vasudeo Atmaram v. Eknath Balkrishna*,³ as authority for the view that the possession of the agent, or manager, deemed to have begun permissively for the minors, and to have continued as such until *after* they had arrived at the age of majority, was taken as not adverse until she did something to convert it into a wrongful possession on her account by a denial of their title. However, this rule appears to be stated too broadly. As observed in an Irish case,

“if these observations are *literally* construed, it is difficult to see how the statute can bar the right of any person whose right of entry accrued while he was an infant, unless, *after* he has attained full age, something has been done to change the character of possession of the person in possession (as where the infant has left home and has not for many years made any claim to the property)”.

A similar rule was applied by the Punjab Chief Court in *Bela Singh v. Buta*,⁴ where the minor and his mother had left their

49. *Nabab Mir Sayad Almakhan v. Yasin Khan*, (1892) 17 Bom. 755 (758).

50. *Thandavaraya Odayan v. Narayana Goundan*, (1911) 9 I.C. 505 (Mad.); also see *Vaidyanatha Aiyar v. Aiyasami*, (1908) 32 Mad. 191 (Where a minor member, after division of family property continues undivided from and under the guardianship of another, the latter's collection of certain debts due to the family is also on behalf of the minor's share of the debt) and *Shidlingawa Sadeppa v. Rajava Tanesaheb*, (1931) 134 I.C. 366=33 Bom. L. R. 603 (Art. 144 applied to suit to set aside transfer of equity of redemption by the guardian of minors).

1. 1 Atk. 489.

2. (1873) 17 Eq. 378.

3. 35 Bom. 79=12 Bom. L. R. 956=8 I.C. 639.

4. 94 P.R. 1884.

native village, and the property of the minor was in hands of certain collateral relations of his as his *sarbarahs*. It was held that the possession of the defendants permissive in its commencement was not shown to be adverse, and the mere fact that the plaintiff attained his majority some seventeen years before the institution of the suit could not be deemed sufficient of itself to convert the defendant's previously permissive possession into an adverse one. But, there can be no question that possession may be adverse to an owner, *e.g.*, an infant, though there is no manager at all to represent him. In *Vithalbowa v. Narayan Daji*,⁵ where in 1860 land appertaining to a math, was sold by the manager *K*, subject to the payment of assessment, and after his death, *R*, who succeeded as manager, sued to set aside the sale, but the suit was dismissed, and the vendee's *miras* right was confirmed; but later in 1871 one *G* obtained a decree declaring him to be the legal manager of the math, and removing *R*, who was held to have no title to the office: and on *G*'s death, in 1887, plaintiff, his successor in the legal management of the math, brought a suit against the vendee to recover possession of the lands, and he sought to exclude the period between 1860 and 1875, when there was no lawful manager, in computing the limitation for the suit, it was held that if defendant's possession was adverse to the ownership of the *math* during 12 years after *K*'s death, the operation of the law of limitation would not be affected by the fact that there was no legal manager during that time.

In *Thakore Fatehsingji v. Bamanji*,⁶ where the plaintiff's estate was under the management of the Collector prior to the Bombay Minor's Act came into force, and subsequently the Collector obtained a certificate of administration to the plaintiff's property under that Act, and when the plaintiff came of age, the administrator did not hand over the property, but before the plaintiff could receive charge of the property, the Collector had leased out his lands to the defendant without any sanction from the Government, or the District Court, and the defendant refused to give up possession, it was held that there can be no adverse possession of a limited interest in property as well as of the full title as owner; and that the defendant had been in adverse possession as a permanent tenant. Similarly, it has been held by the **Punjab Chief Court** in *Shamir v. Ladha Singh*,⁷ that the fact of the plaintiffs being minors at the date of the alienation in dispute by their mother did not prevent the possession of the alienees being adverse against the minors. In *Basanta Kumar Roy v. Secretary of State*,⁸ their

5. (1893) 18 Bom. 507.

6. (1903) 27 Bom. 515 (517).

7. 100 P.R. 1909=152 P.L.R. 1909.

8. 1917 P.C. 18=21 C.W.N. 642=44 Cal. 858 (P.C.): s.c. (1909) 14 C.W.N. 317 (*Surudas Kundu v. Basanta*).

Lordships of the **Privy Council**, in differing from the High Court upon the determination of the appeal, did not express any opinion adverse to their view on the point that the possession of the Revenue authorities could be adverse against the minors under the guardianship of the Court of Wards. Accordingly, it has been correctly observed in *Seetaramaraju v. Subbaraju*,⁹ by Kumaraswami Sastri and Devadoss, JJ., that

"it cannot be stated as a general proposition that there could be no adverse possession of property which belongs to a lunatic or minor during the continuance of the lunacy or minority of the owner. The question has in each case to be decided with reference to the anterior relationship between the person taking possession and the minor lunatic, and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic."

"Art. 144 provides a period of twelve years from the date when the possession becomes adverse to the plaintiff. It seems to us from the provisions of the Limitation Act that lunacy or minority would not by itself prevent limitation from running as against a lunatic or minor and that in cases where it is clear that the person entering into possession was under no duty to the lunatic or minor and entered into possession for his own benefit and in assertion of a title hostile to that of the lunatic or minor, limitation would begin to run from the date when he so took possession though the lunatic would be entitled to file a suit within three years from the date when his disability ceases. If he died a lunatic, then his suit would be instituted by his legal representative."

In *Shidlingava v. Rajava*,¹⁰ where a Muhammadan mortgaged some of his land to the mortgagee, and after his death, he left as his heirs, his widow, and two of his minor sons, and the widow as the guardian of the minors and with the consent of the brother of her deceased husband sold the equity of redemption, and the purchaser after some time redeemed the mortgage and held possession of the property in his own title, it was held that the suit by the minor sons after three years of their attaining majority, and after more than twelve years of the redemption of the mortgage was barred by time under Art. 144, Limitation Act.

2191. ADVERSE POSSESSION AMONGST CO-SHARERS.—The principles, which are applicable to cases of this description, in which the question arises as to whether the possession of one co-owner has been adverse to that of another, must now be taken to be well settled.

English authorities. Mr. Justice Story, observed in *Ricard v. Williams*,¹¹ that

"the law will never construe a possession tortious, unless for necessity; on the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful, and this upon

9. (1921) 45 Mad. 361 (368, 369).

10. 1932 Bom. 23=134 I.C. 366=33 Bom. L. R. 603.

11. (1882) 7 Wheaton 107.

the plain principle that every man shall be presumed to act in obedience to his duty, until the contrary appears".

In *Prescote v. Nevers*,¹² the same learned Judge stated that

"the only difference between the possession of a co-owner and other cases is that, **acts**, which if done by a stranger would *per se* be a *disseisin*, are in the case of tenancies in common **perceptible of explanation consistently with the real title**; acts of ownership are not in tenancies-in-common, acts of *disseisin*. It depends upon the **intent** with which they are done **and their notoriety**; the law will not presume that one tenant-in-common intends to oust another; the facts must be notorious, and the intent must be established in proof."

In the words of Chief Justice Marshall, in *Mc Clung v. Ross*,¹³

"a **silent possession**, accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, **ought not to be construed into an adverse possession.**"

The law relating to co-tenants in matters of this kind has been authoritatively stated by the Privy Council in *Corea v. Appuhamy*.¹⁴ Lord Macnaghten speaking about the contention that a certain person entered as 'sole heir', apparently because he had it in his mind from the first to cheat his sisters, observed:

"But is such a conclusion possible in law? **His possession was in law the possession of his co-owners.** It was **not possible** for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

In *Clymer v. Dawkins*,¹⁵ it was ruled that

"the entry and possession of one tenant-in-common is ordinarily deemed to be the entry and possession of all the tenants, and this **presumption will prevail in favour of all until some notorious act of ouster** or adverse possession by the party so entering **is brought home to the knowledge or notice of the others**; when this occurs, the possession is from that period treated as adverse to the other tenants."

Lord Denman observed in *Cully v. Doc dem Taylerson*,¹⁶ that

"no doubt **exclusive receipt of profits continuously for a long period may point to an ouster**, but the Court must be satisfied that such taking of profits is an indication of **denial of rights** in the other co-tenants to receive them.

2192-2200.—INDIAN DECISIONS.—Following the above basic principles in the main, it has been recognised in numerous decisions, both by their Lordships of the Privy Council, and by the Indian High Courts

12. (1827) 4 Mason 326.

13. (1820) 5 Wheaton 116.

14. 1912 A.C. 230.

15. (1845) 3 Howard 674.

16. (1840) 11 Ad. & E. 1008 (1014).

"that when the parties are co-sharers, co-owners, or tenants-in-common, and *no partition has taken place between them*, the sole occupation of one of them is not *prima facie* inconsistent with the right of others".¹⁷

The trend of authorities supports the conclusion

"that mere non-participation of the profits by one and exclusive occupation and enjoyment of the joint property by the others is not *per se* adverse possession; in order that the possession may be adverse there must be (a) a disclaimer of the other's right by an open assertion of a hostile title on a part of the co-owner setting up adverse possession, and (b) notice thereof (*i.e.*, of such disclaimer) to others, either direct or to be inferred from notorious acts and circumstances".¹⁸

2193. It has been stated by Mookerjee and Caspersz, JJ., in *The fundamental rule.* the leading Calcutta case of *Jogendranath Rai v. Baldeo Das*,¹⁹ that

"the fundamental rule is that the entry and possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all". "The obvious reason for this rule is that the possession of one co-owner is in itself rightful, and does not imply hostility as would the possession of a mere stranger".

The same rule has been stated in different words by the Oudh Court in *Mahipal Singh v. Sarjoo Prasad*.²⁰

"It is well established rule of law that if a co-sharer has been in possession of a particular land, his possession cannot be considered adverse against the other co-sharer, and his possession must be deemed to be on behalf of them all. In order to establish adverse possession in such a case, a co-sharer has to establish that he expressly denied the title of the other co-sharers and remained in possession after such denial for over twelve years".

17. Rustomji's Limitation Act, p. 838; See *Mt. Yakut v. Inayatullah*, 1934 Pesh. 7=148 I.C. 926; see and cf. *Deba v. Rohtagi Mal*, 28 All. 479 (480) and *Mansa Ram v. Behari*, 6 P.R. 1912=12 I.C. 453 (After partition, the possession of one co-sharer cannot be taken as possession held on behalf of others).

18. *Mt. Yakut v. Inayatullah*, 1934 Pesh. 7=148 I. C. 926; also see *Hardit Singh v. Gurmukh Singh*, 64 P. R. 1918=1918 P. C. 1=47 I. C. 626 (P. C.); *Jogendranath v. Baldeo Das*, (1907) 35 Cal. 961 (968); *Gangadhar v. Parashram*, (1905) 29 Bom. 300; *Amrita v. Shridhar*, (1908) 33 Bom. 317 (322); *Ittapan v. Manivikrama*, (1897) 21 Mad. 153 (159); *Venkatachellam v. Annapurna*, (1928) 109 I.C. 553=1928 Mad. 652; *Ahmad Razakhan v. Ramlal*, (1914) 37 All. 203=13 A.L.J. 204; *Mt. Mubarik Unnisso v. Muhd. Raza Khan*, (1924) 46 All. 377=79 I.C. 174=1924 All. 384=22 A.L.J. 307; *Harkesh Singh v. Mt. Hardeo*, (1927) 102 I.C. 66=1927 All. 454=49 All. 763; *Mahipal v. Sarjoo*, 1926 Oudh 141=92 I.C. 99; *Bashir Ahmad v. Parshotam*, 1929 Oudh 337 (339); *Akbar v. Tabu*, 45 P.R. 1914, etc., etc.

19. (1907) 35 Cal. 961 (968); Followed in *Hori Pru v. Mi Aung Kraw Zan*, (1919) 52 I.C. 629=10 L.B.R. 45=12 Bur.L.T. 129.

20. 1926 Oudh 141=3 O.W.N. 100=92 I.C. 99=13 O.L.J. 326; Relied on *Corea v. Appuhamy*, (1912) A.C. 230; *Jogendra Nath v. Baldeo Das*, (1908) 35 Cal. 961 and *Ahmad Raza Khan v. Ramlal*, (1915) 37 All. 203=13 A.L.J. 204.

This rule of law, which has been laid down in numerous cases both by their Lordships of the Privy Council as well as by the High Courts in India, was again repeated by the Oudh Chief Court, in *Bashir Ahmad v. Parshotam*,²¹ in these words:—

“The rule is that if a property belongs to several sharers and one co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse to the other co-sharers. He must be deemed to be in possession on behalf of the other co-sharers, and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been an ouster of the other co-sharers. The ouster takes place when the title of the co-sharers is denied.”

The basic principle is, therefore, clearly laid down that the possession of one co-sharer is ordinarily the possession of all the co-sharers; but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers that in future he intends to hold for himself alone.²²

2194. It has been recognised in numerous rulings that the possession of one co-sharer is ordinarily the possession of other co-sharers, and being in itself rightful it cannot be considered adverse to other co-sharers not in physical, but only in constructive possession.²³ Where one of several co-sharers in an occupancy holding is in actual cultivating possession thereof his possession cannot be considered to be wrongful nor can he be said to be in wrongful receipt of the profits accruing from the holding belonging to them in common.²⁴ In the case of joint property, possession or exclusive occupation without more is not sufficient to constitute ouster or adverse possession even if such exclusive possession extends beyond the statutory period of twelve years.²⁵ Exclusive possession by co-sharers of portions of undivided estates is a common thing. Such exclusive possession does not amount to an ouster of the other co-sharers. Every joint owner has a right to use any portion of the joint lands so long as he does not exclude the other co-sharers from it.²⁶ The

21. 1929 Oudh 337 (339).

22. *Akbar v. Tabu*, 45 P.R. 1914=22 I.C. 805=105 P.L.R. 1914=61 P. W. R. 1914; also see *Beli Ram v. Munshi*, 1934 Lah. 456; *Abdul Qayum v. Abdul Rahman*, (1933) 146 I.C. 710=1933 Oudh 439=10 O.W.N. 844 and cf. *Tomejuddi v. Mulai Chowkidar*, (1916) 35 I.C. 72 (Cal.) (Abandonment by one co-sharer, and exclusive possession by another co-sharer, is adverse).

23. *Jogendranath Rai v. Baldeo Das*, (1907) 35 Cal. 961 (968); also see *Sujabibi v. Tarap Mandal*, (1915) 26 I.C. 788 (Cal.); *Ramparson Upadhia v. Kalab Husain*, (1916) 36 I.C. 100 (All.); *Bharat Prasad v. Ganga Baksh*, (1911) 9 I.C. 425 (Oudh).

24. *Amjad Ali v. Azizuddin*, 132 I.C. 201 (1)=1931 All. 551.

25. *Subodh Chandra v. Bhabalika*, (1934) 60 Cal. 1406=149 I.C. 410=1934 Cal. 356.

26. *Kameshwar Narain Singh v. Janardhan*, (1925) 87 I.C. 736=1925 Pat. 492=3 Pat.L.R. 81.

exclusive possession by *A* of property which originally has been joint, does not *per se* amount to adverse possession as against *A*'s co-sharers²⁷; and the rule is laid down that mere possession however exclusive or long-continued, if silent, cannot give one co-tenant in possession title as against the other co-tenant.²⁸ The possession of a co-sharer being in law the possession of his co-sharers, it is not possible for him to put an end to that possession by any secret intention in his mind.²⁹ Thus, a case of adverse possession by a co-sharer cannot be established by mere paper assertions not brought home to the knowledge of the other co-owners, when there has been no actual exclusion of the latter from use and enjoyment for the period of limitation.³⁰ Mere mental determination is insufficient in law for extinguishing the title of the other co-owners.³¹ When it is said that the possession of a co-owner of joint undivided property can never be deemed to be adverse to any one who is lawfully entitled to joint possession with him,³² it means that, *in the absence of evidence to the contrary*, the possession of a co-tenant is possession on behalf of the whole body of co-tenants, and is not possession adverse to the other co-tenants.³³ In cases where the litigating parties are co-owners, or co-tenants having an equal right to use property for a specified purpose, the presumption of law is that the possession of one is the possession of all. Every such person is seized of the property *per my et per tout*, and anything short of denial of title cannot destroy the plaintiff's right.³⁴ This explains the reason that the rights of absentee co-sharers remain alive where one member of a family leaves a village without any intention of giving up his rights in his ancestral or joint family land, when this is cultivated or looked after

27. *Asad Ali Khan v. Akbar Ali Khan*, 1 C.L.R. 364; *Mt. Yakut v. Inayetullah*, 1934 Pesh. 7=148 I.C. 926.

28. *Jogendranath Rai v. Baldeo Das*, (1907) 35 Cal. 961 (970); *Jewan Ram v. Mansingh*, 1934 Lah. 84 (1)=148 I.C. 943 (Exclusive possession by a co-sharer is not an assertion of exclusive title); *Kailash Chander Nag v. Bijay Chandra Nag*, (1923) 72 I.C. 680=36 C.L.J. 434=1923 Cal. 18.

29. *Faizuddin Khan v. Reju Khan*, (1913) 20 I.C. 584 (Cal.); s.c., (1915) 28 I.C. 22; 21 C.L.J. 192; also see *Mahadeo Prasad v. Ramphul*, 1926 Oudh 258=1 Luck. 62; *Ghulam Muhd. v. Mt. Begum*, (1930) 122 I.C. 105 (Lah.).

30. *Suraj Bibi v. Tarap Mandal*, (1915) 26 I.C. 788 (Cal.); *Ram Parson v. Kalab Husain*, (1916) 36 I.C. 100 (All.).

31. *Bibi Khatun v. Ahmed Ishaque*, (1915) 27 I.C. 1 (Cal.) and *Faizuddin Khan v. Rejukhan*, (1915) 28 I.C. 22.

32. *Abdul Qayum v. Abdul Rahman*, (1933) 146 I.C. 710=10 O.W. N. 844=1933 Oudh 439.

33. *Manmohan Nath Tewari v. Ram Dhani*, 16 R. D. 286; *Kedar v. Baran*, 15 R.D. 259.

34. *Mastan Singh v. Santa Singh*, (1933) 14 Lah. 267=145 I.C. 553=1933 Lah. 705 (F.B.).

by the other co-tenants or co-sharers, without any overt act of hostile title.³⁵ Another aspect of this question is that where one of the co-owners is found to be in adverse possession of the land belonging to a stranger, it is presumed that the defendant co-owners have trespassed on the suit land jointly; that possession by one of them was really possession for all.³⁶

It follows from the authorities that **one co-owner may hold adversely to his co-parcener**, and, if his possession is continued uninterruptedly for the statutory period, he will acquire an indefeasible title³⁷; but, the rule is well-established that mere occupation or enjoyment or management of joint property by one co-sharer does not constitute adverse possession as against the other co-sharers, and to constitute an adverse possession as between tenants-in-common there must be an exclusion or ouster.³⁸

2195. (1) It has been stated in *Jogendranath's case*,³⁹ that

"A co-tenant will not be permitted to claim the protection of the statute of Limitations, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him; it must further be established that the fact of adverse holding was

Ouster necessary for adverse possession. brought home to the co-owner either by information to that effect given by the tenant-in-common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and *disseisin* are intended to be asserted".

This view is identical with what has been adopted by the **Calcutta**

(i) **Calcutta.**

High Court in the cases of *Mahomed Ali Khan v. Khaja Abdul Gunny*,⁴⁰ *Baroda*

*Sundari Debi v. Annoda Sundari Debi*⁴¹ and *Ujal Bi Bibi v. Umar-kanta*.⁴² Many acts which would be clearly adverse and might amount to dispossession as between a stranger and a true owner of land would between joint owners naturally bear a different construction.⁴³ Therefore, in order to establish adverse possession by

35. *Nizamuddeen v. Gahia*, 61 P.R. 1870; *Gyan Singh v. Hasara Singh*, 37 P.R. 1875; *Hait Ram v. Chait Ram*, 46 P.R. 1875; *Gohar v. Fattah Din*, 75 P.R. 1880; *Lakha Singh v. Gurmukh Singh*, 62 P.R. 1890.

36. *Asimullah v. Ghulam Mahomed*, (1931) 131 I.C. 341=32 P.L.R. 246=1931 Lah. 232.

37. *Jogendranath Rai v. Baldeo Das*, (1907) 35 Cal. 961 (969); Relied on *Doe v. Prosser*, (1774) 1 Cowper, 217; *Doe v. Taylor*, (1833) 5 B. and Ald. 575.

38. *Bandocharya v. Shrinivasacharya*, (1903) 5 Bom.L.R. 743; *Gangadhar v. Parashram*, (1905) 29 Bom. 300; *Anant Ganpati v. Vishnu*, 1934 Bom. 273=58 Bom. 410.

39. (1907) 35 Cal. 961 (969)—Mookerjee and Caspersz, J.J.

40. (1883) 9 Cal. 744 (753).

41. (1898) 3 C.W.N. 774.

42. (1904) 31 Cal. 970=9 C.W.N. 32.

43. *Mahamad Ali v. Abdul Gunny*, (1883) 9 Cal. 744 (753).

one tenant-in-common against his co-tenants, there must be exclusion or ouster of the co-tenants and the possession subsequent to that must be for the statutory period.⁴⁴ What is sufficient evidence of exclusion must depend upon the circumstances of each case. Where possession can be referred to a lawful title, it cannot be said that it was illegal and that it was adverse to a co-owner. Therefore, in order to have the statute of limitation run against a co-owner, there must be actual ouster or some act equivalent to ouster.⁴⁵ It is settled beyond controversy by recent decisions of the Judicial Committee which affirm the principle that the possession of one co-sharer can be said to be adverse against another only if there is an open denial of title, and limitation can run, if at all, only from that date.⁴⁶

2196. (2) The **Allahabad High Court** has followed this view

(ii) Allahabad.

in *Ahmad Raza Khan v. Ramlal*,⁴⁷ that the possession of one co-sharer is in law the possession of all the co-owners, and nothing short of ouster or something equivalent to ouster will put an end to that possession. Where a co-owner in possession did not deny the title of the other co-owners till shortly before the institution of the suit and never laid claim to more than his share, it was presumed that the co-owner in possession was in possession on his own behalf and as well on behalf of his co-owner.⁴⁸ Among co-sharers, the possession of one co-sharer cannot become adverse to another, except where the co-sharer in possession has explicitly denied and repudiated the title of the others, and has been in possession since then for more than twelve years.⁴⁹ The exclusive possession of one co-sharer, even though coupled with non-payment of profits cannot amount to clear

44. *Govinda Chandra Bhattacharjee v. Dinanath Acharjee*, (1920) 56 I. C. 141=47 Cal. 274=23 C.W.N. 977=30 C.L.J. 512; *Ayennessa Bibi v. Sheikh Isuf*, (1912) 14 I.C. 722=16 C.W.N. 849 (Mere non-participation in rents not of itself necessarily amounting to adverse possession).

45. *Bhairabendra Narain Roy v. Rajendra Narain Roy*, 1924 Cal. 45=50 Cal. 487=74 I.C. 193.

46. *Hasim Ali v. Abjal Khan*, (1924) 82 I.C. 392=40 C.L.J. 30=1924 Cal. 1046; Relied on 64 P.R. 1918 (P.C.); 1912 A.C. 230 and 1918 A.C. 895; 53 I.C. 901=43 Mad. 244 (P.C.); 67 I.C. 444=1922 P.C. 84; also see *Balaram v. Shyama Charan*, 60 I.C. 298=24 C.W.N. 1057 (1062)=33 C.L.J. 344.

47. (1914) 37 All. 203; Relied on *Jafar Husain v. Mashuq Ali*, (1892) 14 All. 193 and *Jogendranath v. Baldeo Das*, (1907) 35 Cal. 961.

48. *Ibid.*, (1914) 37 All. 203=13 A.L.J. 204; also see and cf. *Muhammad Ishaq v. Nathu*, (1912) 16 I.C. 342 (All.) (Exclusive possession for a long period, without any counter-claim or demand from the other tenant-in-common, may be evidence from which actual ouster may be presumed); but, see *Mamraj v. Murki*, (1929) 114 I.C. 904=12 R.D. 262.

49. *Mt. Mubarikun Nissa v. Muhd. Raza Khan*, (1924) 79 I.C. 174=22 A.L.J. 307=46 All. 377=1924 All. 384; Relied on *Corea v. Appuhamy*, 1912 A.C. 230.

adverse possession unless there has been ouster of the other co-sharers to their knowledge and openly.⁵⁰ Similar view has been taken in *Jagarnath Singh v. Jainath Singh*¹ and *Phani Singh v. Nawab Singh*,² which explain the principles regulating the relations between joint owners. In *Harcharn v. Bindu*,³ it was observed that co-sharers who collect profits for their co-sharers are in a position similar to that of a Lamberdar, about whom it was held in *Minhin Lal v. Badri Prasad*,⁴ that the fact that a co-sharer plaintiff has received no profits for twelve years previous to the suit from the Lamberdar is not by itself sufficient to bar the suit in the absence of evidence that the defendant Lamberdar was during these twelve years holding adversely to the plaintiff. In the absence of ouster, there can be no adverse possession in such a case; and there should be clear proof of ouster to the knowledge of the excluded co-sharer, in order to establish adverse possession.⁵

2197. (3) The same conclusion is supported by the **Bombay** decisions in *Nilo Ramchandra v. Govind Ballab*⁶ and *Dinkar Sadashiv v. Bhikaji Sadashiv*,⁷ where the possession of the defendants, had not been shown to be "as his own property to the exclusion of the plaintiff". In *Gangadhar v. Parashram*,⁸ it was held that to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is *evidence* from which an actual ouster of the other tenants-in-common may be *presumed*. This view was again accepted by the same High Court in *Amrita v. Shridhar*,⁹ that

50. *Harbesh Singh v. Mt. Hardevi*, (1927) 102 I.C. 66=1927 All. 454=49 All. 763; Relied on *Corea v. Appuhamy*, 1912 A.C. 230; also see *Mamraj v. Murki*, (1929) 114 I.C. 904=12 R.D. 262.

1. (1904) 27 All. 88.

2. (1905) 28 All. 161.

3. (1910) 32 All. 389; Followed in *Tilakdharilal v. Abdul Wahab Khan*, (1925) 89 I.C. 913 (Pat.).

4. (1905) 27 All. 436; also see *Bharat Prasad v. Ganga Baksh*, (1911) 9 I.C. 425 (Oudh); Cf. *Muhd. Ishaq v. Nathu*, (1912) 16 I.C. 342 (All.).

5. *Fazl Husain v. Mahomed Kasim*, 1934 All. 193=150 I.C. 81= 1934 A.L.J. 544=4 A.W.R. 1427; also see *Karam Bibi v. Rahim Khan*, 18 R. D. 39.

6. 10 Bom. 24.

7. 11 Bom. 365.

8. (1905) 29 Bom. 300; Relied on *Bandacharya v. Shrinivasacharya*, (1903) 5 Bom.L.R. 743; also see *Culley v. Taylerson*, (1840) 11 Ad. and E. 1008 at p. 1014 and *Taylor v. Prosser*, (1774) 1 Cowper, 217 (219, 220); Followed in *Asudomal v. Ali*, (1911) 10 I.C. 554.

9. (1908) 33 Bom. 317 (322)=11 Bom.L.R. 51; Followed *Culley v. Taylerson*, 11 Ad. and E. 1008, at p. 1014, *supra*; also see *Ayennessa Bibi v. Sheikh Isuf*, (1912) 14 I.C. 722 (Cal.) (The exclusive possession or participation of profits, must indicate denial of rights of the other co-tenants) -

"exclusive receipt of profits continuously for a long period may point to an ouster, but the Court must be satisfied that such taking of profits is an indication of a denial of rights in the other co-tenant to receive them".

Thus, in a suit by a co-owner for joint possession the question is not whether the plaintiff has been in possession and enjoyment of the suit property within twelve years next prior to the suit. The only question in such a suit is whether the defendant can prove facts which would amount to an ouster of the plaintiff for twelve years.¹⁰

2198. (4) The Madras High Court has held to the same effect in *Ittapan v. Manavikrama*,¹¹ where (iv) Madras. the tenancy under the plaintiff had not determined by the tenants attorning to the defendant, a co-sharer, and there had been no ouster of the plaintiff, barring his suit under Art. 144 of the Limitation Act. In *Venkatachellam v. Annapurna*,¹² it was observed that,

"it is settled law that in order that possession may be adverse between co-sharers there must be, on the part of the owner setting up adverse possession, a disclaimer of the other's right, by an open and unequivocal assertion of a hostile title. Acts which would amount to dispossession if done by strangers, would not in the case of a co-sharer, be construed as such, for the reason, that each of the co-owners being entitled to the enjoyment of the property, it will be presumed until the contrary is shown that the acts were not unlawful acts but were done in the exercise of a lawful right".

2199. (5) The rule of law has been laid down in Oudh Court in accordance with the views of the Privy Council, and other High Courts. See (v) Oudh. *Mahipal Singh v. Sarjoo Prasad*¹³ and *Bashir Ahmad v. Parshotam*,¹⁴ noticed in S. 2193, ante. In the case of co-owners the possession of one co-owner is in law the possession of the other co-owners as well, and it is not possible for one co-owner to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster can bring about that result.¹⁵ To enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must

10. *Chandbhai Mahamadbhai v. Hasanbhai Rahimutula*, (1921) 64 I.C. 205=46 Bom. 213 (215)=1922 Bom. 150=28 Bom.L.R. 1038.

11. (1897) 21 Mad. 153 (159).

12. (1928) 109 I.C. 553=1928 Mad. 652=52 M.L.J. 223=28 L.W. 599; Followed in *Abdul Rahman v. Haji Mahomed*, (1929) 118 I.C. 207=1929 Sind 212 (Mere entry of name in the revenue register, or mere non-enjoyment of the produce are insufficient to prove adverse possession).

13. (1926) 92 I.C. 99=3 O.W.N. 100=13 O.L.J. 326=1926 Oudh 141.

14. 1929 Oudh 337 (339)=115 I.C. 440.

15. *Ibid.*, 1929 Oudh 337 (339); Referred to *Corea v. Appuhamy*, (1912) A.C. 230; *Hardit Singh v. Gurmukh Singh*, 1918 P.C. 1=64 P.R. 1918 (P.C.); *Jogendra Nath v. Baldeo Das*, (1908) 35 Cal. 961; *Ahmed Raza Khan v. Ramlal*, (1917) 37 All. 203=26 I.C. 922; also see *Ejar Ali Kidwai v. Court of Wards*, 1930 Oudh 510=130 I.C. 65 (2)=6 Luck. 106.

be of such an actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other co-tenants.¹⁶ As observed in *Inderpal Singh v. Thakur Din Singh*,¹⁷

"One thing is perfectly clear that the co-tenant out of possession starts with the presumption in his favour that the possession of other co-tenants is not adverse, but lawful", "and, further it is equally well-established that nothing short of ouster or something equivalent to ouster must be proved by the co-tenant in possession in order to bring about the success of the plea of adverse possession".¹⁸

2200. (6) In *Hardit Singh v. Gurmukh Singh*,¹⁹ a case from Punjab, their Lordships of the Privy Council held that exclusive possession of

joint estate by one member of the joint family by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate so as to assert an adverse claim against other interested members. A co-sharer's possession is generally not adverse²⁰ unless he shows unequivocally by an overt act an intention to hold for himself alone.²¹ There is a presumption in law that joint property is in possession of all co-sharers, unless there is an overt denial of their right by member in actual possession for twelve years.²²

In *Akbar v. Tabu*,²³ the Punjab Chief Court held that the possession of one co-sharer is ordinarily the possession of all the

16. *Mahadeo Parshad v. Ramphul*, 1926 Oudh 258=1 Luck. 62; also see *Sheoraj v. Ajudhia*, 1929 Oudh 284.

17. 1924 Oudh 266=27 O.C. 77; also see *Ali Sher v. Wajidali*, 1930 Oudh 177=4 Luck. 339=121 I.C. 892 and *Sheoraj v. Ajudhia*, (1929) 116 I.C. 195=1929 Oudh 284.

18. *Inderpal Singh v. Thakur Din Singh*, 1924 Oudh 266=78 I.C. 895=27 O.C. 77; Followed in *Sheo Raj v. Ajudhia*, 1929 Oudh 284=6 O.W.N. 213=116 I.C. 195=4 Luck. 503; *Parhlad Singh v. Kalka Singh*, 132 I.C. 539 (Oudh); Relied on *Corea v. Appuhamy*, (1912) A.C. 230; *Hardit Singh v. Gurmukh Singh*, 1918 P.C. 1; *Muthunayagam v. Brito*, (1918) A.C. 895=87 L.J.P.C. 146 and *Varada Pillai v. Jeevarathnammal*, 1919 P.C. 44=43 Mad. 244=46 I.A. 285 (P.C.); also referred *Jogendra Nath v. Baldeo Das*, (1908) 35 Cal. 961=6 C.L.J. 735=12 C.W.N. 127.

19. 64 P.R. 1918=47 I.C. 626 (P.C.).

20. *Nizamuddeen v. Gahia*, 61 P.R. 1870; *Gyan Singh v. Hazara Singh*, 37 P.R. 1875 (Absentee co-sharer); *Hait Ram v. Chaitan*, 46 P.R. 1875 (Absentee co-sharer); *Gohar v. Fattahdin*, 75 P.R. 1880 (Absentee co-sharer); *Lakha Singh v. Gurmukh Singh*, 62 P.R. 1890 (Absentee co-sharer).

21. *Hansraj v. Maulu*, (1921) 63 I.C. 881 (Lah.); also see *Akbar v. Tabu*, 45 P.R. 1914=22 I.C. 805.

22. *Mt. Amir Begam v. Mt. Begam*, 127 P.L.R. 1914=22 I.C. 861 (2); *Salhum v. Malku*, 1931 Lah. 439=131 I.C. 105; *Yara v. Jalal*, 1931 Lah. 631 (2).

23. 45 P.R. 1914=22 I.C. 805=105 P.L.R. 1914=61 P.W.R. 1914.

co-sharers; but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers that in future he intends to hold for himself alone.²⁴ That the adverse possession so begun cannot be stopped by the other co-sharers, merely by affirmation that there are co-sharers, or by mere application for partition²⁵; that the mere retention by the revenue authorities of the names of the co-sharers as such after the aforesaid overt act has been done, does not prevent limitation from running against him, nor does even a decree in their favour, not accompanied by actual effective assertion of rights and taking possession of these rights help them.²⁶ Though ordinarily the possession of a sharer is the possession of his co-sharers, and is not adverse to them, yet the conduct of the defendants may amount to an overt act of dispossession, and denial of title and so set the limitation running.²⁷ With regard to co-owners of joint property the law is that there should be an ouster, or overt act amounting to ouster, and adverse possession after ouster or explicit denial and repudiation of title of the other co-sharers for more than 12 years before one co-owner can succeed against another.²⁸ Co-heirs under Muhammadan Law are in the position of tenants in common, and the entry and possession of one of such co-heirs must be deemed to be on behalf of all the co-heirs. His possession cannot be adverse to the other co-heirs in the absence of express ouster or denial of the title of the other co-heirs.²⁹

2201. It has been noticed in Ss. 2193, and 2194, above, that
 What constitutes ouster. exclusive possession is not necessarily adverse, and nothing short of ouster or something equivalent to ouster will put an end to lawful possession of one co-sharer, which is taken to be on behalf of all the co-sharers. In this connection it is to be noticed that the trend of authorities supports the conclusion

“that mere non-participation of the profits by one and exclusive occupation and enjoyment of the joint property by the others is not *per se* adverse possession; in order that the possession may be adverse, there must be (a) a disclaimer of the other's right by an open assertion of a hostile title

24. *Akbar v. Tabu*, 45 P.R. 1914; Relied upon in *Muhd. Hassan v. Sahara*, (1923) 71 I.C. 805 (Lah.).

25. *Ibid.*, 45 P.R. 1914; Relied upon in *Venkatarama Iyer v. Subramania Sastri*, (1924) 78 I.C. 37 (40)=20 L.W. 122.

26. *Ibid.*, 45 P.R. 1914.

27. *Nandsingh v. Nathasingh*, 86 P.R. 1909.

28. *Narsing Das v. Gopal Chand*, 12 Lah. 101=132 I.C. 177=32 P.L.R. 316=1931 Lah. 339; also see *Jam Budha v. Dasu Ram*, (1927) 106 I.C. 488=9 L.L.J. 545=29 P.L.R. 131; *Maung Than Gyaung v. Ma Lun Baw*, (1927) 104 I.C. 383=6 Bur. L. J. 93.

29. *Ghulam Muhd. v. Mt. Begum*, (1930) 122 I.C. 105=1930 Lah. 251=31 P.L.R. 113; *Mt. Jano v. Narsing Das*, (1929) 117 I.C. 803=1929 Lah. 549; *Mt. Ahmad Bibi v. Shamsdin*, (1928) 109 I.C. 658 (Lah.).

on the part of the co-owner setting up adverse possession, and (b) notice thereof, of (*i.e.*, of such disclaimer) to others, either direct or to be inferred from notorious acts and circumstances".³⁰

It is true that as a general proposition one co-sharer has no right to take exclusive possession of a joint property, but the question whether such exclusive possession amounts to an ouster or not depends upon the circumstances of each particular case.³¹ Ouster may no doubt be presumed from sole possession continuously held for a long period without any claim or demand by a person claiming under the other tenant-in-common.³² But, possession or occupation of joint property by one co-sharer does not constitute adverse possession against any co-sharer until there has been a disclaimer of the latter's title by open assertion of hostile title on the part of the former.³³ Ouster must, therefore, mean dispossession of one co-sharer by another where a hostile title is set up by the latter and where the occupation of the latter is not consistent with joint ownership.³⁴ To establish as amongst co-owners of joint property that there has been adverse possession of one against the others by reason of a particular act to which a hostile character is attributed, it must be conclusively shown that such act is wholly inconsistent with, and is not by any possibility attributable to, his character as joint owner.³⁵ To enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an **actual, open, notorious, exclusive, and hostile** character, as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants.³⁶ The evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co-

30. See *Rustomji's Limitation*, p. 838; also *Mt. Yakut v. Inayatullah*, 1934 Pesh. 7=148 I.C. 926.

31. *Nawadipchandra Chakravarti v. Bhagaban Chandra*, 101 I.C. 27=1927 Cal. 462=31 C.W.N. 496; Folld. in *Bibi Amina v. Saburannessa*, 32 C.W.N. 449 (451); also see *Durga Sankar v. Kamini Kumar*, 1928 Cal. 535=111 I.C. 74.

32. *Gangadhar v. Parashram*, (1905) 29 Bom. 300; *Amrita Ravji v. Shridhar Narayan*, (1908) 33 Bom. 317 (322) and *Culley v. Doe dem Taylerson*, (1840) 11 Ad. & E. 1008 (1014); *Ram Narain v. Mannu Lal*, (1928) 107 I.C. 866; also see *Anant Ganpati v. Vishnu Rambhan*, 58 Bom. 410=36 Bom. L. R. 284=1934 Bom. 273 (Exclusive receipt of profits for a long time, an indication of a denial of right).

33. *Ujal Bi Bibi v. Umakanta*, (1904) 31 Cal. 970; Folld. *Baroda v. Annoda*, (1898) 3 C.W.N. 774 and *Ittapan v. Manavikrama*, (1897) 21 Mad. 153 (166).

34. *Basanta Kumari v. Mohesh Chandra*, 21 I.C. 621=18 C.W.N. 328; Reld. in *Ram Chandra v. Lakshmi Kanta*, (1928) 111 I.C. 19=1928 Cal. 574=47 C.L.J. 603.

35. *Surja Bibi v. Tarap Mondal*, (1913) 26 I.C. 788 (Cal.).

36. *Lokenath Singh v. Dhweekeshwar Prosad*, (1915) 27 I.C. 465=20 C.L.J. 253; also see 28 N.L.R. 282.

tenant in possession must be shown by unequivocal conduct.³⁷ The ouster of the other co-tenants, in order to render the possession adverse, need not be by violent or intimidating expulsion or repulsion nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication; but, it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed.³⁸ An assertion of exclusive title in mutation proceedings may be evidence of ouster, but not the institution of a suit by one joint tenant in his or her own name.³⁹ It is a well-accepted rule that as between co-sharers possession of one and non-receipt of profits by the other do not set limitation running against the co-sharer not in possession.⁴⁰ Though ordinarily the possession of a sharer is the possession of his co-sharers, and is not adverse to them, yet the conduct of the defendants may amount to an **overt act of dispossession and denial of title** and so set limitation running.⁴¹ Ouster implies denial of the right of the claimant to his or her knowledge, actual or presumed.⁴² We have seen in **Ss. 2194-99, ante**, that ouster generally consists in a denial of the other co-sharer's right openly, and notoriously, to the knowledge of the excluded co-sharer, for the statutory period of 12 years. Article 144 applies to suits between co-owners or co-tenants *inter se*, where the title of one is denied by the other.⁴³ Where there is an actual turning out or keeping excluded the co-tenant entitled to joint possession, there is an ouster.⁴⁴ In order to establish adverse possession, or ouster, a co-sharer has to establish that he expressly denied the title of the other co-sharers and remained in possession after such denial for over 12 years.⁴⁵ The ouster takes place when the title of the co-sharers is denied, or a successful assertion of right has been made to the sole enjoy-

37. *Lokenath Singh v. Dhawakeshwar*, (1915) 27 I.C. 465=20 C.L.J. 253.

38. *Ibid.*

39. *Mt. Jagrani Misrani v. Sheo Dulari*, (1921) 64 I.C. 462 (All.); cf. *Bashir Ahmad v. Parshotam*, 1929 Oudh 337=6 O.W.N. 536 (Mere entry of name in Mutation Register is no indication of adverse possession).

40. *Fazl Husain v. Mahomed Kazim*, 1934 All. 193=150 I.C. 81=4 A.W.R. 1427=1934 A.L.J. 544; also see *Ahmadullah v. Bashir Ahmad*, (1926) 94 I.C. 855 (Oudh).

41. *Nand Singh v. Natha Singh*, 86 P.R. 1909; also see *Monmotha Nath v. Bepin Behari*, (1929) 117 I.C. 532=1928 Cal. 582 (Assertion of hostile title by defendant sets limitation running).

42. *Fazl Husain v. Mahomed Kazim*, 1934 All. 193=150 I.C. 81.

43. *Mastan Singh v. Santa Singh*, 145 I.C. 553=34 P.L.R. 618=14 Lah. 267=1933 Lah. 705 (F.B.).

44. *Ambika Prasad Upadhya v. Sada Sheo Lal*, 55 All. 173=1933 A.L.J. 33=1933 All. 173.

45. *Mahipal Singh v. Sarjoo Pershad*, 1926 Oudh 141 (142); *Bashir Ahmad v. Parshotam*, 1929 Oudh 337 (339).

ment of the property.⁴⁶ Explicit denial and repudiation of the title of a co-sharer,⁴⁷ rather than exclusive possession and non-payment of profits,⁴⁸ amounts to ouster. A disclaimer of the other's right by an open and unequivocal assertion of a hostile title, constitutes ouster.⁴⁹ Exclusive possession and receipts of rents and profits are not enough to constitute ouster.⁵⁰

2202. (1) The *onus* is on the defendant co-sharer in possession of joint property to show when his possession became adverse, and when the other co-sharers were to his knowledge excluded from all participation, and their title denied.¹ It is now a settled rule of law that the possession of a co-sharer must be deemed to be possession on behalf of the remaining co-sharers and cannot be considered to be adverse. Where a co-sharer sets up adverse possession against another, it is incumbent on him to prove that he denied the title of the latter and that such denial was brought to the knowledge of that co-sharer.² Possession of a plot of land does not constitute adverse possession in relation to a co-sharer, unless the latter claims or asserts some right in the land which is denied by the sharer in possession.³ Even if a member of a Mahomedan family collects the rents and profits of the family property, his possession cannot be considered adverse to his mother and sister so long as these live and mess jointly with him and receive money's worth in the payment of their family expenses.⁴ Possession of a person will ordinarily be *presumed* to be held in his own right and adversely to the true owner, however, this presumption will not apply when a special relationship exists between the parties as tenants-in-common or members of an undivided family. The presumption in such cases will be that possession is held on behalf of all the co-owners, or members of the family and it will lie on the possessor to prove that he held exclu-

46. *Brahma Singh v. Raghuraj Singh*, 1933 Oudh 560; also see *Hari Pru v. Mi Aung Kraw*, 52 I.C. 629=12 Bur. L. T. 129 and *Jagannath v. Chandai*, 1921 Cal. 647=67 I.C. 31.

47. *Ahmad Raza Khan v. Ramlal*, (1914) 37 All. 203=13 A.L.J. 204 and *Mt. Mubarik-ul-nissa v. Muhammad Raza Khan*, (1924) 79 I.C. 174=22 A.L.J. 307=46 All. 377=1924 All. 384.

48. *Harkesh Singh v. Mt. Hardevi*, (1927) 102 I.C. 66=1927 All. 454=49 All. 763; *Anant Ram v. Kishore Chand*, 32 P.L.R. 824.

49. *Venkatachellam v. Annapurna*, (1928) 109 I.C. 553=1928 Mad. 652.

50. 51 C.L.J. 424=A.I.R. 1930 Notes 10 (c).

1. *Asim v. Ghulam*, 6 P.L.R. 1904.

2. *Nur Ali v. Mt. Shahzadi*, (1929) 114 I.C. 497 (Oudh).

3. *Shurfunnissa Bibee v. Kylash Chunder*, (1876) 25 W.R. 53; cf. *Chand Bibi v. Lal Mahomed*, (1918) 48 I.C. 692 (Cal.) (Refusal of a demand cannot be laid down as a test applicable to all cases of this sort); also see *Beli Ram v. Munshi Ram*, 1934 Lah. 456.

4. *Moonshee Sirdar v. Mohengo Sirdar*, (1875) 24 W.R. 1.

sive possession to the knowledge of those whose right he seeks to affect by such possession.⁵ There can be no ouster without the knowledge of the person ousted, and if no notice is given to the co-sharer of the denial of his right, the occupant must make his possession so visibly hostile and notorious as to justify the inference of knowledge on the part of the co-owner sought to be ousted, and of laches if he fails to discover and assert his rights.⁶ A co-sharer can only establish adverse possession against a co-sharer by showing the most unequivocal assertion of, and exercise of, such adverse possession as against such co-sharer.⁷ As between brothers, when no partition is proved, the adverse possession of one should be proved by satisfactory evidence establishing possession continuous, public, and adequate to the circumstances of the case.⁸ Where in a partition between co-owners an item of joint property is left undivided, and allowed to remain in the possession of one of them, such possession must be considered to be that of a co-owner; and the burden of proving the adverse nature of his possession, by repudiating the title of the other co-owner to his knowledge lies on the co-owner who sets it up.⁹

(2) A co-sharer, no doubt is competent to relinquish his share in a joint holding, but the evidence of such
Absentee co-sharers. relinquishment, when the property is originally left in the possession of a co-sharer, must be very clear and unequivocal, either by direct act, or by a course of conduct.¹⁰ For instance, where a co-sharer sells a specific portion of a joint holding which portion is in his possession, and possession of which is immediately delivered to the purchaser, the possession of such a purchaser is adverse to the other co-sharers from the moment of his entry. This principle has been accepted and followed by the **Lahore High Court**, in *Chint Ram v. Bakh Tawar*,¹¹ and in *Sohandan v. Aurang Khan*.¹² It has also been referred to by the

5. *Muthurakko Thevan v. Orr*, (1910) 35 Mad. 618 (621); also see *Ahmad Raza Khan v. Ramlal*, (1915) 26 I.C. 922 (All.); *Ramzan v. Mukht Behari*, 15 R.D. 261=12 L.R. 141 (Rev.); *Beli Ram v. Munshi*, 1934 Lah. 456 and *Venkatachallam v. Annapurni*, 55 M.L.J. 233.

6. *Jogendranath Mukherji v. Rajendranath*, (1922) 68 I.C. 200 (2)=1922 Cal. 54=26 C.W.N. 890; also see *Jagannath v. Chandni*, 26 C.W.N. 65=67 I.C. 31 and *Abdul Wahed v. Mohan Bashi*, (1930) 34 C.W.N. 246 (249)=1930 Cal. 466.

7. *Ram Chand v. Kirpa Ram*, 120 P.R. 1908; *Jogendro v. Baldeo*, 35 Cal. 961 (968, 969).

8. *Jagjivandas v. Bai Amba*, (1900) 25 Bom. 362.

9. *Vaiyapuri v. Subramania*, (1929) 114 I.C. 337 (Mad.).

10. *Hardit Singh v. Gurmukh Singh*, 64 P.R. 1918=47 I.C. 626=1918 P.C. 1; also see *Harcharn v. Binda*, 32 All. 389=5 I.C. 559=7 A.L.J. 298.

11. 1 P.L.R. 1902.

12. (1911) 9 I.C. 540=23 P.L.R. 1911=48 P.W.R. 1911.

Allahabad High Court, in *Asud Ali v. Anand Sarup*¹³; also by the Bombay High Court in *Tarubai v. Venkatrao*¹⁴ and *Bhaiji Shamrao v. Haji Miya Mahammad Amin*.¹⁵ The Madras High Court refers to it in *Murajalli v. Ramasami Chetti*.¹⁶ It is for the co-sharer in possession in order to defeat the title of the absentee co-sharer or his descendants to prove by some overt act that he constituted his possession into an adverse possession to the other co-sharers, an overt act of which such co-sharer had knowledge.¹⁷

(3) Section 10 of the Limitation Act has no application to a suit by a co-sharer to recover his share of the mesne profits of joint property from co-sharers who have been in possession of the property and who have throughout denied plaintiff's title to it.¹⁸ The period of limitation, under Art. 144 of the Limitation Act, for a suit for possession by the co-sharers out of possession begins to run from the time when the co-sharers in possession refuse to give up the area in excess of their share, on being asked to do so, thus setting up adverse possession in their own exclusive right.¹⁹ A co-sharer out of possession starts with a presumption in his favour that the possession of the other co-tenants is not adverse but lawful.²⁰ The limitation against a co-sharer does not begin to run until his title is openly denied.²¹ The mere fact that a co-sharer whose title is admitted did not live in the joint house, or receive any profits of the joint property for more than twelve years cannot destroy his title. In order to establish adverse possession between co-owners there must be evidence of an open assertion of hostile title by one of them to the knowledge of the other.²² The co-sharer in possession has

13. 27 I.C. 35=12 A.L.J. 1233.

14. 27 Bom. 43=4 Bom. L. R. 721.

15. 14 Bom. L. R. 314=15 I.C. 500.

16. (1918) 45 I.C. 867=41 Mad. 650=34 M.L.J. 528.

17. *Beli Ram v. Munshi Ram*, 1934 Lah. 456; also see *Jogendra v. Baldeo*, 35 Cal. 961 (970); *Alima v. Kutti*, 14 Mad. 96 (97) (Burden lies on the defendant to show a disclaimer by assertion of a hostile title, and notice thereof to the owner either direct, or to be inferred from notorious acts and circumstances).

18. *Mt. Shamsulnisa v. Yakub Baksh*, (1921) 61 I.C. 393 (Lah.).

19. *Jamal Singh v. Gurmukh Singh*, 20 P.R. 1910.

20. *Ali Sher v. Wajib Ali*, (1930) 121 I.C. 892=1930 Oudh 177=4 Luck. 339; also see *Inderpal Singh v. Thakur Din Singh*, 1924 Oudh 266=27 O.C. 77.

21. *Sant Baksh v. Ramnath*, (1928) 111 I.C. 376=12 R.D. 236.

22. *Mt. Sughra Begum v. Nur Ali*, (1926) 98 I.C. 80=1927 Oudh 6=3 O.W.N. 796=13 O.L.J. 824; also see *Fazl Husain v. Mahomed Kasim*, 1934 All. 193=150 I.C. 81=1934 A.L.J. 544 (Clear proof of ouster to knowledge of other required) and *Abdul Wahed v. Mohan Bashi*, 34 C.W. N. 246 (249)=1930 Cal. 466 (Such knowledge may be proved directly or by constructive notice or inferentially).

to establish ouster by express denial of title of the other co-sharers, and remaining in possession after such denial for over twelve years.²³

2203. ILLUSTRATIONS.—

(1) In *Raj Bahadur v. Bharat Singh*,²⁴ where a co-sharer in an undivided mahal claimed to recover a share in the profits of certain *sir* land appertaining to the mahal, it was held that the mahal, being undivided, the defendant's possession of the *sir* land had never really been possession hostile to the plaintiff, and in the absence of any repudiation of the right of the plaintiff or his predecessors in title to enjoy the profits or to be in possession of their share of the *sir* lands, the claim was not time-barred.

(2) In *Nand Singh v. Natha Singh*,²⁵ where plaintiffs and their ancestors had been absent the best part of a century, and though they lived only some 14 miles away, in all that time they were not shown to have taken any share in the management of the land, or to have participated in the profits, and a declaratory suit by plaintiffs that they were co-sharers was dismissed in default, it was held that defendant's intimation to the Patwari that plaintiffs had no share in the land, and their names should be kept out of revenue papers was an attack on plaintiff's title giving out defendant's intention to hold exclusively in future.

(3) Where property is owned by several co-owners, the mere fact that one of them has not received the profits of the property is no proof that the possession of the other co-owners was adverse; to establish adverse possession of the other co-owners it is necessary for them to prove that they expressly repudiated the title of their co-owner to his knowledge, and that they held the property after such repudiation for twelve years before suit.²⁶ Non-payment of rent by a tenant for more than twelve years does not constitute adverse possession.²⁷

(4) In *Gangadhar v. Parashram*,²⁸ the sole possession of one tenant-in-common had been proved for nearly fifty years, and, therefore, there was sufficient ground for presuming that sole possession for so long a period amounted to a denial of the right of the other tenant-in-common who was out of possession.

(5) Where in a suit by a member of one branch of the family against a representative of another branch for possession of certain villages it appeared that with reference to three villages, the defendant's predecessor had been in sole possession and participation of the profits of the villages for more than the statutory period, and had clearly denied the interest of the plaintiff in those villages in certain revenue proceedings; and, with reference to the fourth village, there was no denial of title till recently, but having regard to the separation of the branches, non-participation of profits since a long time, and the omission of this village in the list of property as handed over to the plaintiff on his attaining majority by his

23. *Mahipal v. Sarjoo*, 1926 Oudh 141; *Bashir Ahmad v. Parshotam*, 1929 Oudh 337 (339).

24. (1904) 27 All. 348; Approved in *Mihin Lal v. Badri Prasad*, (1905) 27 All. 436.

25. 86 P.R. 1909; Reld. in *Nathu v. Kamashur*, 38 P.L.R. 1911=9 I.C. 957 (Abandonment by and adverse possession against co-sharer).

26. *Bharat Prasad v. Ganga Baksh*, (1911) 9 I.C. 425 (Oudh).

27. *Dadoba v. Krishna*, (1879) 7 Bom. 34.

28. 29 Bom. 300=7 Bom. L. R. 252.

guardian, the possession of the defendant was held to be adverse for more than the statutory period, and the suit was held barred by Art. 144 of the Limitation Act.²⁹

(6) Where the parties were co-sharers, but the defendant had remained in occupation of the land for 25 years against the plaintiff's will; and, in spite of this the plaintiff slept over his right and never demanded any rent, it was held that the possession was adverse.³⁰

(7) In *Mahesh Narain v. Nowbat Pathak*,³¹ where *B* took a lease of a hill from certain co-sharers of an estate and worked a quarry, and *A*, the other co-sharer, brought a suit against *B*, claiming an account of all the stones quarried and carried away by him, it was held that, inasmuch as there was no actual ouster, or destruction of the common property by working a quarry, which was the proper and legitimate use of the hill, *A* was not entitled to an account in the absence of any proof that *B* received more than his just share.

(8) In *Varada Pillai v. Jeevarathnammal*,³² where plaintiff alleged joint ownership following an unregistered gift, their Lordships referred to the document as explaining the nature and character of the possession held by the defendant; and it being proved that she in fact took possession of the *mitta* in her own right when it was transferred into her name, and retained such possession with receipts of the rent until her death, adverse possession for over twelve years was held established. The rule of English law, that the possession of one of several co-parceners, joint-tenants or tenants-in-common, is the possession of the others so as to prevent limitation affecting them, was of no application, on the facts of the case, to sharers in an unpartitioned agricultural village in India, not holding as members of a joint family.

(9) In *Hardit Singh v. Gurmukh Singh*,³³ their Lordships of the Privy Council observed that if possession may be either lawful or unlawful, in the absence of other evidence, it must be assumed to be the former. Accordingly, held that the revenue records showing the absentees as co-sharers were the subject of challenge when parties interested in their alteration took no step whatever to secure rectification and the appellants remained entitled to their joint share in the property: and that the evidence of actual user by the respondent was not sufficient to establish the contention of abandonment, or exclusion.

(10) Where a Muhammadan owner died leaving several heirs, it was held that even if a joint owner was in exclusive possession of the property, the other co-sharers were in constructive possession of the property, and a suit for possession of the defined though undivided share of the co-owner in the possession of the other co-owners was governed by Art. 144, Limitation Act, limitation running from the date when the defendant's possession became adverse.³⁴

29. *Govindrao v. Rajabai*, 58 I.A. 106=130 I.C. 673=1931 P.C. 48=60 M.L.J. 386 (P.C.).

30. *Sheoraj Narain v. Jagannath Prasad*, 1931 Oudh 381=132 I.C. 772=8 O.W.N. 854=12 L.R. 193 (Rev.).

31. (1905) 32 Cal. 837.

32. (1919) 43 Mad. 244 (252) (P.C.); also see *Jhamplu v. Kutramani*, 39 All. 696 (698)=15 A.L.J. 761=42 I.C. 713 (Unregistered deed of relinquishment by a brother, admitted in evidence to show the nature of possession held adversely).

33. 64 P.R. 1918=1918 P.C. 1.

34. *Rustam Khan v. Janki*, 111 I.C. 809=51 All. 101=1928 All. 467

(11) Where a person who is in possession of certain property under the assertion of a hostile title subsequently becomes a co-owner in the property and continues to assert his hostile title and exercise possession to the exclusion of the other co-owners, his possession does not cease to be adverse merely because he is a co-owner in the property.³⁵

(12) Where in Settlement proceedings, parties were declared co-sharers in certain land, and on partition, plaintiffs were allotted a certain area, but mutation being refused on defendant's objection, plaintiffs sued for a declaration of title, it was held that plaintiff's title was sufficiently proved, and the possession of defendants co-sharers was not *prima facie* adverse, and the mere non-payment of produce would not suffice for plaintiff's exclusion.³⁶

(13) Where *N* left a house, which was held by his widow, with whom *G* was living, and after her death, *N*'s brother *G* remained in sole possession and gifted the property to his daughter, and his brother and nephew sued for possession of a two-thirds share, it was held that the onus was on *G*, the defendant, to prove that his possession was adverse to other co-heirs.³⁷

(14) Where *A* mortgaged her six anna share in a *bhaiyachara* property to the defendants in 1875; and *A*'s son *R*, redeemed the properties in 1888, and sold three annas share to the defendants; and *R* disappeared in 1890, and the defendants continued in possession of the whole six annas share, and they applied for mutation in their own names, in 1926, on the representation that they were the real heirs of *R*, alleging that *R* was dead; it was held that the possession of the defendants was never adverse to *R*, and the suit was not, therefore, barred by limitation.³⁸

(15) Where some of the co-sharers of a village founded by a common ancestor left it and settled elsewhere and did not receive any rent for fifty years, but there was no open denial of their title and they used to visit the village at times; it was held that their title to the village property was not extinguished.³⁹

(16) Where one of the members of a joint Hindu family who was in sole possession and enjoyment of the family house improved it and constructed several buildings from his separate funds, and the members of another branch never occupied the house at any time but were living elsewhere and even on occasions when they were in great need they were not taken into the house and did not attempt to enforce their co-parcenary rights, it was held that there was sufficient evidence of ouster and exclusion.⁴⁰

2204. CO-SHARERS: POSSESSION AFTER PARTITION, EFFECT OF.—We have noticed the rule laid down in S. 2192, *ante*, that

=26 A.L.J. 1041 (F.B.); also see *Maung Po Kin's case*, 1 Rang. 405=1924 Rang. 155=76 I.C. 855 and *Nurdin Najbuddin v. Umrao Bu*, 59 I.C. 780=45 Bom. 579=22 Bom. L. R. 1429.

35. *Pankaj Mohan Bal v. Bipin Behary Chakladar*, (1923) 76 I.C. 511=38 C.L.J. 220=1924 Cal. 118.

36. *Khuidad v. Alamgir*, 116 P.R. 1900.

37. *Mangal Singh v. Mt. Shankari*, (1919) 50 I.C. 746 (Punj).

38. *Ali Sher v. Wajid Ali*, (1930) 121 I.C. 892=4 Luck. 339=1930 Oudh 177=7 O.W.N. 61.

39. *Mamraj v. Murki*, (1929) 114 I.C. 904=12 R.D. 262.

40. *Bapatla Venkata Row v. Bapatla Venkoba Row*, (1927) 102 I.C. 300=1927 Mad. 595=38 M.L.T. 283.

"when the parties are co-sharers, co-owners, or tenants-in-common, and *no partition has taken place between them*, the sole occupation of one of them, is not *prima facie* inconsistent with the right of others".⁴¹

In *Muhammad Din v. Muhammad*,⁴² the Lahore High Court observed that "whatever may have been the rights of parties to a partition proceeding before the partition of land, the partition creates new rights. Therefore for howsoever long a period a co-sharer may have been in possession of a piece of land, which in partition is allotted to another co-sharer, his adverse possession begins only from the date of partition". In *Daulat Ram v. Nanak Chand*,⁴³ possession of the property after partition was held adverse to the plaintiffs to whom the property was allotted at partition. Subsequent abandonment beyond twelve years did not revive the title of plaintiffs-appellants.

Where a family had, by a separation ceased to be a joint Hindu family, though still retaining property jointly, and on a certain date, they divided even that property, though no doubt one member remained in actual possession of it all as before, it was held that the possession of that member must be taken to have become adverse to other members, and those claiming under them at once from the date of partition, and not from the time when the others had demanded and had been refused possession of their allotted share.⁴⁴ Similarly, where a partition of land had taken place, and a particular field was allotted to *B*, which remained in possession of *A*, it was held that from the date of partition *A* began to hold adversely against *B*, and *B* must, if he wished to preserve his rights, take action within the time allowed by law.⁴⁵ Of course, where under a partition deed certain land remained joint till the harvest, the possession of the shares up to that date was merely the possession of co-sharers in separate possession of portions of the joint estate, and did not become adverse to each other till after the harvest, even if the sharers took possession of the plots allotted to them before the harvest.⁴⁶ In *Bepin Behari v. Jagat Kishore*,⁴⁷ where in certain partition proceedings *A* was awarded possession of part of land claimed by *B*, and in a suit for possession by *A* as *chakdar*, *B*

41. *Mt. Yakut v. Inayatullah*, 1934 Pesh. 7=148 I.C. 926; Rustomji's Limitation, p. 838.

42. (1922) 67 I.C. 425=3 L.L.J. 377.

43. 1923 Lah. 362=76 I.C. 742.

44. *Mansa Ram v. Behari*, 6 P.R. 1912=12 I.C. 453; also see *Lakhera v. Mahji*, (1919) 50 I.C. 550 (Punj.) (Adverse possession of portion of *shamilat* after partition).

45. *Fateh Din v. Nikka*, 81 P.R. 1911=13 I.C. 790=105 P.L.R. 1912=261 P.W.R. 1911.

46. *Hadayat Khan v. Shahamand*, (1923) 73 I.C. 665 (Lah.).

47. (1914) 22 I.C. 575 (Cal.).

pleaded limitation, it was held that *A's* cause of action arose in 1903 for first time, and that *B*, could not be held to have been in adverse possession before partition. A

Allahabad.

A similar view was taken by the Allahabad High Court in *Deba v. Rohtagimal*,⁴⁸ where the property sold was a share in a house belonging to two separated brothers, and in a suit by the vendee for possession it was held that the possession of one of the brothers could not be taken to be on behalf of the absent vendor. But in *Champalal v. Mangal Chand*,⁴⁹ where plaintiff sued for possession alleging dispossession, a presumption of permissive possession was drawn between cousins, after partition, on the facts of that particular case.

Bombay.

In *Vithoba v. Narayan*,⁵⁰ West, J., observed that

"possession is evidence of title, and is primarily exclusive," and,

"it is for him who impugns the exclusive title to show that the possession originated in some way which has preserved his own right." . . . "It is no proof of property's being still undivided that it was once undivided; otherwise there would be a ground for a general redistribution of all Hindu estates. A counter-presumption of greater force arises from long exclusive possession."

The same learned Judge observed in another case,

"when of two persons one is in enjoyment of property and the other has no enjoyment or possession, that is, *prima facie*, an exclusion of the latter. There may be a contract, or other jural relation between the parties which accounts for the sole possession, and makes it preserve, instead of destroying the joint right, but of such a state of things positive evidence is always required, since otherwise possession continued even for centuries would afford no security to property. *An enjoyment by agreement even after partition, by one for several would*, of course, satisfy the test, but then there must be evidence of the agreement to present the inference of exclusive possession."¹

However, the Madras High Court has held in *Vaiyapuri v. Subramania*,² that where in a partition

Madras.

between co-owners, an item of joint property is left undivided and allowed to remain in the possession of one of them, such possession must be considered to be that of a co-owner, and cannot be held to be adverse in the absence of evi-

48. (1906) 28 All. 479 (480).

49. (1917) 40 I.C. 420 (All.).

50. 1883 B. P. J., p. 262; see note to *Ramchandra Narayan v. Narayan Mahadev*, (1886) 11 Bom. 216 (221).

1. *Lachiram v. Uma*, B.P.J. (1883), p. 285. See note to *Ramchandra Narayan v. Narayan Mahadev*, (1886) 11 Bom. 216 (221).

2. (1929) 114 I.C. 337=1929 Mad. 27; Reld. on *Rajagopala v. Soundara Raja*, (1923) 74 I.C. 1018=1924 Mad. 113=45 M.L.J. 476=1923 M. W.N. 636.

dence of repudiation of title of the other co-sharer to his knowledge. The burden of proving the adverse nature of his possession lies in such a case on the co-owner who sets it up, and the evidence with regard to it must be viewed from that standpoint. Similarly, in *Kumarappa v. Saminatha*,³ where a member of a Hindu family who was divided in status from others was in enjoyment of the same portion of the family properties, while others enjoyed other portions, he was not held excluded in law or ousted from these other portions so as to disentitle him to a share of those portions, however long their enjoyment by others. The **Bombay** view in *Vishnu Ramchandra v. Ganesh*,⁴ was not followed, considering that it was opposed to the view taken by their Lordships of the **Privy Council** in *Lakshman v. Ramchandra*.⁵ A **Full Bench** of the **Madras High Court** in *Yerukola v. Yerukola*,⁶ takes the view that where on the separation of brothers, members of a joint Hindu family, some of the properties were divided by metes and bounds, and the rest remained in the hands of different members, who collected outstandings from debtors, and rents from tenants, that the properties remaining undivided were held by the brothers as tenants-in-common, and Art. 120 was held to apply, time beginning to run from the date when an account was demanded and refused.

2205. A **Full Bench** of the **Bombay High Court** has taken the view in *Bhavrao v. Rakhmin*,⁷ that where co-parceners have alienated their shares in the joint property by sale and mortgage, and the alienees have been in possession for more than twelve years, a claim for partition is, as against such alienees barred by limitation under Art. 144 of the Limitation Act. The purchaser from a single co-parcener does not by his purchase get a good title to the land conveyed, but only a qualified right which is liable to be defeated if the co-parceners take the requisite steps within the statutory period.⁸ Nevertheless his exclusive possession does not on that account cease to be adverse. He, *entering as owner*, his possession must necessarily be adverse to the true owners. This principle so laid down by the **Bombay High Court** has been accepted and followed by the **Lahore High Court** in *Chint Ram v. Bhakhtawar Rikh*⁹ and

Adverse possession of alienee from co-sharer.

Bombay.

Lahore.

3. (1918) 42 Mad. 431.

4. (1897) 21 Bom. 325.

5. (1881) 5 Bom. 48 (P.C.).

6. (1922) 45 Mad. 648=1922 Mad. 150=42 M.L.J. 507 (F.B.).

7. (1898) 23 Bom. 137 (F.B.).

8. *Pandurang v. Bhaskar*, (1874) 11 Bom. H. C. R. 72.

9. 1 P.L.R. 1902.

Sohandan v. Aurang Khan.¹⁰ Again, in *Anwar v. Kishen Singh*,¹¹ it was held that where a joint owner of land sells it in its entirety and delivers possession to the vendee, the possession of the vendee is adverse to the other joint owners. It may be observed that the ordinary rule that the possession of a co-sharer should be deemed to be on behalf of all the co-sharers unless he can prove adverse possession by clear evidence, has no application to such a case, as the possession of the vendee cannot, in its inception, be said to be on behalf of such joint owner or as a co-sharer.¹² In *Udi v. Marumal*,¹³ it was held by Moti Sagar, J., that in the case of co-sharers, the possession of one co-sharer is the possession of all, and if one of them sets up a prescriptive title against the others he must prove that this possession was openly hostile and it could not be lawfully referred to a legal title as co-sharer; but, a transferee or an assignee cannot by the mere fact of transfer or assignment, become a co-sharer, if his rights as such are denied by the other co-sharers and a suit by him, therefore, for possession against his assignor's co-sharers must be brought within twelve years from the date of transfer. A Letters Patent appeal against this decision was dismissed on being found by the Bench that the transferor had himself no subsisting interest in the property at the time of the sale; and, his transferee could not be in a better position than himself, and claim a share in the property.¹⁴ Accordingly, distinguishing this ruling, it was held in a later Lahore case that where a suit for possession and partition is brought by a transferee of a co-sharer's interest in joint property, after twelve years from the date of transfer, the suit is not barred unless there has been ouster of the transferor, or the transferee for a period of more than twelve years before the institution of the suit.¹⁵

Calcutta.

The Calcutta High Court has distinguished the Bombay Full Bench decision, and has held that if *A* and *B* together own property of which *A* is in actual possession, and *A* sells his moiety to *C*, the possession of *A* immediately becomes the possession of *C* also.¹⁶ There is a clear distinction in this

10. 9 I.C. 540=23 P.L.R. 1911=48 P.W.R. 1911.

11. (1923) 71 I.C. 171=1922 Lah. 205.

12. *Ibrahim v. Ali Muhammad*, 116 I.C. 890=1930 Lah. 214.

13. (1924) 6 L.L.J. 567=78 I.C. 159=1924 Lah. 682; Refd. in *Mt. Mehran v. Rahimi*, (1927) 102 I.C. 426=1927 Lah. 426=28 P.L.R. 181 (Limitation for a suit for possession of property by a donee from a co-sharer who was in constructive possession through another co-sharer is twelve years from the date of the gift).

14. *Fateh Muhammad v. Ghulam Muhammad*, (1929) 120 I.C. 604=1928 Lah. 957.

15. *Ibid.*, (1929) 120 I.C. 604=1928 Lah. 957; Folld. *Hardit Singh v. Gurmukh Singh*, 64 P.R. 1918=47 I.C. 626=58 P.W.R. 1918 (P.C.).

16. *Biswanath Chakravarti v. Rabija Khatun*, 1929 Cal. 250=56 Cal. 616; Dist. 23 Bom. 137 (F.B.).

respect between the possession of a co-parcener and that of a stranger.¹⁷ The entry of an alienee from a co-parcener into the property alienated is adverse to the other co-parceners from the very moment of that entry.¹⁸ If a co-parcener has alienated pro-

Madras. perty belonging to the family, so as to exclude other co-parceners from it, adverse possession in favour of the alienee begins to run from the date of the alienation and the consequent exclusion of the co-parceners.¹⁹ But, the possession of a co-sharer before the alienation being for himself and his co-parceners and being thus of a fiduciary character, it cannot begin to be adverse to the co-parceners in the absence of intimation conveyed by him to them that he intended to exclude them. Thus, it seems to be impossible to hold that the plaintiffs can be prejudiced by reason of the fact that a deed of sale was executed behind their back by their agent, the co-sharer transferor,

Allahabad. in favour of a stranger. The Allahabad High Court has held that a suit for possession by transferees from co-heirs who were not actually in possession against transferees from co-heirs who were in actual possession is not barred by limitation provided it is brought within 12 years of the transfer in favour of defendants.²⁰ In *Linga Munisami v. Govindasamy*,²¹ the Madras High

Madras. Court took the view that a suit by a member of a joint Hindu family for declaration of title to and possession of co-parcenary property in the hands of an alienee from another co-parcener is governed by Art. 144 and not Art. 127 of the Limitation Act, and limitation begins to run against him from the date when the alienee takes open and public possession of the property. As to whether knowledge (actual or constructive) of the plaintiff is necessary for the alienee's possession to become adverse, there is a conflict between the decision in *Muthukrishna Iyengar v. Sankara Narayan Iyer*,²² and that in *Bhadrao v. Rakhmin*,²³ but, the latter view was agreed to by Ramesam, J., in the Madras case of *Linga Munisami*,²⁴ above cited. Ramesam, J., observed that,

17. *Jogendranath Rai v. Baldeo Das*, (1908) 35 Cal. 961 (968)=12 C.W.N. 127=6 C.L.J. 735.

18. *Abdul Gafur v. Ashamnath Bibi*, (1920) 54 I.C. 385=11 L.W. 31; Reld. on *Muthusami v. Ramakrishna*, 12 Mad. 292.

19. *Malkappa v. Mudkappa*, (1912) 37 Bom. 84=17 I.C. 657; Folld. in *Umrao Singh v. Lachhmi Narayan*, (1917) 39 I.C. 762 (F.B.).

20. *Ram Parson Upadhia v. Kalab Hussain*, (1916) 36 I.C. 100 (All.).

21. (1922) 70 I.C. 317=15 L.W. 294=42 M.L.J. 364=1922 Mad. 369; Reld. on 23 Bom. 137 (F.B.); 37 Bom. 84=14 Bom. L. R. 931.

22. 22 I.C. 615=1 L.W. 119=26 M.L.J. 140=38 Mad. 903.

23. 23 Bom. 137 (F.B.).

24. (1922) 70 I.C. 317 (319)=1922 Mad. 369.

"it may be that, if the transaction under which the alienee obtains possession is consistent with the possession not being adverse to the plaintiff—as, where a member sells only his share but, on account of the difficulty of delivery of possession of an undivided share, delivers possession of the whole property—there is no adverse possession against sharers other than the alienee. But where the sale purports to be of the whole interest in the property and the purchaser enters into possession in assertion of a claim to the whole his possession is *prima facie* adverse to the other members."²⁵

In *Venkatarama Iyer v. Subramania Sastry*,²⁶ it was held likewise that the possession of one owner is not ordinarily adverse to the other co-owners. Not only possession by one co-owner but also an exclusion of the others or the denial of their title to their knowledge is essential to render such possession adverse. The same principle is applicable to the case of a transferee from one of several co-owners. Reliance is placed for this view on the Privy Council decisions in *Watson & Co. v. Ramchand*,²⁷ and *Lachmeswar Singh v. Manowar Hussain*,²⁸ as well as *Varada Pillai v. Jeevaratnammal*,²⁹ the two first defining the point at which the Court will restrain the enjoyment of one co-sharer as interfering with the rights of the others, and the last dealing directly with prescription. It was observed that in each of these cases the prescribing party was the transferee of a co-sharer, not a co-sharer or his descendant, being in the first a lessee, in the second a purchaser, and in the third a beneficiary under a will, and that his knowledge of his rights and those of the other co-sharers was assumed.

"But the material fact, and it is irreconcilable with the decision in *Bhavrao v. Rakhmin*,³⁰ is that not only a possession by one co-sharer, but also an exclusion of the others or a denial of their title to their knowledge, was held essential before such possession could be restrained or regarded as adverse."³¹

There is, accordingly,

"no justification for the general statement that a transferee in possession of common property is subject to no special restriction in prescribing against co-sharers other than his transferor. It can be said only that, if he prescribes as a co-sharer, a matter to be decided with reference to the terms of his transfer and the circumstances, he must prove exclusion or denial of title; but that, in the event of his having neither actual nor constructive notice of the common character of the property, he will be

25. *Linga Munisami v. Govindasami Naicken*, (1922) 70 I.C. 317 (319, 320).

26. (1928) 78 I.C. 37=20 L.W. 122; cf. *Bhavrao v. Rakhmin*, 23 Bom. 137 (F.B.) and *Bhaiji Shamrao v. Hajimiya Mahamad*, 15 I.C. 500=14 Bom. L. R. 314.

27. 18 Cal. 10=17 I.A. 110 (P.C.).

28. 19 Cal. 258=19 I.A. 48 (P.C.).

29. 53 I.C. 901=43 Mad. 244=46 I.A. 285 (P.C.).

30. 23 Bom. 137 (F.B.).

31. *Venkatarama Iyer v. Subramania Sastry*, (1928) 78 I.C. 37=20 L.W. 122.

on the same footing as any ordinary transferee with an independent, but invalid title, or with none".³²

The Rangoon High Court takes the view that an alienating co-heir is to be regarded as an agent of the other co-heirs so that an alienation by him of common property without the consent of the rest is adverse to their interest and limitation runs from the date of alienation, and not from the date of suit for partition of common property.³³

Illustrations.

(1) Defendants were in possession of a house on behalf of themselves and of plaintiffs. They mortgaged it to a third person, alleging it to be their exclusive property, but they remained in possession of it as tenants. There being nothing to show to the plaintiffs that the character of the defendant's possession had changed, it was held, that the defendant's possession did not become adverse to the plaintiffs.³⁴

(2) Where during greater part of the year the cattle of the proprietary body of a village grazed over the whole area of the village *shamilat*, but, during a few months, portions of the *shamilat* were enclosed to keep out the cattle, and hay on those portions was cut and removed by the co-sharers, and one of the co-sharers, who had enclosed a much larger area of the *shamilat* than that to which he was entitled, sold his share in the common land, but not any definite area as belonging exclusively to him, to a stranger; it was held that as the co-owners continued to exercise their rights after the sale, their position was in no way affected by the stranger vendee periodically asserting adverse rights.³⁵

2206. CO-HEIRS: ADVERSE TITLE BETWEEN.—We have seen in S. 2192, *et seq.*, that the rule of law is the same as to co-sharers, co-owners, or tenants-in-common, that the sole occupation by one of them is not *prima facie* inconsistent with the right of others.³⁶ Co-heirs under Muhammadan Law are in the position of tenants-in-common, and the entry and possession of one of such co-heirs must be deemed to be on behalf of all the co-heirs. His possession cannot be adverse to the other co-heirs in the absence of express ouster or denial of the title of the other co-heirs.³⁷ In 1912 A.C. 230, where the defendant, one of several heirs, who took as tenants-in-common, got into possession of the whole of the deceased's property and his possession was undisturbed, and uninter-

32. *Venkatarama Iyer v. Subramania Sastry*, (1928) 78 I.C. 37=20 L.W. 122.

33. *Maung Tun U v. Maung Tun Aung*, 1927 Rang. 158=5 Rang. 93.

34. *Umrao Singh v. Lachmi Narayan*, (1917) 39 I.C. 762 (Punj.).

35. *Birjoo v. Bhikhu*, (1921) 64 I.C. 876 (Lah.).

36. *Jogendranath Rai v. Baldeo Das*, (1907) 35 Cal. 961 (968); *Hari Pru v. Mi Aung*, (1919) 52 I.C. 629=10 L.B.R. 45=12 Bur. L. T. 129; also see *Bashir Ahmad v. Parshotam*, 1929 Oudh 337 (339); *Mahipal Singh v. Sarjoo Prasad*, 1926 Oudh 141=93 I.C. 99=3 O.W.N. 100.

37. *Ghulam Muhammad v. Mt. Begum*, (1930) 122 I.C. 105=1930 Lah. 251=31 P.L.R. 113; *Mt. Jano v. Narsing Dass*, (1929) 117 I.C. 803=1929 Lah. 549; *Mt. Ahmad Bibi v. Shamsdin*, (1928) 109 I.C. 658 (Lah.); also see *Asiruddin Mandol v. Mt. Latifunnessa*, (1925) 85 I.C. 763=1925 Cal. 1176.

rupted, and his co-heirs brought a suit for their share of inheritance, their Lordships of the Privy Council held that

"entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-heirs, the principle applicable being that possession is never considered adverse if it can be referred to a lawful title".³⁸

Lord Macnaghten, in this case, observed that it was not a possible conclusion in law that the defendant, one of several co-heirs, could enter in possession as *sole* heir, or plunderer, in his own right.

"His possession was, in point of law, the possession of his co-owners, and it was not possible for him to put an end to that possession by any *secret* intention in his mind. Nothing short of ouster could bring about that result."³⁹

This authoritative pronouncement is generally followed by all the High Courts in India.⁴⁰ The heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred, unless and until the other heir set up an adverse right to the knowledge of that heir. Mere intention on their part will not affect the character of possession, nor is the heir bound to inquire whether there has been an adverse dealing with his property.⁴¹ Walsh, J., has observed in *Mustafa Khan v. Mt. Dulari*,⁴² that every case of adverse possession by a co-sharer must be considered on its own facts, and the principle that the possession of one co-sharer is in law the possession of all, should not be pressed too far. There are cases in which consent to usurpation is not inconsistent with its becoming adverse, as for instance, where a person consents to usurpation, not thinking it worth while to interfere.⁴³ But, on the authorities the sole possession of one of two or more joint owners is not adverse to the others until the joint owner has done some act to the knowledge of the others which amounts to a denial of the latter's right.⁴⁴ A suit for a share in the inheritance

38. *Corea v. Appuhamy*, 1912 A.C. 230.

39. *Ibid.*

40. *Ahmad Raza Khan v. Ramlal*, 26 I.C. 922=37 All. 203; *Champalal v. Mangal Chand*, 40 I.C. 420 (All.); *Ram Parson v. Kalab Hussain*, 36 I. C. 100 (All.); *Mt. Mubarik v. Raza Khan*, 46 All. 377=1924 All. 384=22 A. L. J. 307=79 I. C. 174; *Faizuddin v. Reju Akal*, (1913) 28 I.C. 22=21 C.L.J. 192; *Asiruddin Mondol v. Mt. Latifunnessa Bibi*, (1925) 85 I.C. 763=1925 Cal. 1176; *Muthukrishna v. Sankaranarayana*, (1914) 25 I.C. 573 (Mad.); *Hidayat Ali v. Khadar Khan*, (1915) 30 I.C. 586; *Asghar Husain v. Akbar Husain*, (1916) 36 I.C. 743 (Oudh).

41. *Marian Beeviammal v. Kadir Meera Sahib*, (1915) 29 I.C. 275 (Mad.).

42. (1921) 65 I.C. 75 (All.).

43. *Ibid.*

44. *Chandbhai Mahamadbhai v. Hasanbhai Rahimutulla*, (1922) 64 I.C. 205=46 Bom. 213=23 Bom.L.R. 1033=1922 Bom. 150 and *Ahmad Raza v.*

where there is no proof of the existence of a joint family, becomes barred after the lapse of 12 years from the death of the last owner.⁴⁵ Where a Muhammadan brother and sister inherited together property left by their deceased father, and the minor sister lived with her brother, it was held that the mere fact that the sister's name was not recorded in the revenue papers did not prove that she was excluded from her legal share and that her brother was in adverse possession.⁴⁶ The joint family is not an institution of the Muhammadan Law; and on the death of a Mahomedan each of his heirs becomes entitled to claim his or her share and limitation begins to run against each under Art. 144, Limitation Act. There is no presumption in such a case that the male heirs hold the shares of the female heirs on behalf of the latter as managers of a family.⁴⁷ In some cases, it has been held that a male heir is presumed to be holding on behalf of female relatives.⁴⁸ However, it is a question of fact, depending upon the circumstances of each case, whether the possession of one of co-heirs is a possession on his own behalf, or a possession on behalf of all the co-heirs.⁴⁹ There can be no adverse possession between co-heirs in joint possession, *e.g.*, where the brothers and sisters have been jointly in possession,⁵⁰ but where the defendant was allowed by his co-heirs to remain in possession of certain land for 13 years without any agreement on the part of the defendant that he had held on behalf of the co-heirs, or any acknowledgment of the co-heirs' right, the case is entirely different.¹ Where a Mahomedan heir dies leaving a number of heirs, and only one of the heirs remains in possession of the property his possession is not adverse to the other co-heirs in the absence of a clear denial of title and an overt act amounting to ouster. The mere fact that he exclusively grants a lease is not sufficient denial of title.² If the Court finds that the entering co-tenant took pos-

Ramlal, 26 I.C. 922=37 All. 203=13 A.L.J. 204; Followed in *Shakur v. Husaini Bibi*, (1923) 71 I.C. 653=1923 All. 447.

45. *Mt. Murad Khatun v. Muhammad Baksh*, (1916) 33 I.C. 742 (Punj.); also see *Lalal Din v. Mt. Karam Nur*, (1931) 134 I.C. 491=32 P.L.R. 381 (Suit brought by a Mahomedan co-heir for declaration of title within 12 years of a denial of her title, held, within time).

46. *Inayat Husain v. Aziz Banno*, (1911) 10 I.C. 413 (All.).

47. *Mt. Zainab v. Ghulam Rasul*, (1923) 73 I.C. 425=1923 Lah. 519; also see *Mangal Singh v. Shankari*, (1919) 50 I.C. 746 (Punj.) (Art. 123, not applicable to a suit by one heir against a co-heir).

48. *Haider Khan v. Chand Khan*, (1919) 50 I.C. 691 (All.) (Male heir presumed to be holding on behalf of female relatives).

49. *Lachman Singh v. Sohan Singh*, 97 P.R. 1890; *Inayat Husain v. Aziz Bano*, (1911) 10 I.C. 413; *Fariduddin v. Ali Husain*, 79 P.W.R. 1910; also see (1921) 4 L.L.J. 57.

50. *Ma Nyein Me*, (1916) 32 I.C. 568 (L.B.).

1. *Ma Ye v. Maung Hlaw*, 2 L.B.R. 184.

2. *Shamim Ahmed v. Heasmul Haq*, 131 I.C. 211=1930 A.L.J. 1456=1931 All. 193.

session on behalf of all the heirs, there is no adverse possession unless the defendant establishes ouster or denial of the plaintiff's right to his knowledge for more than 12 years.³ Where a person who is not the heir of a deceased Muhammadan obtains possession of a portion of the property belonging to the deceased under an assertion of title on the basis of gift, his assertion is a sufficient disclaimer of the title of the heirs of the deceased, and sets the limitation in motion against them.⁴

2207. ADVERSE POSSESSION, BY OR AGAINST FEMALE HEIRS.—*See* notes under Art. 141, as to adverse possession by or against Hindu widows, and other female heirs, and its effect on the right of reversioners, and other heirs.

A Hindu widow, or a female heir, takes a limited estate, and on her death, her reversioners do not succeed by any right derived through her, since they are the heirs of the last full owner. But, since the estate vests in the female heir in her own right, she is entitled to represent it in all transactions concerning it.⁵ The reversioners are bound by the result of any litigation concerning the estate, if (i) the heiress in the previous suit represented the estate, (ii) there was a *bona fide* litigation, and (iii) the decree was obtained on a fair trial of the matter in suit.⁶ The reversioner is entitled to sue for possession of immoveable property, to which he becomes entitled on the death of a female limited owner, at any time within 12 years from her death, as provided in Art. 141 of the Limitation Act⁷; or in case of its forfeiture, within the same period calculated from when the forfeiture is incurred, as provided in Art. 143 of the Limitation Act: Provided that where the heiress had at any time set up an adverse title against the reversioner, his claim will be barred by her adverse possession for twelve years.⁸ We have seen in the notes under Art. 141, *ante*, that since the Limitation Act of 1871, the death of the heiress is the starting point of limitation for suits by reversioners for recovery of the estate,⁹ and adverse possession against the widow, or a female

3. *Mangal Singh v. Mt. Shankari*, (1919) 50 I.C. 746 (Punj.); *Venkatachellam v. Annapurni*, 1928 Mad. 652 (2)=55 M.L.J. 223.

4. *Wajid Ali v. Mt. Sahima Begum*, (1925) 89 I.C. 473 (Oudh.)

5. *Bhan v. Gobind*, (1878) B.P.J. 60.

6. Dr. Gour's Hindu Code, Ss. 3103, 3105, 3106, and 3107 at pp. 1523-1525.

7. *Anund Koer v. Sodi Naraindas*, 83 P.R. 1881.

8. *Sham Koer v. Dah Koer*, 29 Cal. 664 (P.C.).

9. *See* Art. 142, Act IX of 1871; *Ram Singh v. Bhim*, 38 All. 117; *Tulsa Bai v. Bhagwat Prasad*, 11 A.L.J. 333=20 I.C. 179; *Mahran v. Qudrutullah*, (1909) 3 I.C. 984=121 P.L.R. 1909; *also see* Art. 141, Act XV of 1877 and Act IX of 1908 and *Ranchordas v. Parwatibai*, 23 Bom. 725 (P.C.); *Jhumsan v. Tiloki*, 25 All. 425; *Ram Deo v. Abu Jafar*, 27 All. 494; *Ram Singh v. Bhani*, 37 All. 117; *Samba Siva v. Ragava*, 13 Mad. 512.

heir is not taken as adverse to the reversioners, whose cause of action only begins upon her death.¹⁰ A Hindu widow only holds her deceased husband's property under a qualified interest, and the absolute interest of the reversioners accrues when the succession opens out after the widow's death. The death of the female being the sole starting point under Art. 141, the possession of a Hindu widow, ordinarily, cannot be adverse to the reversionary heirs; and any act such as that she had set up an adoption, and transferred the estate purporting to be absolutely in favour of the alleged adoptee or of a transferee for or without value, would not start limitation against the reversioner.¹¹ Similarly, the possession of a grantee or of any person deriving title from the widow, or female heir would not be adverse to the reversioners, until her death or re-marriage, when the right of reversioner to possession could be said to have accrued in his favour.¹² During the lifetime of a limited owner, the possession of her property by her alienees cannot be adverse to the reversioners so as to destroy their contingent rights.¹³ A decision against the widow who fails to recover her estate within twelve years of her husband's death, only affects her title, and cannot bind the reversioner.¹⁴ However, where the trespass commenced against the last full owner, and the limitation had started against all comers, the intervention of a life estate could not arrest the operation of limitation against the reversioners, and adverse possession in favour of trespasser against the title of the widow would bar the reversioners also.¹⁵

It cannot be said that whenever a Hindu widow is found in possession of property without title, her possession must be regarded as that of a widow's estate.¹⁶ Where the widow of a member of a joint Hindu family takes possession on the death of her husband

10. *Chiragha v. Mahtaba*, 79 P.R. 1898; *Pursut Koer v. Palut Roy*, 8 Cal. 442 (445); *Muthiyala v. Burada Gunta*, 43 Mad. 855=1921 Mad. 246=60 I.C. 135; *Mukta v. Dada*, 18 Bom. 216 (220); *Cursondas v. Vundrabandas*, 14 Bom. 482; *Srinath v. Prosanna*, (1883) 9 Cal. 394 (F.B.) and *Ranchordas v. Parpatibai*, (1899) 23 Bom. 725 (P.C.).

11. *Bhagwati v. Murarilal*, 7 I.C. 427=15 C.W.N. 524; *Cursondas v. Vundrabandas*, 14 Bom. 482 (486); Affirmed *Vundrabandas v. Cursondas*, 21 Bom. 646 (670); s.c. *Ranchordas v. Parbatibai*, 23 Bom. 726 (736) (P.C.).

12. *Suntoskee v. Mt. Balasce*, (1863) 10 W.R. 276; *Srinath v. Mahesh*, (1869) 12 W.R. 14 (F.B.); *Pursut Koer v. Palut Roy*, (1881) 8 Cal. 442; *Sambasiva v. Ragava*, (1890) 13 Mad. 512; *Kokilmoni v. Manik*, 11 Cal. 791.

13. *Shambhu Prasad v. Mahadeo Prasad*, 55 All. 554=144 I.C. 293=1933 A.L.J. 1185=1933 All. 493.

14. *Ramchandra v. Kakutur*, 32 M.L.J. 1230=42 I.C. 228.

15. *Mohendranath v. Shamsulnessa*, 27 I.C. 954=19 C.W.N. 1280.

16. *Sant Bakhsh Singh v. Bhagwan Baksh Singh*, 1931 Oudh 25=6 Luck. 365=129 I.C. 328=7 O.W.N. 1082.

of property which was in his possession during his lifetime, there is no presumption that she takes possession as the widow of a separated Hindu, and not under a full title.¹⁷ Where a female heir was the sole recorded proprietor of the estate while she had only a right to maintenance, the male members could not be said to be in joint possession and enjoyment of the estate, so as to avoid a bar by limitation under Art. 144, Limitation Act.¹⁸ Similarly, where it is found that a Hindu widow took possession of the property absolutely and not in lieu of maintenance, or as the result of any arrangement with the heirs and successors of the last male holder at any time, she acquires full title by adverse possession.¹⁹ So again, where a Hindu widow is in exclusive possession of her husband's property as his heir, and adverse title is set up by her on her own account, *e.g.*, by publicly obtaining mutations of names in respect of that property, this would make limitation run against the reversioners in her lifetime, from the date of her adverse assertion of title.²⁰ A widow's estate for life never constitutes a possession adverse to the reversionary heirs. Possession taken by a Hindu widow under an arrangement with the other members of the family, and in pursuance of an award, cannot be adverse to the members of the family.²¹ But, when a Hindu widow openly asserts an absolute title, a suit by the reversioners of her husband is barred after the statutory period of twelve years.²² Although the statute of limitation can never begin to run against the reversioner in consequence of possession or dispossession of a female, so long as she holds as heir of the last male, yet if she holds under some claim of title independent of him, her possession is hostile to the rightful heir or reversioner from the time it begins.²³

17. *Kati Charan v. Piari*, 46 All. 769 (772)=1924 All. 740=83 I.C. 754=22 A.L.J. 725; *Rikhdeo v. Sukhdeo*, 49 All. 713=102 I.C. 175=1928 All. 45; *Uman Shankar v. Aisha Khatun*, 45 All. 729=1924 All. 86=74 I.C. 869.

18. *Jowala Buksh v. Dharm Singh*, 10 M.I.A. 511; also see *Sant B. Singh v. Bhagwan B. Singh*, 6 Luck. 365=1931 Oudh 25.

19. *Raj Bahadur v. Kanhaiya Baksh*, (1927) 99 I.C. 890=4 O.W.N. 350=1927 Oudh 138.

20. *Satgur Prasad v. Raj Kishorelal*, (1919) 42 All. 152=1919 P.C. 60=46 I.A. 197 (P.C.); also see *Habraji v. Chandrabali*, 1931 Oudh 89 (2)=130 I.C. 849.

21. *Radha Dulaiya v. Rashioklal*, 45 All. 1 (5)=1923 All. 25=75 I.C. 14=20 A.L.J. 814.

22. *Lachhan Kunwar v. Anant Singh*, 22 I.A. 25=5 M.L.J. 1=22 Cal. 445 (P.C.) and *Sham Koer v. Dab Koer*, 29 I.A. 132=29 Cal. 664=6 C.W.N. 657 (P.C.) and *Mahabir v. Adhikari*, 23 Cal. 942 (P.C.).

23. *Kedarnath v. Jatindra*, (1909) 4 I.C. 44=9 C.L.J. 236; Relied on *Roy Radakissen v. Nauratanlal*, 6 C.L.J. 490 (522).

Illustrations.

(1) In *Lachhan Kunwar v. Manorath Ram*,²⁴ a Hindu widow took possession of her husband's estate during the life-time of her son, or of his son's widow asserting a preferential title to the property, and retained adverse possession for over 12 years. A suit was brought by the son's widow, and the reversionary heirs, both of the father and of the son to recover possession of the property. It was held by their Lordships that since the widow took possession claiming absolute title, after the lapse of the statutory period of 12 years a suit by the reversionary heirs of the husband was barred.

(2) In *Lojwanti v. Safachand*,²⁵ their Lordships of the Privy Council observed that the Hindu widow, is not a life-renter, but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing *as widow* she possesses adversely to any one as to certain parcels, she does not acquire the parcel as *stridhan* but, she makes them good to her husband's estate.

(3) Similarly, where a Hindu woman remained in possession of the estate of her deceased husband after her re-marriage, her possession of such estate was regarded as adverse to the reversioners of her first husband; but, in the absence of any indication whether she knew or did not know that on her re-marriage she had forfeited her right to the estate of her first husband, and that she was holding the property in her own right, it was presumed that she continued to hold the property as the widow of her first husband: and, in such a case after her death the property would go to the heirs of her first husband and not to the heirs of the widow.²⁶

(4) Where of two Hindu brothers, *J* and *M*, *J*, died first leaving a widow *B*, whose name was recorded with respect to the share held by her husband: and on the death of *M*, *B*'s name was also recorded in respect of his share, and *B* continued in possession of the whole till her death, and she had also made a transfer of her husband's half share during her lifetime, it was held in a suit by her reversioners for recovery thereof that the first assertion of adverse title was the date of her alienation and the suit was not barred by time.²⁷

(5) In *Mt. Deshrani v. Kishore Singh*,²⁸ it was observed that as regards the nature of possession by one Hindu female entitled to maintainance against another Hindu female in whom the inheritance vests for the time being, the quality and extent of right acquired by adverse possession always depends upon the claim accompanying it and upon the nature of *animus possidendi*. The question whether possession is adverse or not is always a question of one's own intention to hold adversely and knowledge of such intention must be brought home to the real owner so as

24. 22 Cal. 445=22 I.A. 25 (P.C.).

25. (1924) 80 I.C. 788=1924 P.C. 121=5 Lah. 192=2 P.L.R. 245 (P.C.); also see *Chakradhar Jha v. Shabkant Misra*, (1925) 88 I.C. 767=6 P.L.T. 363=1925 Pat. 460 and *Jagmohan Singh v. Prayag Narain Singh*, (1925) 87 I.C. 473=6 P.L.T. 206=1925 Pat. 523=3 P.L.R. 251.

26. *Umrao Singh v. Pirthi*, (1925) 86 I.C. 445=1925 All. 369.

27. *Bindraban v. Ram Narain*, (1925) 85 I.C. 449=1925 All. 330.

28. (1927) 100 I.C. 446=22 N.L.R. 175=1927 Nag. 104=10 N.L.J.

to extinguish his title. Accordingly, in the absence of any proved positive assertion of a hostile claim on the part of the two widows, *R* and *B*, at the time of the commencement of their possession, and in the absence of *B*'s own evidence, the inference was legitimate that the nature and quality of *B*'s possession was not proved to be such as could give rise to further inference that it was as an absolute owner, and that it, therefore, became adverse as against the reversioner also.

(6) Where according to the custom of the community to which the parties belonged, the widows were excluded from the inheritance, the widow's possession for more than twelve years barred the reversioner's suit for possession.²⁹

Widow excluded from inheritance.

(7) In *Gajadhar Pande v. Parbati*,³⁰ where a separated Hindu died leaving him surviving two widows, and a daughter-in-law, the widow of his predeceased son, and upon the death of the survivor of the two widows the daughter-in-law took possession of the property and remained in possession thereof for more than twelve years, adversely to the reversioners, it was held, that the suit by the reversioners to recover possession was time-barred, their cause of action having commenced from the death of the survivor of the two widows of the last owner.

(8) If a widowed daughter-in-law, who was only entitled to maintenance, was allowed to remain in possession of her father-in-law's property in lieu of maintenance, she did not acquire the property as her stridhan, and her alienee could not be in possession after her death, adversely to the heirs of her father-in-law.³¹

Widow's possession as maintenance holder.

(9) But, where an oral gift, which is not valid under the Hindu Law is made in favour of a Hindu widow, and the donee perfects her title by adverse possession, the property becomes the *stridhana* of the donee, and the title which she acquires by prescription does not enure to the benefit of the heirs of the last male owner of the property.³²

(10) When a stepmother who is only entitled to maintenance and residence continues to be in possession of the estate after the death of the stepson who was the last male-holder to whom she is not the heir, her possession cannot be wrongful at least till the reversioners entitled assert the right to possession and demand it from her.³³

(11) Where a Hindu governed by the Dayabhaga school at his death left two daughters (his heirs) and a daughter-in-law, widow of a predeceased son, and the daughter-in-law took possession of the estate to the exclusion of the daughters, who were living at their husband's houses, and this possession continued for more than twelve years, it was held that the possession of the daughter-in-law was adverse and that under S. 28 of the Limitation Act it extinguished the right of the daughters.³⁴

29. *Desai Ranchoddas v. Rawal Nathubai*, 21 Bom. 110 (113).

30. (1910) 33 All. 312; Reld. on *Sham Koer v. Dab Koer*, (1902) 29 I.A. 132 (P.C.).

31. *Jagmohan v. Prayag Narayan*, 6 P.L.T. 206=87 I.C. 473=1925 Pat. 523.

32. *Mt. Maluka Kunwar v. Pateshar Singh*, (1926) 96 I.C. 672=3 O.W.N. 536=1926 Oudh 371 (F.B.); also see and cf. *Varada Pillai v. Jeevarathnammal*, (1919) 43 Mad. 244 (P.C.).

33. *Muthuswami Kavundan v. Ponnayya*, (1928) 110 I.C. 613=1928 Mad. 820=55 M.L.J. 436=51 Mad. 815.

34. *Sachindra Kishore Dey v. Rajani Kant Chuckerbutty*, (1915) 27 I.C. 250 (Cal.).

(12) Where on the death of the widow, with a life-estate, the share of the estate which stood mutated in her name went into the possession of her daughter, who remained in possession for more than twelve years before her death, it was held that the right of the reversioners to sue arose on the death of the widow, and, as the daughter had no right to get possession on the death of her mother, her possession was adverse to the reversioners, and their suit was barred.³⁵

(13) A suit by a Hindu widow to recover possession of her deceased husband's estate is governed by Art. 144 of the Limitation Act.³⁶

2208. ADVERSE POSSESSION OF LIMITED INTEREST.—The Madras High Court

Madras.

has held that adverse possession of partial interest in land or immoveable property is as much possible for the purpose of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property.³⁷ Thus, a person in possession of a property as *usufructuary mortgagee* under a void mortgage, for more than twelve years acquires by prescription, the rights of a mortgagee, and is as such accountable to the mortgagor for the rents and profits not only of the last three years preceding the suit for redemption but for the whole period of his possession.³⁸ When an unenfranchised *inam* land was mortgaged and the mortgagee remained in possession for over twelve years, he acquired by prescription the right of a usufructuary mortgagee, and was held liable to be redeemed as such.³⁹ In *Madhava v. Narayana*,⁴⁰ it was held that adverse possession for twelve years of a limited, *i.e.*, *kanom* interest, in immoveable property is a good plea to a suit in ejectment to the extent of that interest. Further, in *Sundara Gurukkal v. Subramania Archakar*,⁴¹ it was held that by virtue of adverse possession a person does not acquire a higher title than he has prescribed for. From the authorities it is clear that a person can

35. *Adya Shankar Tewari v. Chandrawat*, (1934) 150 I.C. 519=11 O.W.N. 736=1934 Oudh 265.

36. *Padamlav Acharya v. Fakira Debya*, 1931 P.C. 84=131 I.C. 758=60 M.L.J. 619 (P.C.).

37. *Sankaran v. Periasami*, (1890) 13 Mad. 467; also see *Seshamma v. Chichaya*, 25 Mad. 507=12 M.L.J. 119 and *Subayya v. Maddulitiah*, 17 M.L.J. 469=3 M.L.T. 187 and *Parameshwaran v. Krishnan*, 26 Mad. 535.

38. (*Sontayana*) *Gopala Dasy v. Inapata Lupula Rami*, (1921) 44 Mad. 946=64 I.C. 328=41 M.L.J. 194.

39. *Butchiraju v. Seetharamayya*, (1925) 93 I.C. 955=1926 Mad. 377=23 L.W. 707.

40. (1886) 9 Mad. 244.

41. (1912) 16 I.C. 960 (Mad.); also see *Muthurakku v. Robert Gordon Orr*, (1911) 35 Mad. 618=21 M.L.J. 615; *Gopala Dasy v. Rami*, (1921) 44 Mad. 946=41 M.L.J. 194; *Nadapena Appanna v. Saripilli*, (1923) 47 Mad. 203=45 M.L.J. 567; *Subba Rao v. Lakshmana Rao*, (1925) 49 Mad. 820 and *Butharaju v. Seetharamayya*, (1925) 23 L.W. 707.

acquire the limited title of a mortgagee by adverse possession for the statutory period.⁴² Similarly, the **Bombay.**

Bombay High Court has held in *Budesah v. Hanmanta*,⁴³ that a tenant may, after the statutory period, acquire the right of perpetual tenancy. Where the owners of a certain land executed a long lease for 500 years in favour of the defendant, and plaintiffs as assignees of the owners sued to recover possession on the ground that the transaction was a mortgage, it being found that the transaction was void in consequence of the provisions of the Bhagdari Act (Bombay Act V of 1862), it was held that the defendants were entitled to such rights as they had acquired by the document by adverse possession, namely, the right to hold the land for 500 years as against the plaintiffs.⁴⁴ In *Ramchandra v. Kalo Devji*,⁴⁵ it was held that there can be no acquisition by adverse possession of an absolute title when nothing but a limited interest as mortgagee has been asserted, and to which he was entitled. But where in an ejectment suit by an Inamdar, it was shown that the defendants for more than twelve years before suit openly asserted their claim to hold as mirasi tenants, a title to such limited interest was held to have been acquired by prescription.⁴⁶ Similar-

Calcutta. **Calcutta High Court** takes the view that possession of a limited interest, for instance the claim to an intermediate tenure, may be just as much adverse as is adverse possession of a complete interest in the property; consequently, such possession of a limited interest may be just as much adverse for the purpose of barring a suit for the determination of that limited interest as adverse possession of complete interest in the property operates to bar a suit for the whole property. Such adverse possession of a limited interest, however, though a good plea to a suit for ejectment is good only to the extent of that interest.⁴⁷ This principle was explained in *Ishan Chandra Mitter v. Raja Ramaranjan Chakarbutty*,⁴⁸ and has been recognised

42. *Nadepena Appanna v. Saripilli Chinna Vadu*, (1924) 79 I.C. 510=47 Mad. 203=45 M.L.J. 667=1924 Mad. 292; Reld. on *Manavikraman v. Amma*, 24 Mad. 471 (F.B.).

43. 21 Bom. 509; Reld. on 9 Mad. 244 and 13 Mad. 467; also see *Maidni Saiba v. Nagapa*, 7 Bom. 96; *Yamunabai v. Dhondi*, 5 Bom. L. R. 186; *Chandri v. Daji Babu*, (1900) 24 Bom. 504=2 Bom. L. R. 491 and *Thakore Fatesingji v. Bamanji Ardeshir Dalal*, (1903) 27 Bom. 515=5 Bom. L. R. 274.

44. *Chaturbhai Lallubhai Patel v. Motibhai Bapurji Patel*, (1922) 24 Bom. L. R. 1345=77 I.C. 952.

45. (1915) 39 Bom. 587; also see *Bhogilal v. Kalansam*, (1927) 29 Bom. L. R. 1558.

46. *Trimbak v. Ghulam Jilani*, 34 Bom. 329; also see *Narhar v. Ganpati*, 1929 Bom. 174 (175)=117 I.C. 438=31 Bom. L. R. 218.

47. *Swarnamoyi v. Sourindranath Mitra*, (1925) 89 I.C. 747=42 C. L.J. 14=1925 Cal. 1189; *Icharan Singh v. Nilmoney*, (1908) 35 Cal. 470 (476); *Narayan Moyi v. Umesh Chandra*, (1917) 38 Cal. 459 (Cal.).

48. 2 C.L.J. 125 (136).

and applied in a long series of cases, in Calcutta,⁴⁹ as in Bombay and Madras High Courts noticed above. The **Patna High Court**

Patna. also recognises that the defendant in a suit for possession can set up a plea of adverse title to a limited interest such as an occupancy right or perpetual tenure.⁵⁰ The receipt of rent or non-payment of rent is immaterial when defendant sets up plea of adverse title to limited interest or, pleads tenancy, and in the alternative possession of a

Nagpur. limited interest.¹ The **Nagpur Judicial Commissioner's Court** holds likewise that where a person asserting ownership of a limited interest holds possession of the same for twelve years he acquires only the interest which he has prescribed for and not the full ownership of the property inasmuch as it is impossible to acquire by prescription anything more than what is prescribed for.² Possession for twelve years or any other period prescribed by the law on an invalid title cannot perfect anything but that title.³ To the same effect is

Allahabad. the decision of the **Allahabad High Court** in *Rajai v. Beharilal*,⁴ where the plaintiff's predecessors-in-title put the defendants in possession of a house under an agreement that the latter would be entitled to occupy the house on condition of their keeping the same in proper repairs, and, though the agreement was unregistered the defendants remained in possession in terms of the agreement for more than twelve years. It was held that the unregistered agreement could be looked into to ascertain the assertion of title made by the grantee in entering upon the house; and that the defendants acquired by adverse possession in title which the agreement, if registered, would have conferred upon them. A person in adverse possession of property claiming to hold it as mutwalli does not prescribe for

49. *Bagdu Majhi v. Raja Sri Sri Durga Prosad Singha*, 9 C.W.N. 292; *Ujir Ali Sardar v. Shadai Behara*, (1920) 38 C.L.J. 182; *Bhairabendra Narain v. Rajendra Narain*, (1923) 50 Cal. 487=1924 Cal. 45=74 I.C. 193; *Satyendranath v. Krishna Sakhakar*, (1920) 35 C.L.J. 185; *Shama Charan v. Abhiram*, (1906) 33 Cal. 511.

50. *Ram Rachhya Singh v. Kamakhya Narain Singh*, 1925 Pat. 216 (220)=6 Pat. 1. T. 12=4 Pat. 139=84 I.C. 586; Reld. on *Ramchurn Raha Bukhshee v. Mungul Sircar*, (1871) 16 W.R. 232; *Watson & Co. v. Rani Shurut Sundari Debi*, (1867) 7 W.R. 395; *Dinomoney v. Doorga Pershad*, (1873) 12 B.L.R. 274=21 W.R. 70 and 7 Bom. 96; 9 Mad. 244, etc.

1. *Ibid.*, 1925 Pat. 216 (220)=4 Pat. 139=84 I.C. 586; Reld. on *Icharan Singh v. Nilmoney*, (1908) 35 Cal. 470=7 C.L.J. 499=12 C.W.N. 636 and *Ishan Chander Mitter v. Raja Ramranjan*, (1905) 2 C.L.J. 125.

2. *Chunnu v. Subbeti*, (1926) 98 I.C. 540=22 N.L.R. 181=1927 Nag. 67.

3. *Dina Singh v. Jamal Singh*, (1924) 78 I.C. 446 (Nag.).

4. (1929) 115 I.C. 141=1929 Notes 19 (d).

more than a mutwalli's right in such property and may acquire to that extent the status of a mutwalli.⁵

2209. VENDOR AND VENDEE: ADVERSE POSSESSION BETWEEN.—

Adverse possession of vendor.

See notes under Art. 136, *ante*. (1) In *Anand Coomari v. Ali Jamin*,⁶ the Calcutta High Court considered the nature of the possession of a vendor remaining in possession after the execution of a conveyance by him. The authority of *Tew v. Jones*,^{6-a} was relied upon to hold that in the case of a sale out and out the vendor remaining in possession, is in adverse possession to the purchaser. Further, the date of the execution of the deed is the commencement of the adverse possession, and it should not be deferred up to date of the completion of the document by registration under the special provisions of the Registration Act.⁷ The title of the vendee is derivative, but he enters and holds possession for himself and not at all for the vendor. Until the defendant has possession, he cannot have adverse possession.⁸ Accordingly, where a vendor was at the time of sale of certain immoveable property out of possession, and he recovered possession after the date of sale, the purchaser could sue for possession within twelve years of the vendors having recovered possession, though it was more than twelve years after the vendor had been originally dispossessed.⁹ If in a conditional sale the vendor of the property remains in possession of the land as tenant of the vendee and holds over after the conditional sale has become absolute, his possession is not adverse to the vendee even after the date when the conditional sale became absolute.¹⁰

(2) The possession of a vendee is not derivative, but is in his own right and if the vendee holds possession under a transfer invalid for want of registration, his possession is adverse to that of the vendor. In *Sambhubhai Karsandas v. Shivaldas Sadasivdas*,¹¹ where the defendant could not prove a title by purchase, inasmuch as his unregistered deed of sale could not be received

5. *Abdul Alim v. Abdul Hamid*, 129 I.C. 375=1930 All. 866.

6. (1885) 11 Cal. 229 (231).

6-a. 13 M. & W. 12.

7. *Ibid.*, 11 Cal. 229 (232); also see *Sayad Nyamtula v. Naria*, (1888) 13 Bom. 424 (428); cf. S. 54, Transfer of Property Act.

8. *Sayad Nyamtula v. Naria*, (1888) 13 Bom. 424 (428).

9. *Ram Prasad Janna v. Lakhi Narain*, (1885) 12 Cal. 197; also see and cf. *Sheo Prasad v. Udai Singh*, (1880) 2 All. 718 (Art. 136 or 144 applied to a suit by vendee for possession of property against vendor, who came into possession of property after the execution of the conveyance).

10. *Anantha Bhatta v. Holeyay Deyyu*, (1896) 19 Mad. 437; cf. *Kanthappa Reddi v. Sheshappa*, (1897) 22 Bom. 893 (Tenant by sufferance, is in wrongful possession).

11. (1879) 4 Bom. 89; Relied upon in *Durganath v. Harkishore*, 1929 Cal. 218 (220)=33 C.W.N. 117.

in evidence, and oral evidence was inadmissible in place of the deed, it was held that it was open to the defendant to establish his adverse title without the aid of the deed of sale, by possession of the premises in his own right for more than twelve years prior to the institution of the suit, by vendors or the assignee of their interest. Where the defendant-vendee's title by purchase goes out of the case, and there is no allegation on the part of the plaintiff that the defendants have been in possession in virtue of some title derived from him, their possession could only be regarded as that of trespassers.¹² An unregistered agreement between the mortgagor and the mortgagee, that the mortgagee shall hold possession as owner will not confer an immediate ownership on the mortgagee, but is valid in so far as it has the effect of changing the legal character of the possession of a mortgagee into possession as owner.¹³ A usufructuary mortgagee to whom the property has been sold without a registered instrument, and who holds possession of the property for over twelve years from the date of the sale, acquires a title to the property by adverse possession, even if the sale fails.¹⁴ Possession is adverse even if it is not of trespassers. Possession, if not permissive, is adverse.¹⁵ Where one of several co-owners could not make a valid alienation of the common property, and the deed by itself was insufficient in law to create title in favour of the defendants, but the defendant having been in possession of the lands in suit for more than twelve years, it was permissible to refer to the terms of the invalid document for the purpose of determining the nature of their possession, as creating absolute rights, which may be acquired by prescription by open and adverse possession maintained by the defendants.¹⁶

(3) Where an intended conveyance -is void from the commencement, for whatever cause, but possession is taken by the transferee under the intended conveyance, such possession is adverse to the transferor and ripens into a good title after the expiry of the statutory period.¹⁷ This has been held in the House

12. *Sambhu v. Nama*, (1911) 12 I.C. 362=35 Bom. 438 (441)=13 Bom.L.R. 867; Relied in *Gayani Sahu v. Balchand Sahu*, (1923) 73 I.C. 41 (Pat.).

13. *Usman Khan v. Dasanna*, (1912) 37 Mad. 545=23 M.L.J. 360=16 I.C. 694; Followed in *Karnam Kandasami Pillay v. Chinnappa*, (1921) 62 I.C. 603=13 L.W. 423=40 M.L.J. 105=44 Mad. 253.

14. *Musigadu v. Maneam*, (1921) 63 I.C. 215=13 L.W. 400=1921 M.W.N. 251; also see *Sohanlal v. Mohanlal*, 1928 All. 726=50 All. 986 (F.B.).

15. *Durganath Bhattacharjya v. Harkishore Chakrabarty*, 1929 Cal. 218=33 C.W.N. 117.

16. *Ram Udit Upadhiya v. Bhagwat Prasad*, (1926) 95 I.C. 438=1926 Oudh 500; Followed *Varada Pillai v. Jeevarathnammal*, 53 I.C. 901=46 I.A. 285=43 Mad. 244 (P.C.); also see *Ibrahim Gulam v. Mohidin Balku*, (1921) 67 I.C. 219=24 Bom.L.R. 287.

17. *Mt. Kasturi v. Baliram*, (1924) 79 I.C. 117=1924 Nag. 222 (A case of gift not made by a registered instrument).

of Lords in *Magdalen Hospital v. Alfred Knotts*.^{17-a} In that case a lease was executed which was void under the provisions of a statute. The **Bombay High Court** followed the English decision in *Adam Umar Sale v. Bapu Bawaji*,¹⁸ where it was held that possession acquired under an alienation made in contravention of S. 3 of Bombay Act, V of 1862, can become adverse so as to bar a suit for recovery by the individual alienor or his representative-in-interest. Where the transferee enters into possession under a deed of transfer which is *ab initio* void on the ground of immoral consideration the transferor cannot recover the property if the transferee has been in possession for more than twelve years.¹⁹ Even when a registered sale-deed is found to be illegal, the purchaser gets full title to the property purchased, if he is put in possession in pursuance of the registered deed and continues to be in possession for over twelve years openly and adversely to the vendor.²⁰ Even though the title under which a person enters upon possession is void, if his possession is under a claim or colour of title, his possession will be adverse to the true owner.²¹ Thus, where a lessee has been in continued possession of property, under a void deed of perpetual lease for more than twelve years, he acquires a title to such property by adverse possession.²² Where the sale is voidable at the instance of reversioners, it is good for the lifetime of the alienating proprietor, and the possession of the vendee can become adverse only after the death of the vendor.²³

(4) Where a trespasser sells his inchoate claim to possession to a purchaser, the latter is entitled to tack the previous possession of his predecessor to his own possession for purposes of limitation and each subsequent purchaser of the claim or right to possession has a similar right to tack the previous periods of his predecessors in title.²⁴

17-a. 4 A.C. 324; 48 L. J. Ch. 579.

18. 33 Bom. 116=1 I.C. 663=10 Bom.L.R. 1128; also see *Thakore Fatesingji v. Bamanji*, 27 Bom. 515=5 Bom.L.R. 270.

19. *Sabaya Yelappa v. Yamanappa Sahu*, (1933) 35 Bom.L.R. 345=1933 Bom. 209.

20. *Mt. Jasoda Kuar v. Janak Missir*, 1925 Pat. 787=4 Pat. 394; also see *Abdul Jabbar v. Gulab Khan*, 1933 Pat. 288=14 P.L.T. 294=144 I.C. 439 (In case of an invalid mortgage, the mortgagee prescribes as such); cf. *Beni Prasad Kuari v. Dukhi Rai*, (1901) 23 All. 270=1901 A.W.N. 69 (In case of invalid sale, the prescription would be in respect of recovery of possession as owner by transferor).

21. *Bageswari Charan Singh v. Jagarnath Kuari*, (1929) 115 I.C. 699=1929 Pat. 117=8 Pat. 549.

22. *Bank of Upper India v. Mt. Harnath Kanwar*, (1926) 93 I.C. 852=1926 Oudh 410; Followed *Varada Pillai v. Jeevarathnammal*, 53 I.C. 901=46 I.A. 285=38 M.L.J. 313=43 Mad. 244 (P.C.).

23. *Salhun v. Malku*, 1931 Lah. 439=131 I.C. 105.

24. *Ma Mi v. Hadji Mahomed*, (1923) 75 I.C. 31=1 Rang. 176=1923 Rang. 261.

But, *independent* trespassers, who enter in defiance of the rights of all previous trespassers, cannot tack the period occupied by the possession of another trespasser.²⁵ Under Art. 144 time begins to run when defendant's possession becomes adverse. The defendant cannot take advantage of the possession of others before him unless they are persons through whom he derives his liability.²⁶ In *Harjivan v. Shivram*,²⁷ where the property in dispute belonged to one *D*, who sold it to *A*, but did not put the vendee in possession, and later *A* sold the property to plaintiff, *H*, it was held that the defendants had a right to tack on the period of their own adverse possession as against the plaintiff to that of *D*'s adverse possession as against *A*. The symbolical possession obtained by the plaintiff in execution of a decree did not break up the continuity of the adverse possession of the defendants and the person through whom they derived their title. The tacking of the periods of possession by two successive trespassers is permissible when one derives title from the other.²⁸ The general principle regarding the tacking of possession of separate trespassers is that it will be tacked when the second trespasser derives his possession from the first. But this cannot be done if the two trespassers are independent of each other and the second has obtained possession otherwise than through the first.²⁹ Where a mortgagee in possession professing himself to be the full owner, and not merely a mortgagee, mortgaged the property, a third party, whose heirs having brought a suit on their mortgage and obtained a decree, put up the property for sale and purchased it themselves, and subsequently they sold by private contract the property which they had so purchased, it was held in a suit for redemption by the representatives of the original mortgagors that the ultimate purchasers, the defendants, were entitled to add to the period of their possession the period of possession of the auction purchasers, their predecessors.³⁰

(5) The possession of a trespasser, although without title, confers upon him a devisable and trans-

<p>Possessory title is heritable and devisable.</p>	<p>ferable interest in the property and his heir or devisee can tack on the period of his devisor's possession to that of his own</p>
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25. *Ma Mi v. Hadji Mahomed*, (1923) 1 Rang. 176=75 I.C. 31.

26. *Mt. Jijibai v. Zabu*, 1933 Nag. 274; also see *Secretary of State v. Debendralal Khan*, 1934 P.C. 23=66 M.L.J. 134=147 I.C. 545=61 I.A. 78=61 Cal. 262 (P.C.).

27. (1894) 19 Bom. 620.

28. *Sajjad Husain v. Burban Ali Beg*, (1926) 96 I.C. 687=1926 All. 697.

29. *Mulla Ahmad v. Fazal Ahmad*, 158 I.C. 968=1935 Pesh. 133.

30. *Ram Piari v. Budh Sen*, (1920) 43 All. 164=1921 All. 389=18 A.L.J. 995; also see *Prahlad Singh v. Barumal*, 1931 All. 18=130 I.C. 697=52 All. 976=1930 A.L.J. 1420 (Possession as usufructuary mortgagee tacked to the period of possession as vendee from the mortgagor).

to resist a suit for ejectment.³¹ Until the true owner comes forward to assert a claim to property, the possessory title however imperfect it may be, is capable of descending by inheritance to heirs, who are, therefore, entitled to continue in possession.³² Possession is, under the Indian, as under the English Law, good title against all but the true owner.³³ Consequently, a person whose title to immoveable property rests upon mere possession is competent to deal with such property as if he were the true owner, and his acts will be good as against all persons other than the true owner.³⁴ These authorities rest upon the English decision in *Asher v. Whitlock*,^{34-a} which was approved of by their Lordships of the Privy Council in the case of *Sundar v. Parbati*.³⁵

2210. MORTGAGOR, AND MORTGAGEE—ADVERSE POSSESSION BETWEEN.—

The general rule.

(1) The possession of a mortgagee although derivative is strictly speaking his own possession. But as against third persons, the possession of the mortgagee, being that of a derivative holder, may be deemed to be the possession of the original owner.³⁶ So long as the relationship of mortgagor and mortgagee continues, both are in possession of their respective interests, and the possession of the mortgagee is not adverse to the owner so far as the former does not claim to hold under a different title. It has always been said that neither the mortgagor nor the mortgagee can by *any adverse act* bar the rights of the other during the currency of the relationship.³⁷ There must be conflicting claims or disputes before the possession of the mortgagee may be adverse to the owner.³⁸ The general rule has been stated as under:—

A party who has lawfully come into possession of land as mortgagee cannot by setting up, during the continuance of such relation, any title adverse to that of the mortgagor, inconsistent with the real legal relation between them—and that however noto-

31. *Ratan Kumar Mahto v. Kangal Kumar*, (1919) 49 I.C. 767 (Pat.).

32. *Bazmir Khan v. Rustam Khan*, (1920) 54 I.C. 398 (All.).

33. *Narayana Row v. Dharmachar*, (1902) 26 Mad. 514; also see *Shigopal v. Ayesha Begam*, (1906) 29 All. 52 (Possessory title is heritable and transferable, and good as against all except the true owner).

34. *Pahlwan Singh v. Ram Bharose*, (1904) 27 All. 169; Relied upon *Govind Prasad v. Mohanlal*, 24 All. 157.

34-a. (1865) L.R. 1 Q.B. 1.

35. (1889) 12 All. 51 (P.C.).

36. *Mitra's Limitation Act*, Vol. II, p. 1742.

37. *Jeechoo Sahu v. Syud Museeoollah*, (1873) 21 W.R. 13; *Ruldu Ram v. Surain Singh*, (1925) 7 L.L.J. 618 (620); also see *Zora v. Chanda*, (1922) 68 I.C. 883 (Lah.); *Zaida Singh v. Roshnai*, 10 L.L.J. 183; *Jiwan Singh v. Ghasita*, (1926) 95 I.C. 9=8 L.L.J. 277 and *Saminath Singh v. Thakur Prasad*, (1926) 100 I.C. 294 (All.) and *Bimanand v. Thuro*, (1923) 4 P.L.T. 659.

38. *Durga Prasad v. Shambhu Nath*, (1885) 8 All. 86 (91).

riously and to the knowledge of the other party—acquire, by the operation of the law of limitation, title as owner, or any other title inconsistent with that under which he was let into possession.³⁹

In the case of a mortgage, the title of the mortgagor will be extinguished only at the expiration of the period prescribed for the redemption of the mortgage.⁴⁰ A mortgagee is not in a position to deny the right of the mortgagors or their successors-in-interest to redeem the mortgage so long as the equity of redemption subsists.⁴¹ A mortgagee cannot by mere assertion of title start possession adverse to the mortgagor or his heirs.⁴² As their Lordships of the **Privy Council** stated in *Khairaj Mal v. Daim*,⁴³ where the possession had been that of mortgagees throughout, that

“as between them (the mortgagor and mortgagee) neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem”.

In cases of mortgages by conditional sale, there is no ground for presuming generally an adverse title as between the mortgagor and mortgagee from mere length of possession. There must be evidence, and something to support the inference that the once undoubted right of the mortgagee to enforce possession was at an end, or barred, or incomplete.⁴⁴

2211. (2) The mere assertion of an adverse title by a mortgagee in possession does not make his possession adverse, or enable him to abbreviate the period of 60 years which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit.⁴⁵ A mortgagor's right to redeem subsists until it has been extinguished by act of parties to the mortgage transaction, or by order of a

Allahabad.

39. *Seshamma Shettati v. Chickaya Hegade*, (1902) 25 Mad. 507 (511) = 12 M.L.J. 119.

40. *Ibid.*; Followed in *Bakha Singh v. Ram Narain Singh*, 1925 All. 133 = 47 All. 73 = 80 I.C. 935 = 22 A.L.J. 905; also see *Kunwar Sen v. Darbarilal*, (1916) 38 All. 411 = 34 I.C. 171 and *Khairaj Mal v. Daim*, (1905) 32 Cal. 296 = 32 I.A. 23 (P.C.).

41. *Bakha Singh v. Ram Narain Singh*, 1925 All. 133 (135) = 47 All. 73 = 80 I.C. 935.

42. *Jivan Singh v. Ghasita*, (1926) 95 I.C. 9 = 8 L.L.J. 277.

43. 32 Cal. 296 = 32 I.A. 23 (P.C.); Followed in *Tilak Chand v. Shambhu Singh*, (1921) 60 I.C. 404 = 7 O.L.J. 524 = 23 O.C. 269; *Mt. Durga Devi v. Girwar Singh*, (1922) 70 I.C. 958 = 1923 All. 11; *Bakha Singh v. Ram Narayan Singh*, 1925 All. 133 = 22 A.L.J. 905 = 80 I.C. 935 = 47 All. 73.

44. *Prannath Roy v. Rookeea Begam*, 7 M.I.A. 323 = 4 W.R. 37 (P.C.).

45. *Ali Muhammad v. Lalta Buksh*, (1878) 1 All. 655; Followed *Sheopal v. Khadim Hossein*, H.C.R. N.W.P., 1875, p. 280 (F.B.); also see *Pannalal v. Rameshar Sahai*, (1915) 29 All. 403; and *Durga Devi v. Girwar Singh*, (1922) 70 I.C. 958 = 1923 All. 11.

Court.⁴⁶ A person getting into possession of mortgaged land in collusion with the mortgagee and setting up adverse possession cannot make the mortgagor suffer, because no such possession, short of the statutory period of 60 years, would be a bar or defence to a suit for redemption, if the parties are otherwise entitled to redeem.⁴⁷ If a mortgagee sells the mortgaged property out and out to a third person, the possession of the vendee does not become adverse against the owner of the equity of redemption from the date of sale.⁴⁸ A mortgagee cannot by denying the existence of the mortgage curtail the period of limitation provided for a suit for redemption.⁴⁹ A mere mutation entry of the mortgagee as a proprietor cannot convert his possession as mortgagee into adverse possession.⁵⁰ Where certain persons accept the position of mortgagees, they are precluded from acquiring a title by adverse possession: and, the owner can in such a case always redeem the mortgage under Art. 148 of the Limitation Act.¹ A mortgagee in possession, who admits in documents the right of the plaintiff to redemption cannot set up adverse possession over the mortgaged property.² The right of the mortgagor is not lost by the adverse possession of a trespasser for more than 12 years during the continuance of a usufructuary mortgage. The mortgagor's right to sue for possession accrues for the first time when after redemption he is unable to take possession of the mortgaged property which he finds to be in possession of a trespasser, who denies his title to it. He becomes entitled to sue the trespasser when he redeems the property and is opposed by the trespasser.³ A usufructuary mortgagee remaining in possession *after satisfaction* of the mortgage *by redemption* is a trespasser.⁴

2212. (3) The **Bombay High Court**, in *Bhagwant Govind v. Kondi*,⁵ followed the Allahabad view that a person having entered into possession as

46. *Pannalal v. Rameshar Sahai*, (1915) 29 All. 403; see S. 2218: Exceptions: and *Pokhpal Singh v. Bishan Singh*, 20 All. 115.

47. *Mt. Durgadevi v. Girwar Singh*, (1922) 70 I.C. 958=1923 All. 11.

48. *Pannalal v. Rameshar Sahai*, (1915) 29 All. 403 (Art. 148 applied).

49. *Raghunath Singh v. Jetto Singh*, (1923) 74 I.C. 830=1923 All. 613.

50. *Ram Ganesh Rai v. Rup Narain Rai*, (1924) 80 I.C. 944=1925 All. 34.

1. *Basdeo Rai v. Jaimangal Rai*, 1931 A.L.J. 914; also see *Bakha Singh v. Ram Narain Singh*, 47 All. 73=1925 All. 133.

2. *Arjun Singh v. Maheshanand*, (1932) 138 I.C. 366=1932 All. 437=1932 A.L.J. 474.

3. *Salig Ram v. Gauri Shankar Tandan*, 159 I.C. 151=1935 A.L.J. 496=1935 A.W.R. 605=1935 All. 542.

4. *Ram Kuar v. Govind Ram*, 1926 All. 62=92 I.C. 414=48 All. 145.

5. (1889) 14 Bom. 279 (281); Followed, *Ali Muhammad v. Lalta Baksh*, 1 All. 658; Referred in *Fakirappa v. Lumanna*, (1919) 44 Bom. 742 (755); also see *Pandu Lakshman v. Annapurna*, (1896) 21 Bom. 793.

mortgagee could not afterwards set up an adverse possession as owner so as to defeat the mortgagor's right to redeem. The fact that the mortgagee prevented proceedings for sale of land for arrears of assessment did not make his possession adverse and did not affect the original relationship of mortgagee and mortgagor between the parties.⁶ In *Tarabai Ramrao v. Dattaram Govind-bhai*,⁷ it was observed that in the case of a possessory mortgage, when possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee, but not to the mortgagor.

2213. (4) A denial by the mortgagee in possession of the mortgagor's right to redeem is not sufficient to convert such possession into adverse possession.⁸ Neither the original mortgagee, nor his representatives, can rely on the twelve years' rule of limitation unless he can prove a subsequent valid sale, in the absence of which his possession must be taken to retain its original character.⁹ The original character of his possession as mortgagee is not changed by the assertion of an absolute purchase from a person who is not competent to sell.¹⁰ An agreement to surrender possession to mortgagee as full owner on expiry of a fixed term is valid, and the parties may agree that the character of possession to be held by the mortgagee should be as owner from a certain date,¹¹ of course, a mortgagee, who first obtains possession *as such* cannot without notice to the mortgagor claim to hold adversely, that is, by mere unilateral declaration of intention, he cannot convert his original possession into the adverse possession.¹² A mortgagee in possession as such cannot by merely asserting possession as owner under an invalid sale convert his possession into adverse possession so as to prescribe for a title under the Limitation Act.¹³ Notwithstanding the assertion by the mortgagee of a larger interest than was

6. *Dasharatha v. Nyahal Chand*, (1891) 16 Bom. 134.

7. (1925) 49 Bom. 539=1925 Bom. 465; cf. (1889) 14 Bom. 176: Relied on (1892) 18 Bom. 51.

8. *Thopara Mussad v. The Collector*, (1886) 10 Mad. 189.

9. *Byari v. Puttanna*, (1889) 14 Mad. 38.

10. *Byari v. Puttanna*, (1890) 14 Mad. 38 (42); *Butchiraju v. Seetharamayya*, (1925) 93 I.C. 955 (Mad.); *Govinda v. Mallayya*, (1915) 31 I.C. 678 (Mad.).

11. *Usuman Khan v. Nagalla Dasanna*, (1912) 16 I.C. 694 (Mad.).

12. *Munia Goundan v. Ramasami Chetty*, (1918) 41 Mad. 650 (658) (In this case the possession was obtained from the very beginning under an assertion of exclusive title).

13. *Ariyaputhira v. Muthukumaraswamy*, (1912) 37 Mad. 423=15 I.C. 343=12 M.L.T. 425=23 M.L.J. 339; Dissented in *Karnam Kandasami Pillay v. Chinnappa*, 62 I.C. 603=44 Mad. 253=40 M.L.J. 105.

validly passed to him by the mortgage, Art. 148 of the Limitation Act will apply to a suit for redemption by the mortgagor.¹⁴

2214. Where a collateral of the original owner who had got his name entered in the revenue records as owner, on the death of the surviving widow, brought a suit for redemption alleging that he had acquired the equity of redemption by adverse possession, it was held that the plaintiff could not and did not acquire ownership of the equity of redemption by merely having his name entered in the revenue register.¹⁵ This was referred and followed in *Ghulam Haider Shah v. Bazid Shah*,¹⁶ where it was held that no unilateral act by either party to a mortgage can prejudice the title of the other. A mortgagee who comes into possession as a mortgagee, cannot force the mortgagor to come into Court and to sue for redemption merely by asserting a proprietary title.¹⁷ A sale of equity of redemption to mortgagee, after sale to stranger is a mere nullity, and cannot operate to confer any title on the mortgagee.¹⁸ Accordingly, the defendant's possession as co-mortgagee could not, as the result of the alleged sale of the equity of redemption in his favour, become adverse to the plaintiffs.¹⁹ Where a mortgagee has once got possession of the mortgaged property as mortgagee, he cannot alter the nature of his possession, by a mere assertion or by a wrongful decree or by getting himself recorded in the register of mutations, nor can the original character of the possession as mortgagee be changed by the assertion of an absolute purchase of the property unless the alleged purchase is valid and binding.²⁰ A mortgagee in possession as such cannot by merely asserting possession as owner under an invalid sale convert his possession into adverse possession so as to prescribe for a title under the Limitation Act.²¹ Where a mortgagee is let into possession, his position is to some

14. *Rajai Tirumal Raju v. Pandla Muthial Naidu*, (1910) 35 Mad. 114.

15. *Shah Newaz v. Shah Ahmed*, (1920) 1 Lah. 549=59 I.C. 478=2 L. L.J. 583; Relied on *Kunwar Sen v. Darbarilal*, (1916) 34 I.C. 171 (All.) (Adverse possession of the right to redeem not possible where the right to possession and actual possession is with the mortgagee).

16. 72 I.C. 989 (Pesh.).

17. *Ibid.*; also see *Zora v. Chandu*, (1922) 68 I.C. 883 (884).

18. *Shujauddin Khan v. Sher Muhd. Khan*, (1923) 73 I.C. 475=1923 Lah. 365; Relied on *Mohanlal v. Bhagu Shah*, 14 I.C. 513=252 P.W.R. 1912.

19. *Ibid.*; also see *Amir v. Nadir Ali*, (1922) 68 I.C. 733=1923 Lah. 74 (1) (The original character of the possession is not changed by assertion of an absolute purchase from a person who is not competent to sell).

20. *Jiwakhan v. Lakhmi Chand*, (1911) 11 I.C. 429=146 P.W.R. 1911=232 P.L.R. 1911.

21. *Shujauddin v. Sher Muhd. Khan*, (1923) 73 I.C. 475=1923 Lah. 365; Followed 37 Mad. 423=15 I.C. 343=23 M.L.J. 339.

extent of a trustee, and he is bound to protect the interests of the mortgagor and to prevent any invasion of his rights by a stranger. If the mortgagee by neglect or collusion allows any person to come into possession of the property, for instance, a purchaser of equity of redemption under an invalid sale, there will be no invasion of the rights of the mortgagor, and when the time for redemption comes, he will be entitled to treat the stranger as a trespasser, and the stranger's right by adverse possession against the mortgagor will not commence unless and until the mortgagor had sought to exercise the right of redemption, and redeemed the property.²² In *Azim v. Mahmud*,^{22-a} where the property mortgaged was redeemed by a third party, more than twelve years before the suit for possession was brought by the plaintiff, who represented the mortgagor, it was held by the majority that the defendant who redeemed the mortgage knew that the land was mortgaged, and having obtained possession by redeeming the mortgage he was in the position of the assignee of the mortgagee, and it was immaterial whether or not the defendant at the time of redeeming the mortgage claimed to be himself the owner of the property. A mortgagee cannot by mere assertion of title start possession adverse to the mortgagor, or to the mortgagor's heirs.²³

2215. The rule was stated by the **Oudh Judicial Commissioner's Court** in *Mohendra Bahadur Singh v. Chandrapal Singh*,²⁴

"that the possession of a derivative holder, such as a mortgagee, cannot be adverse to the owner of the property in so far as the mortgagee does not claim to hold under a different title. Where the occupation is in its origin permissive, its conversion into an occupation of a wholly adverse nature is not to be presumed in the absence of affirmative evidence to establish the change, and mere denial of the title of the mortgagor is not enough. The law is that no act of a mortgagee can by itself change the character of the possession which was originally acquired".

As between a mortgagor and his mortgagee, neither can deny the title of the other for the purposes of the mortgage. A mortgagor cannot derogate from his grant so as to defeat the mortgagee's title, nor can the mortgagee deny the title of the mortgagor to mortgage the property.²⁵ Thus, as between mortgagor and mortgagee or their representatives neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, can constitute adverse possession or will

22. *Zinda v. Mt. Roshnai*, 1928 Lah. 250=10 L.L.J. 183=113 I.C. 53; Followed *Bimanand Sawase v. Thuroo Mahto*, 1923 Pat. 592.

22-a. 124 P.R. 1883.

23. *Jivan Singh v. Ghasita*, (1926) 95 I.C. 9=8 L.L.J. 277=1926 Lah. 549=27 P.L.R. 402.

24. (1921) 63 I.C. 284=24 O.C. 155.

25. *Nirankar Prasad v. Mt. Bechai*, (1926) 95 I.C. 849=1926 Oudh 517.

be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem.²⁶

2216. The **Patna High Court** holds the view that the position of a mortgagee is to some extent that of a trustee, and he is bound to protect the interests of the mortgagor, and to prevent any invasion of his rights by a stranger.²⁷ This view has been followed by the Lahore High Court in *Zinda v. Mt. Roshnai*, noticed in S. 2214, above.

2217. In *Maung Shwe Paung v. Maung Ai*,²⁸ the **Lower Burma Chief Court** held that the mere assertion of title by mortgagees in possession cannot render their possession adverse or abbreviate the period of law allowed to the mortgagor. The mere fact of defendant's names appearing in the revenue registers as owners could not be held to deprive the mortgagor of his equity of redemption or to shorten the period allowed to him to sue. Neither the laches of the mortgagor nor an assertion of title by the mortgagee affect the period of redemption.²⁹

2218. Where, the act upon which the mortgagee relies as establishing the charge in the character of his possession is not his own act, but an act to which both the mortgagor and the mortgagee are parties, the possession of the mortgagee is to be taken as adverse to the mortgagor, inasmuch as the possession of a grantee under a void grant is adverse to the grantor.³⁰ A mortgagee of a *raiyati* holding for an indeterminate period not less than five years or till repayment thereafter offends against S. 10 (3) (1), Chota-Nagpur Landlord and Tenant Procedure Act, and as such is invalid and the mortgagee can prescribe forthwith. But the question whether he has prescribed from the date of mortgage or not depends upon whether the possession which he asserts is merely possession as mortgagee or possession under some title such as raiyati. Where he prescribes *qua* mortgagee the right which accrues to him after the

26. *Nirankar Prasad v. Mt. Bechai*, (1926) 95 I.C. 849=1926 Oudh 517; Relied on *Khiaraj Mal v. Daim*, 32 Cal. 296=32 I.A. 23 (P.C.); also see *Tilak Chand v. Shambhu Singh*, (1921) 60 I.C. 404 (Oudh) and *Bajrang Bali v. Mt. Mahrajia*, (1926) 92 I.C. 832 (Oudh); *Achche Mirza v. Ahmad Shah*, (1926) 97 I.C. 922=1926 Oudh 594=3 O.W.N. 693.

27. *Binand Sawase v. Thuroo Mahto*, 1923 Pat. 592=4 P.L.T. 659=76 I.C. 277; also see *Dinanath v. Ramarai*, 6 Pat. 102=97 I.C. 348=1926 Pat. 512.

28. (1911) 11 I.C. 853=4 Bur.L.T. 185; Relied on 1 All. 655 and 14 Bom. 279.

29. *Ibid.*; Relied on *Tanji v. Nagamma*, 3 M.H.C.R. 137.

30. *Mahendra Bahadur Singh v. Chandrapal Singh*, (1921) 63 I.C. 284=24 O.C. 155.

statutory period is to hold until redeemed. But if he prescribes under some title other than mortgagee, he acquires title by adverse possession.³¹ A mortgagee cannot change his character as such by taking a settlement from the landlord in his own name.³² In the case of an invalid mortgage the mortgagee prescribes as such and the result is in the ordinary circumstances that after the period of limitation was expired he is entitled to retain possession until his mortgage is redeemed.³³

Co-mortgagor re-deeming whole mortgage.

2219. There is a conflict of opinion on the question of the position of a co-mortgagor who redeems the whole of the mortgaged property.

(1) A Full Bench of the Allahabad High Court held in *Ashfaq Ahmad v. Wazir Ali*,³⁴ that where one of several co-mortgagors redeems the whole mortgage he thereby puts himself into the position of the mortgagee as regards that portion of the mortgaged property which represents the interests of the other co-mortgagors, and the period of limitation applicable to a suit for redemption brought by the other co-mortgagors is that provided for by Art. 148 of the Limitation Act. This was distinguished in *Jai Kishan Joshi v. Budhanand*,³⁵ where the father of a family mortgaged some of the family property in 1860, and in 1877, after the death of the father, one of the sons again mortgaged the property and with the money borrowed on the second mortgage paid off the first mortgage. The second mortgagee or his son remained in possession of the property as mortgagee until 1898, when the second mortgagor sold it to the son of the second mortgagee. When, in 1912, the grandson of the original mortgagor sued for redemption of the mortgage of 1860, it was held that the suit was barred under Art. 144 of the Limitation Act, whatever might have been the position of the members of the family, as regards jointness or separation. But the rule of limitation governing a suit for redemption against the redeeming co-mortgagor as laid down in *Ashfaq Ahmad v. Wazir Ali*,³⁶ was followed in the case of *Khiali Ram v. Taik Ram*³⁷ and

31. *Abdul Jabbar Khan v. Gulab Khan*, 1933 Pat. 288=14 P.L.T. 294=144 I.C. 439.

32. *Tali Mahta v. Lakhraj Mohton*, 1928 Pat. 17=104 I.C. 644; Relied on *Beni Prasad Kuari v. Dukhi Rai*, (1901) 23 All. 270=1901 A.W.N. 69; cf. *Rai Rani v. Gulab*, 1928 All. 552=117 I.C. 831.

33. *Abdul Jabbar Khan v. Gulab Khan*, (1933) 144 I.C. 439=14 P.L.T. 294=1933 Pat. 288.

34. (1889) 14 All. 1 (F.B.); also see *Said-ud-din v. Ratanlal*, (1909) 32 All. 160 (Art. 148).

35. (1915) 38 All. 138.

36. (1889) 14 All. 1 (F.B.).

37. (1916) 38 All. 540.

in *Wazir Ali v. Ali Islam*.³⁸ The same view is taken in *Shiam Lal v. Mt. Hukum Kuar*,³⁹ that a suit for redemption by co-mortgagors against the co-mortgagor paying the amount decreed for redemption of a usufructuary mortgage, lies within sixty years under Art. 148 of the Limitation Act. If the mortgage is a usufructuary one, and the amount is satisfied out of the usufruct, the co-mortgagors are each entitled to recover their individual shares. If, however, one co-mortgagor takes possession of the entire property, he is then deemed to hold the shares of the other co-mortgagors adversely to them.⁴⁰

(2) The opposite view has been taken by the **Bombay High Court** in *Vasudev Bhikaji v. Balaji Krishna*,⁴¹ where it was pointed out that Art. 148 applies against a mortgagee: and a co-mortgagor who has redeemed the whole mortgage is not a mortgagee. His transaction does not amount to a mortgage. He has merely a charge on the property. This view has been followed in *Vithal Moreshwar Desai v. Dinkarrao Ramchandra Rao*,⁴² and in *Bhaiji Shamrao v. Hajimiya Mahammad*.⁴³ The recent Bombay decision in *Ramchandra v. Ganesh Balwant*,⁴⁴ dissents from the Allahabad Full Bench view. If a usufructuary mortgage is redeemed by one co-mortgagor by paying the money out of his own pocket, and is not redeemed out of the usufruct, the redeeming co-mortgagor can retain possession of the property as a lien or until he is paid the shares of the money payable by the other co-sharers; and such possession is not adverse to them.⁴⁵

(3) The Bombay view has been followed in **Calcutta High Court**, as the Transfer of Property Act draws a clear distinction between a charge and a mortgage⁴⁶; and the Bombay view is more consistent with the language of Art. 148 of the Limitation Act. Section 95, Transfer of Property Act, has by Act XX of 1929 been amended in such a way that Ss. 92 and 95, as they now stand make it clear that the right of the co-mortgagor redeeming is the "same right as the mort-

38. (1918) 40 All. 683.

39. (1928) 113 I.C. 832=1929 All. 100.

40. *Gobardhan v. Sujan*, 16 All. 254 (256); *Inayet Hussein v. Ali Husein*, 20 All. 182 (184).

41. (1902) 26 Bom. 500.

42. (1901) 3 Bom.L.R. 685.

43. (1911) 14 Bom.L.R. 314.

44. 1933 Bom. 14=57 Bom. 134=144 I.C. 8=35 B.L.R. 48; Follows (1902) 26 Bom. 500=4 Bom.L.R. 178.

45. *Ramchandra v. Sadashiv*, 11 Bom. 422 (424).

46. *Purna Chandra Pal v. Barada Prosanna Bhattacharjya*, (1918) 46 Cal. 111=45 I.C. 783.

gagee whose mortgage he redeems may have against the mortgagor". In effect therefore the decision in *Srimati Raj Kumari Debi v. Mukundalal Bandopadhyaya*,⁴⁷ where it was held that a co-mortgagor seeking contribution must bring his suit within the period within which the mortgagee could have brought a suit to enforce the mortgage, is now statute law. But, a Full Bench in the case of *Umar Ali v. Asmat Ali*,⁴⁸ has held that cases prior to the amendment of 1929 must be decided on the basis of the Act as it then stood.

(4) According to the **Lahore High Court**, Art. 148 of the Limitation Act refers only to a suit against a mortgagee, and has no application to a suit against a charge-holder. A co-mortgagor redeeming the whole mortgage does not become a mortgagee of the portion redeemed belonging to other co-owners but becomes merely a charge-holder. Thus, a suit by one of the co-owners to recover his share of the property on payment of his share of the charge is governed by Art. 144, and not by Art. 148, Limitation Act⁴⁹; and, where the defendant redeeming co-mortgagor has denied the right of the other co-mortgagors to enter into joint possession until they have paid their share of the charge which the defendant has defrayed, the position of the latter is adverse, and if it has continued for 12 years the suit is barred by limitation.⁵⁰ In *Basanta v. Dhawana Singh*,¹ the same view was taken. A recent Lahore decision is to the effect that the position of a redeeming co-mortgagor is that of a charge-holder, and not that of a mortgagee; and the possession of the redeeming mortgagor becomes adverse to the other co-mortgagors under Art. 144, Limitation Act not from the date of redemption, but only when there is an open assertion of an exclusive title by him.²

(5) In *Munia Goundan v. Ramasami Chetty*,³ where on a sale of equity of redemption by one of two mortgagors, the vendee was in possession of property for more than 12 years after redemption, and the plaintiff, purchaser of the interest of the other co-mortgagor brought a suit to redeem his half-share, it was held that Art. 148 was not

47. 1921 Cal. 166.

48. 1931 Cal. 251=53 C.L.J. 154=35 C.W.N. 409=130 I.C. 889=58 Cal. 1167 (F.B.).

49. *Wazir v. Girdhari*, (1923) 71 I.C. 847=1923 Lah. 311; also see *Ganda Ram v. Munshi Ram*, (1931) 32 P.L.R. 469 (Art. 144 applies and the starting point is the date of redemption).

50. *Narain Das v. Saraj Din*, (1926) 92 I.C. 980=1926 Lah. 238; Relied on 26 Bom. 500=4 Bom.L.R. 178.

1. 55 I.C. 450.

2. *Jhandu v. Nur Mahomed*, (1931) 12 Lah. 671=135 I.C. 506=39 P.L.R. 622=1931 Lah. 744.

3. (1918) 41 Mad. 650=34 M.L.J. 528=45 I.C. 867.

applicable to the case, and the suit was barred under Arts. 126 and 144 of the Limitation Act. Similarly, it has been held in *Sinnanan Chetty v. Sivakami Ammal*,⁴ that Art. 148 does not apply to a suit to recover property on payment of a charge created by Transfer of Property Act, S. 95. It was held that Art. 144, Limitation Act applies to such suits, and not Art. 148.⁵ This view follows the Calcutta, Bombay, and Madras Courts.

(6) The Nagpur Court, follows the Allahabad Full Bench view, in holding that where one of the co-mortgagors pays off the mortgage debt in full a suit by another co-mortgagor for redemption of his share is governed by Art. 148, and not by Art. 144; and that limitation begins to run from the date when the co-mortgagor redeems the mortgage.⁶

(7) The Oudh Chief Court, does not follow the Allahabad view, but the view taken by other High Courts, where it has been held that Art. 148 refers only to a suit against a mortgagee and has no application to a suit against a charge-holder.⁷

(8) In *Ram Narain Rai v. Ram Devi Rai*,⁸ the same view has prevailed as in the High Courts of Bombay, Calcutta, Lahore and Madras.

2220. ILLUSTRATIONS.

(1) In *Ali Muhammad v. Lalta Baksh*,⁹ the mere exhibition of mortgagees, of their names as vendees of the property in the proprietary registers of the Revenue Department was held not to create a proprietary title in them. Such a title must be proved to have a legal origin.

(2) In *Dasharatha v. Nyahal Chand*,¹⁰ where the mortgagee had obtained a decree for sale which he had not executed, but he paid the

4. 1921 Mad. 326 (1).

5. 1921 Mad. 326 (1); Follows (1902) 26 Bom. 500=4 Bom.L.R. 178; (1918) 41 Mad. 650=45 I.C. 867=34 M.L.J. 528 and (1918) 46 Cal. 111=45 I.C. 783=22 C.W.N. 637.

6. *Jairam v. Bhilaji*, 1930 Nag. 300=13 N.L.J. 166; Followed *Suryabhan v. Renuka*, 1926 Nag. 84=92 I.C. 118; Dissented 26 Bom. 500 and 46 Cal. 511.

7. *Shah Wajihuddin Ashraf v. Shah Ahmad Ashraf*, (1927) 104 I.C. 400=1927 Oudh 347=2 Luck. 618=4 O.W.N. 713; Relied on *Makhdam v. Jodi*, 9 O.C. 91; and *Sheo Ganga v. Ranjit*, 52 I.C. 875 (Oudh); Followed *Vithal v. Dinkar Rao*, 3 Bom.L.R. 685; *Vasudeo v. Balaji*, 26 Bom. 500=4 Bom.L.R. 178; *Purnachandra v. Barada*, 45 I.C. 783=46 Cal. 111 (116); *Murjalli v. Ramasami*, 45 I.C. 867=41 Mad. 650; *Ram Narain v. Ram Devi*, 63 I.C. 282=1923 Pat. 98=6 P.L.J. 680 and *Basanta v. Dhauna Singh*, 55 I.C. 450; also see *Ramagre v. Ramudat*, 132 I.C. 261=8 O.W.N. 637.

8. 63 I.C. 282=1923 Pat. 98=6 P.L.J. 680.

9. (1878) 1 All. 655 (658).

10. (1891) 16 Bom. 134.

arrears of assessment when the mamlatdar was about to sell the land, and retained possession by continuing to pay the assessment, it was held that these payments did not make the possession of the mortgagee adverse and did not affect the original relationship of mortgagee and mortgagor between himself and the plaintiff.

(3) Where *A* demised certain lands on kanom to *B*, and the Government declared these lands to have escheated in certain proceedings against *B*, without any notice to *A*; and the lands were sold to *C*; it was held that *C* was at the time of the escheat in the position of a manager for the mortgagees, and *A*'s right of redemption was not affected.¹¹

(4) Where the plaintiff sued for redemption of a mortgage and for accounts from the defendants as mortgagees in possession, and the defendant set up an oral sale by the mortgagor in discharge of the mortgage-debt, and adverse possession for more than the statutory period, it was held that the defendant's possession had been all along adverse as against the mortgagor and that they had acquired a title by prescription.¹²

(5) In *Indar Singh v. Asa Singh*,¹³ it was held in general terms that a mortgagee by conditional sale cannot by obtaining a decree in illegal foreclosure proceedings or by asserting himself to be the proprietor and thereby obtaining mutation in his favour as such alter the character of his original title, nor can he rely upon a possession adverse to the mortgagor to deprive him of his right to redeem the property. But, see *Bashir Husain v. Chandrapal Singh*, where the possession for more than twelve years of the mortgagee obtained *aliunde* in recognition of his proprietary right after the termination of the foreclosure proceedings operated as a bar or defence to a suit for redemption, more so as by virtue of the mortgage, the mortgagee was not entitled to possession of the mortgaged property.¹⁴

(6) Where a usufructuary mortgage contained a provision that the mortgage debt should be satisfied, both principal and interest, by so many years' usufruct of the mortgaged property, and that the mortgagee should deliver up possession without payment on the expiry of the period thus specified, it was held that when under these circumstances the mortgagee held over after the time limited in the mortgage-deed had expired, his possession did not by that fact alone become adverse to the mortgagor.¹⁵ But, the case is different where the decree of Court pronouncing a mortgage debt to be satisfied is passed, which is equivalent to declaration that the relations of mortgagee and mortgagor have come to an end, and renders subsequent possession of the mortgagee adverse to the mortgagor.¹⁶

(7) Where rents and profits are reserved by the mortgage, and payable to the mortgagor, a mere non-payment of rents or profits or forbearance to realise for any length of time would not constitute any adverse possession.¹⁷

11. *Thopara Mussao v. The Collector*, (1886) 10 Mad. 189.

12. *Thotakura Govinda v. Pepakarala Mallayya*, (1915) 31 I.C. 678 (Mad.).

13. 65 P.R. 1908=113 P.W.R. 1908=90 P.L.R. 1908; cf. *Mg. San Chein v. Ma Daung U*, 82 I.C. 829=3 Bur. L. J. 95=1924 Rang. 290 (Where the mortgagee took possession as owner under the forfeiture clause).

14. (1922) 60 I.C. 223 (Oudh).

15. *Pokhpal Singh v. Bishan Singh*, 20 All. 115=A.W.N. (1897) 214 (Art. 148, applied).

16. *Omayurupagam Mutt v. Siva Sooria Thevan*, 1922 Mad. 407 (2); Relied on *Mt. Zaibunnissa v. Parikkat*, (1915) 25 I.C. 611 and *Sita Ram v. Madholal*, (1901) 24 All. 44 (F.B.).

17. *Bimanand v. Thuroo*, (1923) 4 P.L.T. 659=1923 Pat. 592.

If annual payments reserved under the mortgage and payable to the mortgagor are not made every year, that does not exempt the mortgagee from liability to pay the amount at the time of the redemption.¹⁸

2221. EXCEPTIONS, TO GENERAL RULE.—(1) As a general rule, the possession of a mortgagee is not adverse to that of the mortgagor, over the lands mortgaged, however, there may be cases where a mortgagee can by a clear and unequivocal overt act bring the Statute of Limitations into operation.¹⁹ Again, where

(i) **Rival mortgagors.** there are rival mortgagors, the possession of their respective mortgagees cannot but be mutually adverse.²⁰ Where a mortgagee encroaches upon his mortgagor's land not mortgaged to him, **Encroachment on land not mortgaged.** he holds it adversely to the mortgagor from the date of encroachment, although in the settlement papers the encroached area is also shown as mortgaged property.²¹

(2) Where in foreclosure proceedings, under the Bengal Regulation XVII of 1806, the mortgagor deposited within the year of grace in the Court the full amount necessary to redeem the mortgage, but the mortgagee refusing to accept the money so deposited brought a regular suit for foreclosure and despite its dismissal continued in possession, his possession was not that of mortgagee and became adverse as against the mortgagor within the meaning of Art. 144 of the Limitation Act.²² Where a mortgagee in spite of the foreclosure proceedings under Reg. XVII of 1806 being defective, enters into possession, he holds as trespasser, and if he so holds for 12 years, the mortgagor's right of redemption is barred.²³ A mortgagee's possession under the foreclosure clause, is as owner and adverse to the mortgagor, and if it exceeds 12 years, it bars a suit for redemption.²⁴ A mortgagee can set up adverse possession against the mortgagor if his possession at its inception was that

18. *Parasurama v. Venkatachallam*, (1913) 25 M.L.J. 561=21 I.C. 701.

19. *Jiwan Singh v. Ghasita*, (1926) 95 I.C. 9=8 L.L.J. 277; Relied on *Ram Singh v. Basti*, 48 I.C. 447=89 P.W.R. 1918.

20. *Ram Chhor Baksh v. Ram Surat*, (1924) 80 I.C. 582= 1925 Oudh 182.

21. *Mula Singh v. Budh Singh*, (1914) 25 I.C. 616 (Punj.).

22. *Mt. Zaibunissa v. Parichhat*, (1914) 25 I.C. 611 (All.); also see and cf. *Bashir Hussain v. Chandrapal Singh*, (1922) 68 I.C. 223 (Oudh) (Voluntary surrender by mortgagor of equity of redemption, after termination of defective foreclosure proceedings).

23. *Luchi v. Jugarnath*, 1928 All. 197 (198)=26 A.L.J. 149.

24. *Mg. San Chein v. Ma Daung U*, (1924) 82 I.C. 829=3 Bur.L.J. 116=1924 Rang 329.

of a trespasser, and not as a mortgagee.²⁵ For example, where the mortgagee was not entitled to possession under the deed as mortgagee, and he actually took possession claiming to be owner, his possession was not that of a mortgagee but of a trespasser, on the basis of which adverse possession he can obtain an indefeasible title after 12 years.²⁶ Where a mortgage confers no right to possession on the mortgagee, and the latter obtains possession of the mortgaged property in assertion of a proprietary title, his possession will be adverse to the mortgagor.²⁷ In the case of a simple mortgage when the mortgagor is not entitled to possession, 12 years' adverse possession against the mortgagor must be held to extinguish the security as regards the property held adversely to the mortgagor.²⁸

(3) A person in possession of a property as usufructuary mortgagee under a void mortgage, for more than 12 years, acquires by prescription, the rights of a mortgagee, and is as such accountable to the mortgagor for the rents and profits not only of the last 3 years preceding the suit for redemption but for the whole period of his possession.²⁹ The question also is discussed fully in *Musigadu v. Maniam Gopalu Reddy*,³⁰ where it was held that a usufructuary mortgagee to whom the property had been sold without a registered instrument and who held possession of the property for over 12 years from the date of sale acquired a title to the property by adverse possession even if the sale failed. Similarly, a mortgage of an occupancy holding is not permitted by law; but where a mortgagee of an occupancy holding enters into possession of the holding and remains in continued possession thereof for more than 12 years, he prescribes for a title as mortgagee, and the mortgagor can recover possession only by re-

25. *Jowahar v. Amarchand*, (1926) 93 I.C. 934=8 L.L.J. 152 and *Qadar Baksh v. Manghamal*, (1923) 4 Lah. 249=73 I.C. 889=5 L.L.J. 175 and 555=1923 Lah. 495; also see *Sheonath v. Tulsipatram*, (1925) 87 I.C. 188=1925 Oudh 385=12 O.L.J. 139 and *Mohendra v. Chandrapal*, 24 O.C. 155=63 I.C. 284 (285).

26. *Jiwa Khan v. Lakhmi Chand*, 11 I.C. 429=232 P.L.R. 1911=146 P.W.R. 1911.

27. *Munna Lal v. Hamid Ali*, (1925) 79 I.C. 39=1925 Lah. 53.

28. *Pratap Bahadur Singh v. Maheshwar Baksh Singh*, (1909) 12 O.C. 45=2 I.C. 57; Relied on *Karan Singh v. Bakar Ali Khan*, 5 All. 1=9 I.A. 99 (P.C.).

29. *Sontayana Gopala Dasu v. Inapatalupula Rami*, (1921) 44 Mad. 946=64 I.C. 328=41 M.L.J. 194; Relied on *Sundara Gurukkal v. Subramania*, (1912) 16 I.C. 960; also see and cf. *Aiyisa Bevi Ammal v. Kalandarsa Rowther*, (1924) 80 I.C. 561=1924 Mad. 720=46 M.L.J. 501.

30. 63 I.C. 215=13 L.W. 400=1921 M.W.N. 251.

demption.³¹ Likewise, where the mortgagee began to prescribe by adverse possession for the legal status of mortgagee, followed by the mortgagor choosing to sell the property to him on behalf of the plaintiffs, it was held that the sale no doubt was equally void as the mortgage was, but it had the legal effect of altering the nature of the possession which the defendant had in the property, and the prescription of mortgagee's title, followed by prescription for full ownership was known to the party who had deliberately converted the mortgage into a sale.³²

(4) An agreement between mortgagor and mortgagee that from a certain date or on the expiry of the term fixed for payment, the mortgagee could take possession of the mortgaged property and enjoy it as full owner, is valid and binding on the mortgagor; and the mortgagee, who takes possession by virtue of such agreement and who remains in possession for over 12 years, acquires a title to the property by prescription.³³ Thus, it is open to parties to convert possession as mortgagee into possession as owner by mutual agreement or arrangement³⁴; where the parties to a mortgage by condition sale entered into an agreement whereby the mortgagor gave up all his equity of redemption in the property mortgaged, it was held that the unregistered agreement evidenced adverse possession of the mortgagee by consent of parties to the complete transfer of the equity of redemption acted on for over 12 years.³⁵ The principle of law that a mortgagee who enters into possession in his capacity as such cannot change the nature of his possession into an absolute owner by a one sided act,³⁶ can have no application where by a subsequent act of the parties, the mortgage is to be treated as having come to an end, and that from a certain time, the possession of the mortgagee is to be considered as that of the *owner* thereof.³⁷ As their Lordships of the

31. *Maha Mangal Rai v. Kishun Kandou*, (1927) 100 I.C. 346=1927 All. 311.

32. *Aiyasa Bevi Ammal v. Kalandarsa Rowther*, (1924) 80 I.C. 561=1924 Mad. 720=46 M.L.J. 501; Affirmed on appeal 86 I.C. 433; cf. *Ahmad v. Babu Deviji*, 53 Bom. 676.

33. *Usuman Khan v. Nagalla Dasanna*, (1912) 16 I.C. 694=23 M.L.J. 360=37 Mad. 545 (547).

34. *Mudigadu v. Maneam Gopalu Reddy*, 68 I.C. 215=13 L.W. 400=1921 M.W.N. 251 and *Karnam Kandasami Pillai v. Chinappa*, 62 I.C. 603=13 L.W. 423; 40 M.L.J. 105=1921 M.W.N. 1=44 Mad. 253.

35. *Khedu Rai v. Sheo Parson*, 39 All. 423 (426)=17 A.L.J. 366; also *Kandasami Mudaliar v. Ponnuswami*, 109 I.C. 795=1929 Mad. 16.

36. *Gandharp Singh v. Hari Krishna*, (1911) 10 I.C. 999 (All.); *Bijai Partap Singh v. Raghuraj Singh*, (1922) 67 I.C. 572 (Oudh); *Mahendra Bahadur Singh v. Chandrapal Singh*, (1920) 63 I.C. 284 (Oudh); also see *Sulleman v. Esso*, (1925) 91 I.C. 87 (Sindh).

37. *Fakirappa v. Lumanna*, (1919) 44 Bom. 742 (755), *supra*; also see

Privy Council observed in *Shankar Din v. Gopal Prasad*,³⁸ there is nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right to redeem. In the language of **Judicial Commissioner's Court, at Oudh,**

"though the general principle of law is that no act of the mortgagee can by itself change the character of the possession which was originally acquired, yet, where both the parties have treated a mortgage as terminated, the case stands on a different footing".³⁹

(5) An unregistered deed, passing the right of redemption, although inoperative to transfer the equity of redemption, may yet operate to alter the character of the mortgagee's possession and make it adverse to the mortgagor.⁴⁰ Where after the mortgagor's death, his widow as natural guardian of the minor son, sold the equity of redemption to the mortgagee, without necessity, but the sale was not set aside by the minor within 3 years of his attaining majority, the possession of the mortgagee was held adverse.⁴¹ If a mortgagee takes possession as mortgagee, and thereafter the equity of redemption is sold to him by the mortgagor himself, even if the sale is invalid, the mortgagee may be held entitled to possession on the strength of his title as purchaser, adversely from the date of sale.⁴² The mortgagee may set up and

Oral sale. establish an oral sale by the mortgagor in discharge of the mortgage-debt, and adverse possession for more than the statutory period.⁴³ A mortgagee remaining in possession of the mortgaged property for more than 12 years in full ownership in satisfaction of the mortgage-debt, under an *oral sale* from the mortgagor acquires an absolute title to the property, and the mortgagor's right to redeem is extinguished.⁴⁴ Where a usufructuary mortgagee purchases the property in lieu of the debt, actual delivery is not necessary; and even if it is necessary, the vendee's possession from the moment of sale is adverse to the vendor.⁴⁵ The principle that possession can be adverse only to

Kandaswami Mudaliar v. Ponnuswami, (1928) 109 I.C. 795=1929 Mad. 16 and cf. *Pandiyan Pillai v. Vellayappa Rowther*, (1917) 42 I.C. 438=33 M.L.J. 316=6 L.W. 588 (Clog on equity of redemption).

38. (1912) 34 All. 620=25 M.L.J. 621 (P.C.).

39. *Bijai Partab Singh v. Raghuraj Singh*, (1922) 67 I.C. 572 (Oudh).

40. *Mahendra Bahadur Singh v. Chandrapal Singh*, (1921) 63 I.C. 284 (Oudh) and *Usman Khan v. Dasanna*, (1912) 37 Mad. 545.

41. *Fakirappa v. Lumanna*, (1919) 42 Bom. 742 (755).

42. *Ahmed v. Babu Devji*, 53 Bom. 676=1930 Bom. 135=122 I.C. 113.

43. *Thatakuro Govindu v. Pepakayala Mallayya*, (1915) 31 I.C. 678 (Mad.).

44. *Kandasami v. Chinnappa*, 44 Mad. 253 (257).

45. *Sheik Dawood Saheb v. Moideen Batcha Saheb*, 1925 Mad. 566=48 M.L.J. 264=87 I.C. 331.

the person competent to sue,⁴⁶ does not apply where the change in the character of possession was by mutual consent.⁴⁷ It is true that a mortgagee cannot make his possession adverse by a mere assertion of title, but where the mortgaged property is sold to him he can do so even though the sale is void, as such sale can be taken into consideration for determining the nature of the possession held by the mortgagee.⁴⁸ However, the original character of a mortgagee's possession is not changed by the assertion of an absolute purchase from a person who is not competent to sell.⁴⁹ An agreement to relinquish the equity of redemption would not be binding if not properly evidenced by a document, but on the authorities, it will start adverse possession against the mortgagor from the date of such agreement.⁵⁰ So also, where a mortgagor surrendered his equity of redemption to the mortgagee, but there was no registered deed, the possession of the mortgagee thereafter for more than 12 years perfected his title to the property.¹ An unregistered sale-deed which is invalid to transfer title to property may be admissible in evidence to prove the nature of possession held by the purchaser.² Where acts of parties amounting to a release of the right of redemption are evidenced by documents which are inadmissible for want of registration and in cases where the subsequent transaction between the mortgagor and the mortgagee is not evidenced by any writing at all but is simply oral, the mortgagor's equity of redemption would not be put an end to at once, but the subsequent possession on the part of the mortgagee would not be that of a mortgagee but that of an absolute owner, and as against the parties entering into such transaction the mortgagee would acquire an absolute title to the property after the expiry of 12 years from the date of such transaction.³

46. *Palaniyandi v. Vadamalai*, (1915) 2 L.W. 723=28 I.C. 956; *Manickam v. Thanikachalam*, (1916) 4 L.W. 369=34 I.C. 945 and *Nataraja v. Govinda Rao*, 1923 Mad. 461=46 Mad. 579=44 M.L.J. 318.

47. *Usman Khan v. Dasanna*, (1912) 37 Mad. 545=23 M.L.J. 360=16 I.C. 694; also see *Munnigaddu v. Maniam Gopala Reddy*, (1920) 13 L.W. 400=63 I.C. 215 and *Kandasami Pillai v. Chinnappa*, (1920) 44 Mad. 253=40 M.L.J. 105=62 I.C. 603=1921 Mad. 82.

48. *Premdas v. Sarbaland*, 1930 Lah. 71=120 I.C. 481; Relied on *Varada Pillai v. Jeevaratnammal*, 1919 P.C. 44=43 Mad. 244 (P.C.).

49. *Byari v. Puttanna*, (1890) 14 Mad. 38 (42); *Butchiraju v. Setharamayya*, (1925) 93 I.C. 955 (Mad.).

50. *Ibad Ali v. Dwarka*, (1925) 90 I.C. 736=1926 Oudh 145; Relied on *Mahendra Bahadur Singh v. Chandrapal Singh*, 63 I.C. 284=24 O.C. 155=8 O.L.J. 622; *Bijai Pertap Singh v. Raghuraj Singh*, 67 I.C. 572=25 O.C. 115 (123)=1922 Oudh 7 and *Karnam v. Chinnappa*, 62 I.C. 603=44 Mad. 253=40 M.L.J. 105.

1. *Bashir Hussein v. Chandrapal*, 25 O.C. 83=1922 Oudh 133=68 I.C. 223.

2. *Kandaswami Mudaliar v. Ponnuswami Mudaliar*, (1928) 109 I.C. 795=1929 Mad. 16; Relied on *Usman Khan v. Nagalla Dasanna*, 16 I.C. 694=37 Mad. 545=23 M.L.J. 360.

3. *Kandaswami v. Ponnusami*, (1927) 109 I.C. 795 (Mad.), *supra*.

(6) Where a Court by its decree pronounces a mortgage debt to be satisfied and the mortgagor entitled to immediate possession, that is equivalent to a declaration that the relation, between the parties, of mortgagor and mortgagee has come to an end.⁴ In *Makhan v. Bhagirath Pershad*,⁵ the Oudh Court examined the litigation which had taken place between the parties in that case, and held that the effect of that litigation had been to put the mortgagee in possession as proprietor. Similarly, in *Latf Hossein v. Abdul Ali*,⁶ a case decided under the Bengal Regulation XVII of 1806, where the mortgagee had issued a notice under the said Regulation, but had taken no further action when the year of grace expired without any payment having been made by the mortgagor, it was held that his possession was adverse as against the mortgagor from the date of the expiration of the year of grace. Where the mortgage relationship between the parties is terminated by the decision of Court holding that the mortgage had been completely redeemed in so far as it affected the parties to the suit, there is nothing left for the mortgagors to do after the decision except to demand possession from the mortgagee, and to sue for his ejectment as a trespasser.⁷ However, it has been held in some cases that the possession of a mortgagor continuing in possession after satisfaction of the debt either out of the usufruct or otherwise is not necessarily adverse to the mortgagor, and the question involved is one of *animus* or intention of the parties concerned.⁸ Where a mortgagee gets the equity of redemption from one of the two co-mortgagors and claims to be in possession as owner to the knowledge of the other co-mortgagor, the right of the co-mortgagor will be taken as extinguished after 12 years.⁹ When a usufructuary mortgage is satisfied *out of the usufruct*, each co-mortgagor is entitled to take possession of his own share, and if any one of the co-mortgagors takes possession of the share of any other of them, such possession would be taken to be adverse within Art. 144 of the Limitation Act.¹⁰

4. *Mt. Zaibunissa v. Parichhat*, (1914) 25 I.C. 611 (All.); Relied on *Sitaram v. Madholal*, 24 All. 44=A.W.N. (1901) 194 (F.B.); Followed in *Omayurupagam Mutt v. Sivasooria Thevan*, 1922 Mad. 407 (2).

5. 8 O.C. 33.

6. 8 W.R. 476.

7. *Sita Ram v. Madholal*, (1901) 24 All. 44=A.W.N. (1901) 194; Relied in *Mt. Zaibunissa v. Parichhat*, (1914) 25 I.C. 611 (615) (Cal.).

8. *Habibullah v. Abdul Hamid*, (1912) 34 All. 261=9 A.L.J. 131; *Gobind Ram v. Mt. Ram Koer*, 1924 All. 522; *Beti Bai v. Tantya Singh*, (1925) 89 I.C. 574 (576) (All.); *Keshablal v. Bholanath*, (1925) 94 I.C. 342=1926 Cal. 910; s.c., 1930 Cal. 402 and *Harasit v. Jaladhar*, 56 Cal. 1130.

9. *Ibram Gulam v. Mohiddin Balku*, (1921) 67 I.C. 219=24 Bom.L.R. 287.

10. *Inayet Husen v. Ali Husen*, (1897) 20 All. 182; *Gobardhan v. Sujan*, (1894) 16 All. 254; *Fakir Baksh v. Sadat Ali*, (1885) 7 All. 376; *Muhd. Taqi v. Muhd. Baqar*, (1913) 20 I.C. 850 (Oudh).

2222. ADVERSE POSSESSION BETWEEN LANDLORD AND TENANT.—

General rule.

The possession of a tenant is of a *quasi-representative* character. As against a third person, the derivative nature of the possession is deemed in some cases to be the possession of his landlord; but yet the possession of a tenant, who is in actual occupation of the soil, has an independent character which can be maintained against the landlord holding proprietary possession of the lands of the tenancy, and even against the whole world.

As a **general rule**, the possession of a tenant is that of his landlord, and will be so deemed until the contrary appears. A landlord is deemed in law to be in possession of his interest as landlord through the tenant whose possession is subject to the rights of the owner. There must be disputes or conflicting claims in respect of the tenure before the possession of the tenant may become adverse.¹¹ As observed by the **Madras High Court**, in *Seshamma Shettati v. Chickaya Hegade*.¹²

"A person who lawfully came into possession of land as tenant from year to year or for a term of years, cannot, by setting up, during the continuance of such relation any title adverse to that of the landlord, inconsistent with the legal relation between them—and that however notoriously and to the knowledge of the other party—acquire, by the operation of the law of limitation, title as owner or any other title inconsistent with that under which he was let into possession."

The mere assertion by a tenant of the claim to ownership as embodied in the revenue records would not of itself alone suffice to afford a starting point for adverse possession especially when it is not accompanied by any change in the money payment.¹³

2223. A tenant is estopped from denying his landlord's title,¹⁴ *vide* S. 116 of the Evidence Act:

"No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof, shall

11. *Tekait Ram Chander v. Sm. Madho Kumari*, (1885) 12 I.A. 188 (P.C.); *Durga v. Sambhu*, (1885) 8 All. 86 (91).

12. (1902) 25 Mad. 507=12 M.L.J. 119; also see *Rajah of Venkata-giri v. Mukku Narasaya*, (1910) 37 Mad. 1=7 I.C. 202=8 M.L.T. 258=1910 M.W.N. 369; Relied in *Gopal Chandra Das v. Satya Bhanu Ghoshal*, (1926) 92 I.C. 963=1926 Cal. 634; also see *Zeller v. Eckhart*, 4 How (U.S.) 289 (296); cited in Angell on Limitation, 6th Edn., p. 458.

13. *Sohawa Singh v. Kesar Singh*, (1932) 13 Lah. 432=140 I.C. 474=33 P.L.R. 771=1932 Lah. 586.

14. *Bhaiganta v. Himmat*, (1916) 24 C.L.J. 103=20 C.W.N. 1335=35 I.C. 7 and *Reajuddi v. Chand Baksh*, (1916) 24 C.L.J. 453=35 I.C. 28.

be permitted to deny that such person had a title to such property at the time when such license was given."

A defendant, who has been let into possession as tenant by the plaintiff is estopped from denying the latter's title without first surrendering his possession.¹⁵ The estoppel applies to all matters connected with and arising out of the contract, by which the relation of landlord and tenant was created. The estoppel could not, however, extend further and affect matters quite beyond the contract.¹⁶

2224. It is equally well settled, however, that one who enters as tenant, is not, merely because of that fact precluded from subsequently holding adversely to his landlord.¹⁷ In *Thakore Fatesingji Dipsingji v. Bamanji Ardeshir Dalal*,¹⁸ it was observed that,

"authorities show that a tenant in India is not precluded by an admission of tenancy from showing the nature of the tenancy asserted by him to the knowledge of the landlord has been for the period prescribed by the Limitation Act *protanto* adverse to the right to eject either at will or on notice given. The question then is not what was the right which actually existed at the beginning of the tenancy, but what was the right which he has openly enjoyed to the knowledge of the owner or his representative for the time being".

2225. While the contract of tenancy is in force, either party cannot practically obtain a variation thereof by persisting for a long period in his assertion that the term is otherwise than what it really is.¹⁹ Accordingly, it has been held that where the defendant's predecessors were in possession as tenants on the terms of *kabuliat* the mere assertion by them later that they had *mokarrari mourashi* tenancy would not give them any greater right than they held under the lease.²⁰ But, a manifest assertion by the tenant to the knowledge of the person representing the landlord's interest of a right inconsistent with that claimed by the landlord to treat him as tenant-at-will or from year to year would be a disclaimer of the

15. *Muthuraiyan v. Sinna*, 28 Mad. 526; 15 M.L.J. 419; *Mahomed Ibrahim v. Abdul*, 14 Bom.L.R. 987; *Bilas v. Desraj*, 19 C.W.N. 1207 (P.C.); *Vertannes v. Robinson*, 1927 P.C. 151=102 I.C. 639 (P.C.).

16. *Madras Hindu Mutual Benefit Permanent Fund v. Raghava Chetti*, 19 Mad. 200 (Per Subramania Aiyar, J.).

17. *Girish Chandra Gangopadhyaya v. Sri Krishen De Nag*, 1924 Cal. 168=38 C.L.J. 266=75 I.C. 325.

18. (1903) 27 Bom. 515=5 Bom.L.R. 274.

19. *Birendra Kishore Manikya v. Fuljan Bibi*, 38 I.C. 469=25 C.L.J. 467.

20. *Gopal Chandra Das v. Satya Bhanu Ghoshal*, (1926) 92 I.C. 963=1926 Cal. 634.

landlord's title under the ruling in *Vivian v. Moat*.²¹ In *Md. Mumtaz v. Mohan Singh*,²² the Privy Council observed: "they are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an underproprietor to the land".

2226. Where a tenant holds over after the expiry of the lease his possession is either that of a trespasser or of what is known in English Law as a tenant by sufferance, but which does not apply to this country.²³ A tenant holding over after the expiry of the term cannot be said to be holding adversely to the landlord so long as he is in possession, he cannot deny that it was from the lessor that he got the land.²⁴ And, the landlord's assent alone will suffice to convert such a tenancy into a tenancy from year to year or from month to month, according to the nature of the case.²⁵ A tenant's holding over though wrongful, may be changed into that of a tenant-at-will on a *slight* evidence of recognition of relationship as tenant by the landlord.²⁶ In the Punjab the case of a tenant holding over without the permission of the owner is governed by the Tenancy Act, and not by the Transfer of Property Act. A tenant has the right to continue in possession if he wishes until his landlord serves him with notice of ejectment. There is no question of the tenancy being determined by lapse of time and therefore the holding over after the expiry of the lease does not amount to adverse possession.²⁷

A tenant repudiating the title under which he entered becomes liable to immediate eviction at the option of the landlord; but until the landlord indicates that he intends to exercise his option,

21. (1881) 16 Ch.D. 730; 50 L.J. Ch. 331; *Thakore Fatehsingji Dipsangji v. Bamanji Ardeshir Dalal*, (1903) 27 Bom. 515=5 Bom.L.R. 274; also see *Adverse possession of limited interest*, S. 2208, ante.

22. (1923) 45 All. 419 (P.C.); also see *Madhavrao v. Raghunath*, (1923) 50 I.A. 255 (P.C.) and *Naina Pillai v. Ramanathan*, (1923) 51 I.A. 83 (P.C.).

23. *Mohunt Bhugwan v. Ramkrishna Bose*, (1919) 26 C.W.N. 722; Reld. on *Madan Mohan v. Kumar Rameswar*, (1907) 7 C.L.J. 615 and *Chandri v. Daji*, (1900) 24 Bom. 504.

24. *Jnan Chandra Dhupi v. Ray Satish Chandra*, (1925) 91 I.C. 451=1926 Cal. 645.

25. *Vadupalli v. Dronamraju*, (1907) 31 Mad. 163.

26. *Kanthappa v. Sheshappa*, (1897) 22 Bom. 893.

27. *Sohawa Singh v. Kesar Singh*, 13 Lah. 432=140 I.C. 474=1932 Lah. 586.

the tenancy subsists. This principle applies to tenancies from year to year.²⁸ In *Gopika v. Atal*,²⁹ it was observed that

"the true view is that the tenant himself cannot *during the term* by any act of, or declaration of his disseise the landlord. He may by repudiating the landlord's title during the term forfeit the term, but the landlord is not bound to take advantage of the forfeiture and his estate cannot be affected".

In the case of a so-called tenancy by sufferance there is no legal relationship of landlord and tenant, and limitation would commence to run, under Art. 129, from the termination of lease.³⁰ Similarly, the possession of a grantee from the tenant would become adverse only after the determination of the tenancy, when only the landlord is entitled to direct and immediate possession.³¹ In *Gopinath Maharaj v. Moti Chwa*,³² the Nagpur Court held that whatever possessory right a tenant-at-sufferance may have against a rank trespasser, it cannot be claimed that the son of such tenant can inherit the rights of a tenant holding over. His possession is nothing better than that of a trespasser.

2227. An open and public declaration communicated to the landlord by a person in permissive occupation who is not paying rent or rendering services and who is claiming adversely to be an owner, will give a starting point of limitation.³³

A tenant cannot be said to be in adverse possession simply because he pays no rent.³⁴ Failure to pay rent to the lessor by the lessee does not alone operate to create in favour of the lessee a title by adverse possession.³⁵ Mere non-payment of rent or discontinuance of payment of rent, has not by itself, been held to create adverse possession,³⁶ unless in connection therewith the landlord has been apprised

28. *Srinivasa Ayyar v. Muthusami Pillai*, (1900) 24 Mad. 246.

29. 1926 Cal. 193; Reld. on *Beni Pershad v. Dudnath*, (1899) 27 Cal. 156 and *Id. Mamta v. Mohan*, 1923 P.C. 118.

30. *Subbraveti v. Gundala*, (1900) 33 Mad. 260; *Pusamal v. Makdum*, (1909) 31 All. 514 and *Bisheshar v. Kundan*, (1922) 44 All. 583.

31. *Chhota Nagpur Banking Association v. Kumar Kamakhya*, (1928) 7 Pat. 341; *Khatemy v. Ram Narain*, (1925) 90 I.C. 617 (Cal.); *Prohlad v. Mohendra*, (1926) 98 I.C. 94 (Cal.) and *Jnanendra v. Jogendra*, (1925) 91 I.C. 191 (Cal.).

32. 1934 Nag. 67=148 I.C. 561=30 N.L.R. 155.

33. *Sidik Haji Yaqub v. Mahomed Faruq*, 1926 Sind 71=90 I.C. 1007.

34. *Lal Singh v. Wadhawa*, (1927) 100 I.C. 73=1927 Lah. 759.

35. *Reajuddin v. Chand Baksha*, (1916) 35 I.C. 28 (Cal.).

36. *Jagdeo Narain Singh v. Baldeo Singh*, (1922) 2 Pat. 38=49 I.A. 399=3 Pat. L. T. 605=1922 P.C. 272=71 I.C. 984 (P.C.); *Prasanna Kumar Moqkerjee v. Srikantha Rout*, (1912) 40 Cal. 173; *Baqri v. Manak*, (1931) 134 I.C. 1037=32 P.L.R. 727; also see *Sohawa Singh v. Kesar Singh*, 13 Lah. 432=140 I.C. 474=1932 Lah. 586 and *Mohanlal Jha v.*

that the tenant claims title in himself.³⁷ Mere non-payment of rent will not create rent-free title. But long possession may be used to support an inference of legal origin or lost grant.³⁸ Where rent was never paid at all for nearly thirty years, and no serious attempt was ever made to recover rent, and the defendant denied on oath that he ever intended to pay rent or regarded himself as lessee, the defendant's possession must be treated as adverse.³⁹ When the tenant thus disclaims the title of the landlord, claims title in himself, and the landlord has notice of that fact, it has the effect of an ouster, and dissiesin, even though this has happened during the continuance of the term. The rule is thus stated by the **Calcutta High Court** in *Girish Chandra Gangopadhaya v. Sri Krishna De Nag*,^{39-a}

"Where possession is originally taken and held under the true owner, a clear, positive and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner, are indispensable before any foundation can be laid for the operation of the statute of limitations. Without this the length of occupation is immaterial and does not affect the title; possession for the full period of limitation must have elapsed after repudiation before title based thereon can be acquired." "It must be shown that the true owner had knowledge of the adverse holding, or it must be so open and notorious as to raise a presumption of notice to him."

Where a complete hostile right was claimed by the defendant to the knowledge of the plaintiff, and no suit was brought by the plaintiff until more than twelve years after, Art. 144 of the Limitation Act applied to bar the suit.⁴⁰

"Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title."⁴¹

But, on the expiration of the term of a lease for a fixed period the lease must be taken to have determined in the absence of proof of a fresh tenancy and the possession of the tenant becomes wrongful

Kameshwar Singh, (1933) 145 I.C. 527=1933 Pat. 175; Reld. on 1922 P.C. 272.

37. *Girish Chandra v. Sri Krishna De*, (1924) 75 I.C. 325=38 C.L.J. 266=1924 Cal. 168; also see and cf. *Subhadra Kuar v. Ram Sewak*, 149 I.C. 807=1934 All. 288 (Building upon lands without protest).

38. *Keshava Prasad Singh v. Brahmdeo Rai*, 1933 Pat. 656.

39. *Umar Baksh v. Baldeo Singh*, 97 P.R. 1915=32 I.C. 35.

39-a. (1924) 38 C.L.J. 266=75 I.C. 325.

40. *Birendra Kishore Manikya v. Roshan Ali*, (1912) 39 Cal. 453; also see *Ram Chander v. Madho*, (1885) 12 Cal. 484; *Tekaetnees v. Saroo*, (1873) 19 W.R. 25; *Doraraja v. Ram Chandra*, (1905) 16 M.L.J. 5.

41. *Madan Mohan Gosain v. Kumar Rameswar Malia*, 7 C.L.J. 615; Reld. in *Reajuddi v. Chand Baksha*, (1916) 35 I.C. 28 (29); also see *Dadoba v. Krishna*, 7 Bom. 34 (39); *Tatia v. Sadas Shiv*, 7 Bom. 40 (42); *Gangabai v. Kalapa*, 9 Bom. 419 (421); *Rungo Lal v. Abdul Guffoor*, 4 Cal. 314 (318); *Prem Sukh v. Bhupia*, 2 All. 517; *Tiru Churna v. Sanguvian*, 3 Mad. 118.

and, therefore, adverse to the landlord within the meaning of Art. 144 of the Limitation Act.⁴² Even if the tenant under such circumstances be a tenant on sufferance, that merely makes him a tenant by the laches of the true owner and does not create any priority of estate between them.⁴³ If in the beginning the possession is only permissive, *e.g.*, where land is held as a service tenure to be enjoyed as remuneration for services, the fact that no service has been performed for any length of time cannot of itself make the holding adverse. In order to make the possession adverse to the owner, there must be a refusal to perform service or a claim to hold the land free of service.⁴⁴

Alternative defence. It is open to the defendant to plead tenancy and limitation in the alternative.⁴⁵

It may also be noted that there is no bar to the acquisition of title by adverse possession even though the person in adverse possession has, before maturity of his title, become a tenant of a true owner with respect to adjacent piece of land.⁴⁶ See Halsbury, Vol. XIX, p. 158.

"A trespasser who has occupied without title and for less than the statutory period, a plot of land belonging to another and who afterwards takes as tenant from the owner of the plot a strip of adjacent land is not thereby prevented from acquiring as against his landlord, by virtue of the statute, a title to that plot."

If a tenant (other than a tenant for a fixed term) instead of paying rent to the landlord pays it to a third party who claims against the landlord, the possession of the third party will be adverse to the landlord, provided he has knowledge of the facts.⁴⁷

2228. If after the determination of the tenancy, the tenant remains in possession as trespasser for the statutory period, he will, by prescription, acquire a right as owner or such limited estate as he might prescribe for. A person coming into possession of land under a lease which is invalid or void as against the person seeking to eject him is really a trespasser and as such, after the

42. *Shrawan Shahasingh Patil v. Fattu*, (1926) 98 I.C. 911=1927 Bom. 613.

43. *Ibid.*, 98 I.C. 911; Reld. on *Kantheppa Reddi v. Sheshappa*, 22 Bom. 893 and *Chandri v. Daji Bhan*, 24 Bom. 504=2 Bom. L. R. 491.

44. *Rajagopala Goundar v. Maruthamuthu Asari*, 1933 Mad. 668.

45. *Keamuddi v. Hara Mohun*, 7 C.W.N. 294; *Dinomony v. Durga Pershad*, 21 W.R. 70=12 B.L.R. 274 (F.B.); Folld. in *Moti v. Kalu*, 19 I.C. 853; *Maidin Sahiba v. Nagappa*, 7 Bom. 96; *Budesab v. Hanmanta*, 21 Bom. 509; *Janardhan v. Sambunath*, 16 Cal. 806; *Kadir Baksh v. Birendra*, 22 C.L.J. 119; *Naddyar v. Meajan*, 10 Cal. 820.

46. Dr. Pal's Limitation, p. 1018.

47. *Ittapan v. Manivikrama*, 21 Mad. 153 (164); *Tarubai v. Venkat-rao*, 27 Bom. 43 (57); also see *Gossain Mahendra v. Rajani Kant*, 1 C.W. N. 246 (247)=24 Cal. 197.

expiration of the period prescribed by Art. 144, acquires by prescription the limited right under the lease, whether it be a lease for a term of years or a lease in perpetuity.⁴⁸ The possession of a tenant for life is not rendered adverse within the meaning of Art. 144, Limitation Act, by a notice from the tenant that he claims to be holding on a perpetual or hereditary tenure.⁴⁹ A tenant for life cannot prescribe against his landlord during his lifetime; consequently, a transferee from a tenant for life cannot prescribe against his landlord during the lifetime of such tenant.⁵⁰ Persons, who and whose predecessors-in-title have been always holding service *vatān* lands as tenants cannot acquire any title to a permanent tenancy in such lands by adverse possession as against *vatandars* from whom they hold the lands.¹ Where, however, the person in occupation claims a perpetual tenancy granted by one who is himself a trespasser the possession of such person would be adverse from the date of his entry. One who holds possession on behalf of another does not by mere denial of that other's title make his possession adverse, so as to give himself the benefit of the statute of limitations.² Where a wife, during the prolonged absence of her husband, who was erroneously supposed to be dead, acting in excess of the limited powers of a wife in possession of her absent husband's property, made a *mourasi* grant of a portion of her husband's estate, and the grantee entered into and remained in possession for upwards of twelve years, it was held that the position of the grantee was not that of a lessee, and that his position having continued for upwards of twelve years had perfected his title to the lands.³ When the lease purports to be a perpetual lease without reversion to grantors, and no rights reserved to them, but only a nominal rent, symbolical possession as against the grantors would not be effective against the lessee, and thus save the bar in limitation.⁴ There is a distinction as regards a plea of limitation between a person holding as tenant for a term under a party in wrongful possession, and one holding as owner and not as lessee on the term of paying a fixed sum annually to the former owner, although what

48. *Seshamma Shettati v. Chickaya Hegade*, (1901) 25 Mad. 507 (511, 512).

49. *Beni Pershad Koeri v. Dudnath Roy*, (1899) 27 Cal. 156 (P.C.); also see *Srinivasa Ayyar v. Muthusami Pillai*, (1900) 24 Mad. 246 (251).

50. *Chota-Nagpur Banking Association v. Kamakhya*, 7 Pat. 341=109 I.C. 306=1928 Pat. 431 (434).

1. *Madhavrao v. Raghunath*, 1923 P.C. 205=47 Bom. 798=50 I.A. 255=74 I.C. 362=25 Bom. L. R. 1005 (P.C.).

2. *Bejoy Chunder Banerjee v. Kally Prossonno Mookerjee*, (1878) 4 Cal. 327.

3. *Ibid.*, 4 Cal. 327.

4. *Gossain Dalmar Puri v. Bepin Behary Mitter*, (1891) 18 Cal. 520.

he pays is called rent.⁵ In *Sankaran v. Periasami*,⁶ the payment of *poruppu* was held not to prevent the possession of the defendants from being adverse to the plaintiff, as possession of a limited interest in immoveable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property.

2229. Where the defendant in possession sets up a pretended tenancy under the plaintiff which the latter denied, or where the possession of the defendant is on the basis of a void lease, his position is that of a trespasser, sufficient to acquire a limited interest by prescription. In *Maidin Saiba v. Nagapa*,⁷ where the suit was to recover possession of certain lands to which the defendant pleaded that they were included in a *mulgeny* lease granted to him, and it was found that the lands were not included in the lease, but that the defendant had been in actual possession of the lands for over twelve years claiming throughout to hold them as such *mulgeny* tenant, it was held that the defendant's possession was adverse to the plaintiff, as the defendant was, in fact, a trespasser setting up a pretended tenancy which the plaintiff throughout denied, and the case must, under such circumstances, be regarded as throughout a case against a trespasser, and not as one between landlord and tenant. It is well established that there can be adverse possession of a limited interest in property as well as of the full title as owner. A partial interest in land may be lost by adverse possession as well as the whole interest, and the right to such partial interest may be asserted by suit.⁸ Again, a landlord allowing the tenant to assert the validity of an invalid lease for the statutory period of more than twelve years may be debarred from subsequently questioning the right of the tenant to hold under its terms.⁹ Where a lease becomes void by reason of the alienation being prohibited by law, the relation of landlord and tenant does not come into existence and the possession of the alienee becomes wrongful from the commencement.¹⁰ Where a lessee has been in continued possession of property under a void deed of perpetual lease for more than twelve years, he acquires a title to such property by adverse possession.¹¹

5. *Gossain Dalmar Puri v. Bepin Behary Mitter*, (1891) 18 Cal. 250; Reld. on 4 Cal. 327.

6. (1890) 13 Mad. 467.

7. (1882) 7 Bom. 96 (99).

8. *Budesab v. Hanmanta*, (1896) 21 Bom. 509; *Thakore Fatehsingji v. Bamanji Dalal*, (1903) 27 Bom. 515.

9. *Ibid.*, 21 Bom. 509.

10. *Gulabbai Ranchhodbhai v. Bhagwan Kesar*, 1928 Bom. 377=30 Bom. L. R. 980.

11. *Bank of Upper India, Ltd. v. Mt. Harnath Kunwar*, (1926) 93 I.C. 852=1926 Oudh 410.

An alienation made in contravention of S. 3, Bhagdari Act, can give rise to an adverse possession so as to bar a suit for recovery by the individual owner or his representative in interest.¹² In the case of *Chaturbhai v. Motibhai*,¹³ where the defendants held the land adversely under an alienation which was void under the Bhagdhari Act, it was held that the defendants were entitled to such rights as they had acquired by the document by adverse possession. There is nothing in the Bhagdhari Act to prevent any person from acquiring rights to *bhag* property by adverse possession against the previous proprietor of a *bhag*.¹⁴ A permanent mukarrari lease is an alienation of the proprietary interest *pro tanto*, and if the property is *debutter*, such an alienation by the *sebadit* is beyond his legal competence, and the possession of the lessee would be adverse to the lessor as from the date of the lease, although the lessee had continued to pay the rent reserved.¹⁵ Where trust property was assigned on permanent lease to the defendant by a trustee on condition of the defendant paying a yearly rent, and the defendant was sued for surrender of the land after the expiration of twelve years from the date of the lease, it was held that the defendant, holding under an invalid title, acquired a prescriptive right as a permanent lessee under either Art. 142, or Art. 144 of the Limitation Act.¹⁶

2230. There is a difference from one point of view between a case where the tenant asserts that the **Encroachment by land encroached upon by him is a part of an admitted tenancy and cases where the tenant sets up a rent-free title to the encroached land.** The difference is that in one case the assertion means that rent is being already paid for the land and so more rent is not payable, and in the other that no rent is payable because the landlord is not entitled to realize any rent for the land.¹⁷ If the land is found as not included in the admitted tenancy, it must be a case of encroachment or trespass by the defendant. In such a case it is well settled that if the tenant is in **adverse possession of the absolute interest** for over 12 years, then the landlord's right should be held to be completely extinguished.¹⁸ If the tenant is in **adverse possession** for such a period in respect only of a **limited interest** as tenant, then what-

12. *Adam Umar v. Bapuji Bavaji*, (1908) 33 Bom. 116=10 Bom. L. R. 1128.

13. 1923 Bom. 146.

14. *Taluqdari Settlement Officer, Gujrat v. Rikhavdas Parshottamdas*, (1912) 37 Bom. 380=19 I.C. 891=15 Bom. L. R. 378; Reld. in *Gulabbai v. Bhagvan*, 1928 Bom. 377 (380).

15. *Shama Charan Nandi v. Abhiram Goswami*, (1906) 33 Cal. 511.

16. *Narsya Udpa v. Venkataramana Bhata*, (1912) 16 I.C. 53=12 M.L.T. 218=23 M.L.J. 260=1912 M.W.N. 870.

17. *Devendra v. Jhumur*, 1926 Cal. 883=43 C.L.J. 387=95 I.C. 622.

18. *Ibid.*, 1926 Cal. 883.

ever may be the effect of it, on the question of the landlord's right to khas possession, a claim for assessment of rent will not be barred unless as provided for in Art. 130, or Art. 131 of the Schedule to the Limitation Act.¹⁹ We have noticed in S. 2177, *ante*, that the tenant's possession of the land encroached upon can commence to be adverse only when the title adverse to the landlord is asserted, or the landlord becomes aware of the encroachment; this is essential to enable the tenant to acquire title to a limited interest by adverse possession thereof.²⁰ A tenant cannot hold adversely to his landlord by the mere fact of his encroachment. It is necessary that his adverse enjoyment should have been brought home to the notice of the landlord.²¹ If a tenant during his tenancy encroaches upon the land of a third person, and holds it with his own tenure until the expiration of the tenancy, he is considered to have made the encroachment not for his own benefit, but for that of his landlord²²; and if he has acquired a title against the third person by adverse possession, he has acquired it for his landlord, and not for himself.²³ This doctrine appears to have been adopted from English cases, by the Calcutta High Court.²⁴

2231. It was held in *Sharat Sundari v. Bhobo Pershad*,²⁵ that

<p>Adverse possession by third party against landlord.</p>	<p>possession taken by a trespasser during the currency of an <i>ijara</i> lease did not become adverse to the Zemindar (lesser) until upon the expiration of the term, and</p>
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a suit for possession may be brought within 12 years of that date under Art. 144, Limitation Act. Where a suit was brought by plaintiff to recover possession of certain lands from which his predecessor in title had been dispossessed, during the unexpired term of a lease granted by the plaintiff's father to a *Ticcadar*, it was held that the prevailing view was that limitation ran from the date of the expiry of the lease, and not from the time when the defendant had dispossessed the plaintiff's father.²⁶ It is open to a landlord, where his title is in jeopardy from the aggressions of a

19. *Devendra v. Jhumur*, 1926 Cal. 883=95 I.C. 622.

20. *Jogendranath Rai v. Baldeo Das*, 35 Cal. 961 (971).

21. *Lekhraj v. Chandra Prakash*, 151 I.C. 256=3 A.W.R. 456=1934 All. 722 (1).

22. *Nudyarchand Shaha v. Meajan*, (1884) 10 Cal. 820 (821); Reld. on *Earl of Lisborne v. Davies*, L.R. 1 C.P. 259 and *Whitmore v. Hampshire*, L.R. 7 C.P. 1.

23. *Ibid.*, (1884) 10 Cal. 820 (821); Reld. on *Kingsmill v. Millard*, 11 Ex. 313 and *Andrezes v. Hailes*, 2 E. & B. 349.

24. *Guroo Doss Roy v. Issur Chunder Bose*, 32 W.R. 247.

25. (1886) 13 Cal. 101; Folld. *Krishna Gobind Dhur v. Hari Churn Dhur*, 9 Cal. 367; also see *Woomesh Chunder Goopto v. Raj Narain Roy*, 10 W.R. 15 (The landlord may wait until the tenant's interest expires, and then bring an action against the trespasser).

26. *Sheo Sahye v. Luchmessur*, 10 Cal. 577 (580).

neighbouring Zemindar, and where his title may be damaged by a denial of his rights over his land, to bring a suit for the purpose of having his rights declared as against such wrong-doer and for the purpose of being put into possession of the land against them.²⁷ The grantor of a subordinate tenure is not bound to sue for trespass committed against his tenant during the tenure, and his right of action accrues when the tenancy comes to an end.²⁸ The Allahabad High Court has followed the principle of the above-noted Calcutta cases in *Thamman Pande v. The Maharaja of Vizianagram*,²⁹ that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor until at any rate such time as the lessor becomes entitled to possession. This is also in accordance with *Muhammad Hussain v. Mul Chand*,³⁰ where possession during the period of a usufructuary mortgage was held not adverse to the true owner.

"It would be unjust to hold that a lessor, who was regularly in receipt of the rent reserved by the lease for a long term of years, and who therefore had nothing to put him on inquiry, might find at the expiration of the term of his lease that a considerable portion, it may be, of his property had passed out of his hands by a trespasser taking possession of it without his knowledge."³¹

This view differs from the view taken by the Calcutta High Court in *Gobinda Nath Shaha v. Surjakantha*,³² where it was laid down that in a case of a *patni* or other permanent tenure if the Zemindar finds that the *putnidar* or other permanent tenant has allowed a trespasser to hold possession of any land included in the permanent tenure for more than 12 years, such adverse possession would be adverse to the Zemindar also; and, if the *patnidar* then relinquishes the *patni* in favour of the Zemindar, the Zemindar's suit to recover possession from the trespasser would be barred, because time ran not from the date of relinquishment but from the date of the trespasser's possession. Similar view has been taken in *Prosonnomoyi v. Kalidas*,³³ that possession adverse to a lessee is also adverse to the lessor. This is on the general principle of law that it is incumbent upon every lessee to protect his lessor's property from encroachment or unlawful eviction, and that if he fails to do so he exposes himself to an action for damages by his landlord.

27. *Bissesuri Dabeea v. Baroda Kanta Roy Chowdhry*, (1884) 10 Cal. 1076 (1079).

28. *Gunga Kumar Mitter v. Asutosh Gossami*, (1896) 23 Cal. 863; Reld. on *Woomesh Chunder v. Raj Narain*, 10 W.R. 15 and *Davis v. Kaze*, 8 W.R. 55.

29. (1907) 29 All. 593 (595).

30. (1904) 27 All. 395.

31. *Thamman Pande v. Vizianagram*, (1907) 29 All. 593 (595, 596).

32. (1899) 26 Cal. 460.

33. (1881) 9 C.L.R. 347.

2232. (1) It has been more than once laid down by the High Courts of this country that **possession which may be adverse to the mortgagee is not necessarily adverse to the mortgagor**, the reason being that the possession adverse to the mortgagor can only arise after the mortgagor has become entitled to immediate possession by redeeming the mortgage.³⁴ As observed by Mr. Justice Markby in *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*,³⁵

Adverse possession by third party against mortgagee or mortgagor.

(i) Possession adverse to mortgagee not necessarily adverse to mortgagor.

"by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession".

Accordingly, where the defendants, as purchasers of the equity of redemption in a usufructuary mortgage ousted the mortgagees, and took possession when the persons entitled to remain in possession were the mortgagees and not the mortgagors, and the mortgage was unsatisfied; and where the defendants never denied the title of the plaintiffs-mortgagors, there could be no adverse possession against the other mortgagors, and the right of redemption was not lost.³⁶ In this case, the defendants by virtue of their adverse possession against the mortgagees, acquired the rights of the mortgagees, and as held in *Vithoba v. Gangaram*,³⁷ succeeded only to such estate as the mortgagees possessed. In *Chinto v. Janki*,³⁸ Telang, J., stated the legal position thus:—

"The mortgagor having once put the mortgagee in possession ordinarily has no right to the possession himself until the mortgage is paid off. The mere fact of the mortgagee's letting the property go out of his possession cannot give the mortgagor such a right before payment. And, the party in possession though he may be a trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up *jus tertii*."

Thus, if the interest of the mortgagee alone is assailed by a third party, that of the mortgagor is not thereby affected.³⁹ Where a third person redeems the mortgage at mortgagor's desire, with his knowledge and consent, he becomes entitled to hold the property as lienor and the said lien is alive for 12 years under Art. 132 of the Limitation Act, and when that period expires, the

34. *Muhammad Husain v. Mul Chand*, (1904) 27 All. 395 (396); Folld. *Chinto v. Janki*, 18 Bom. 51.

35. (1878) 4 Cal. 327; Folld. in *Bhazrao v. Rakhmini*, (1898) 23 Bom. 137 (141).

36. *Isindar Khan v. Habibullah Khan*, (1907) 30 All. 119 (122).

37. (1875) 12 Bom. H. C. R. 180.

38. 18 Bom. 51 (58); also see *Vinayak Janardhan v. Minai*, 19 Bom. 138.

39. *Ittapan v. Manavikrama*, (1897) 21 Mad. 153 (164).

lien is gone and his possession after that is without any right, and the title may be perfected by adverse possession of over 12 years.⁴⁰

2233. (2) Though a trespasser by holding possession against a mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession unless the person claiming adversely is in physical possession of the mortgaged property. Therefore in the case of a possessory mortgage where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee, but not to the mortgagor.⁴¹ In *Casborne v. Scarfe*,⁴² Lord Hardwicke, no doubt pointed out that an equitable estate might be barred by time just as much as a legal estate, and he there refers to and describes an equity of redemption.

"It must be borne in mind, however, that the equity of redemption where the possession remains with the mortgagor is quite different from the equity of redemption where the possession is with the mortgagee".⁴³

It seems impossible that any person can be in possession of the right to redeem a mortgage where, under the terms of the mortgage, the mortgagee is entitled to the actual possession, and is in fact in possession thereunder.⁴⁴ And the possession of a right, *juris quasi possessio*, if that much questioned phrase be permissible at all,⁴⁵ and if it means anything at all, consists in the *exercise* of a right, *jus in re*.⁴⁶

"If the true owner has no right to immediate possession, it is perfectly immaterial to him who is in possession. Having no right himself to possession, he cannot eject the person in possession. *Contra non valentem agere non currit praescriptio*. A claim, not divulged or communicated or manifested by overt acts affecting existing rights, gives no apparent cause of action, and no article of the Limitation Act appears to apply before a right to sue accrues."⁴⁷

The question when limitation begins to run against the mortgagor when the usufructuary mortgagee is deprived of the possession of the property mortgaged has come often before the Madras High Court. In *Ammu v. Ramkrishna Sastri*,⁴⁸ it was held on appeal that though there might be cases in which the estate

40. *Shambhu v. Nama*, (1911) 35 Bom. 438 (442).

41. *Tarabai Ramrao v. Dattaram Govindbhai*, (1925) 87 I.C. 765=27 Bom. L. R. 441=49 Bom. 539=1925 Bom. 377.

42. (1737) 1 Atk. 603.

43. *Kunwar Sen v. Darbarilal*, (1916) 38 All. 411 (415).

44. *Ibid.*, 38 All. 411 (415).

45. Savigny on Possession, Book I, Ss. IX and XII.

46. *Ibid.*, Book I, S. XII (p. 131).

47. *Tarubai v. Venkatrao*, (1902) 27 Bom. 43 (51, 52).

48. (1879) 2 Mad. 226.

of the mortgagee alone was the subject of trespass, leaving the estate of the mortgagor unaffected, yet there were other cases in which the rights and interests of both the mortgagor and the mortgagee might be invalid and the possession held adversely to them both. In *Chathu v. Aku*,⁴⁹ it was pointed out that the right to redeem was only a right of action, and the right of the true owner was not barred unless the claimant had actual possession of the property itself for twelve years. A mortgagor's title could not be affected unless he was shown to have been aware of proceedings conferring a title upon the representative of the mortgagee.⁵⁰ In *Ittapan v. Manavikrama*,¹ it was held that as the mortgagor has no immediate right to the possession of property before redemption he is not affected by the limitation until the mortgage is paid off, or in any case until the mortgagor has notice of adverse possession of the person taking the property from the mortgagee. The decisions of the other High Courts are substantially to the same effect. The decision in *Vithoba v. Gangaram*,² is clear that there can be no adverse possession of an equity of redemption. The decisions in *Chinto v. Janki*,³ and *Tarubai v. Venkatrao*,⁴ has been already noticed. In this latter case Batty, J., was of opinion that

"no doubt, as long as the mortgagee is in possession, he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, . . . then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor and the mortgagor is not concerned or entitled to insist on being immediately restored to possession; and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor, but holds in spite of him."

The same principle is laid down in *Ismdar Khan v. Ahmad Husain*,⁵ that *prima facie* the possession of a trespasser is not full proprietary possession, but of the limited interest of the mortgagee,

"but there may be cases where the adverse possession against the mortgagee would also be adverse possession against the mortgagor, as, for example, where the mortgagor is entitled to immediate possession, or where the possession of the trespasser is coupled with a denial of the title of the mortgagor".

49. (1884) 7 Mad. 26.

50. *Mussad v. The Collector of Malabar*, (1887) 10 Mad. 189.

1. (1898) 21 Mad. 153 (165).

2. (1875) 12 Bom. H. C. R. 180; Diss. from in *Ammu v. Ramakrishna*, (1879) 2 Mad. 226.

3. (1894) 18 Bom. 51 (54).

4. (1902) 27 Bom. 42 (68).

5. (1908) 30 All. 119.

An equity of redemption may be lost by adverse possession; but for that purpose the trespasser must show that it was acquired and retained with an assertion of an adverse title to the knowledge of the mortgagor, and that the property was taken possession of as absolute property in contradistinction to mortgaged property.⁶ In such cases, Art. 144 applies, and if the period of possession of a trespasser extends over a period of 12 years, he acquires an absolute title to the property of which he has been thus in possession.⁷ The Oudh Judicial Commissioner's Court has reviewed the case-law in *Jai Gobind Singh v. Abbairaj Singh*,⁸ where the conclusion has been reached that there can be adverse possession of the interest of a usufructuary mortgagor, and it will depend on the facts of each case whether the person claiming title through such adverse possession has established his claim or not. Although the possession of usufructuarily mortgaged property by a trespasser can be adverse to the mortgagor, the burden of proving when it became so rests on the former. *Prima facie* by his act of possession the trespasser merely ousts the mortgagee who is entitled to hold the property.⁹ There can be prescription against a mortgagor, but ordinarily there can be no prescription against him unless he is entitled to immediate possession. The fact that he would be entitled to bring a suit for possession is of no consequence.¹⁰

2234. (3) In the case of a simple mortgage, adverse possession of a stranger against the mortgagor, does not become adverse to the mortgagee's interest, until the mortgagee is entitled to immediate possession. (See S. 2175; *ante*).¹¹ In *Priya Sakhi Debi v. Manbodh Bibi*,¹² Sanderson, C.J., held that adverse possession affects the interest which the person, who was entitled to immediate possession, had at that time. In the same case, Mookerjee, J., stated that S. 28 of the Limitation Act clearly contemplates that the person, whose right is extinguished by lapse of time is a person entitled to institute a suit for pos-

6. *Periya Aiya Ambalam v. Shunmugasundaram*, (1913) 38 Mad. 903 (914) (F.B.).

7. *Babu Ram v. Banke Biharilal*, (1906) 3 A.L.J. 424; Folld. in *Ram Piari v. Budh Sen*, (1920) 43 All. 164 (169).

8. (1923) 77 I.C. 125=10 O.L.J. 216=26 O.C. 308=1924 Oudh 40.

9. *Jai Gobind Singh v. Abhairaj Singh*, (1923) 77 I.C. 125 (128); Approved *Peria Aiya Ambalam v. Shunmuga*, 22 I.C. 615=38 Mad. 903 (F.B.).

10. *Ibid.*, 77 I.C. 125 (129) (*Per* Simpson, A.J.C.).

11. *Kali Krishna Chowdhry v. Tara Prosanna*, (1919) 50 I.C. 304 (Cal.); Reld. on *Aimadar Mandul v. Makhan Lal Dey*, 33 Cal. 1015=10 C.W.N. 904 and *Priya Sakhi v. Bireswar Samanta*, 37 I.C. 277=44 Cal. 425.

12. (1917) 44 Cal. 425 (433)=27 C.L.J. 212=37 I.C. 277=21 C.W.N. 177.

session of property. Similarly, the Allahabad High Court has held in *Nandan Singh v. Jumman*,¹³ that a simple mortgage being not merely a security for a debt but a transfer of an interest in the property mortgaged, a trespasser who ousts the mortgagor and holds the property adversely to him may by prescription become the owner of the limited estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee. This of course happens when adverse possession begins after the simple mortgage. If adverse possession precedes the simple mortgage it will run against the mortgagor and mortgagee both.¹⁴ Similarly, if the mortgagee is entitled to the possession of the property mortgaged, adverse possession will run against him from the date of his right to possession.¹⁵ This view is supported by the Calcutta decision in *Ainadar Mandal v. Makhanlal Dey*,¹⁶ and also by the Madras High Court in *Parthasarthy v. Lakshmana*.¹⁷ A Full Bench decision of the Madras High Court has also held that the possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is not adverse to the simple mortgagee, which follows the above view.¹⁸ The Privy Council decision in *Karan Singh v. Bakar Ali*,¹⁹ where the defendants had pleaded that their adverse possession commenced before the mortgage was made and their Lordships held on the facts of the case that adverse possession did not commence until after the date of the mortgage does not affect the legal proposition above set forth by the Calcutta, and Madras High Courts, as held in *Raj Nath v. Narain Das*,²⁰ where the adverse possession of a trespasser begins before the execution of the simple mortgage, it will run against the mortgagor and mortgagee both.²¹ But, adverse possession against the mortgagor does not affect the right of the mortgagee when it commences *after* the mortgage. The distinction is clearly brought out in *Surendra v. Barisal Loan Company*,²² though it was lost sight of in the

13. (1912) 34 All. 640.

14. *Ibid.*, (1912) 34 All. 640 (645).

15. *Ibid.*, (1912) 34 All. 640 (645); cf. *Ramasami Chetty v. Ponna Padayachi*, (1911) 21 M.L.J. 397 (*Held*, that adverse possession against the mortgagor extinguishes the security of the mortgagee) and *Pratap Bahadur Singh v. Maheshwar*, (1908) 12 O.C. 45 (To same effect).

16. (1906) 33 Cal. 1015; Followed *Pugh v. Heath*, (1882) 7 App. Cas. 235.

17. (1911) 21 M.L.J. 467=35 Mad. 231.

18. *Vyapuri v. Sonamma*, (1914) 39 Mad. 811 (F.B.).

19. (1882) 5 All. 1 (P.C.).

20. (1914) 36 All. 567 (570-572).

21. *Nandan v. Jumman*, 34 All. 640 (645); also *Parthasarthy v. Lakshmana*, 35 Mad. 231 and *Nallamuthu v. Betha Naicken*, 23 Mad. 37 (39).

22. 1930 Cal. 313=126 I.C. 257=34 C.W.N. 519=50 C.L.J. 317.

Madras case of *Ramaswami v. Ponna*,²³ which was overruled by the Full Bench decision in *Vyapuri v. Sonamma*.²⁴ It was also overlooked by the Oudh Judicial Commissioner's Court in *Pratap v. Maheshwar*,²⁵ where the Privy Council decision in 5 All. 1, seems to have been misapplied to case of adverse possession which began after the execution of the simple mortgage as extinguishing the security of the mortgagee also.

In *Purmananddas Jiwanddas v. Jamnabai*,²⁶ it was held that obstruction to the obtaining possession by a mortgagee under his mortgage by persons who while claiming a lien on the property admitted the mortgagor's title to the property, is not adverse possession as against the mortgagee's title as purchaser. A mortgagee purchasing the mortgaged property with the consent of the mortgagor under the power of sale contained in the mortgage deed acquires an unimpeachable title derived from the power of sale, which is altogether distinct from and overrides his title as a mere incumbrancer.²⁷ If the tenants let into possession by the mortgagee, continue in possession without notice of an adverse claim to the mortgagor, the possession of such tenants subsequent to the redemption is not adverse to the mortgagor, but should be deemed to be held under the mortgagor on the same terms as they held under the mortgagee.²⁸

2235. ADVERSE POSSESSION OF DEBUTTER PROPERTY.—

Adverse possession
by trustee of religious
endowment.

—See notes under S. 10, Limitation Act, and Art. 134 of Schedule I, to the Limitation Act. Persons in whom an estate becomes vested in trust for a specific purpose within the meaning of S. 10 of the Limitation Act cannot by breach of trust continued for a period of 12 years confer a statutory title on themselves in derogation or extinction of the trust.²⁹ Time would be no bar to an action against the *shebait*s themselves in such circumstances for recovery of *debutter* properties from their hands.³⁰ The adverse possession of a person standing in the relation of the

23. 36 Mad. 97; Overruled in *Vyapuri v. Sonamma*, 39 Mad. 811=29 M.L.J. 645 (F.B.).

24. *Vyapuri v. Sonamma*, 39 Mad. 811 (F.B.).

25. 2 I.C. 57=12 O.C. 45.

26. (1885) 10 Bom. 49 (57).

27. *Ibid.*

28. *Chenappa v. Parbaniappa*, 18 M.L.T. 492=2 L.W. 1132=31 I.C. 630.

29. *Srinivasa v. Venkata*, (1911) 34 Mad. 257; *Attorney-General v. Munro*, (1848) 2 Deg. Sm. 122 (163) and *Newsome v. Flowers*, (1861) 30 Beav. 461; cited in *Charu Chandra Pramanik v. Nahush Chandra Kundu*, 1923 Cal. 1 (7)=36 C.L.J. 35=50 Cal. 49=74 I.C. 630.

30. *Shama Charan v. Abhiram*, (1906) 33 Cal. 511 (Reversed on another point in (1909) 36 Cal. 1003=36 I.A. 143 (P.C.)).

shebait to an idol, whose duty it is to ensure that the estate be safeguarded and kept in proper custody is fundamentally different in quality from the hostile holding of a stranger claimant, and it would obviously be unsound on principle to tack together the possession of persons who stand in entirely different categories.³¹ In case of a trust, it is not possible for a trustee to hold the property adversely to the trust title by having possession of the property and appropriating it to the trustee's own use. (*Vide* Indian Trusts Act, 1882, Ss. 63 and 64).³² Where, however, the trustee takes possession of the property under a trust which is not valid in law, and the person beneficially interested seeks to defeat the trust, not to enforce it, the possession of the trustee would be considered adverse to the rightful owner.³³ The legal position as stated by Mitra in his work on Limitation has been accepted by the Madras High Court in *Kalatty v. Mangapathi*,³⁴ viz.,

"whilst the trustee is in possession of the estate, the right of the beneficiary is safe, so that if the trustee mistakes his beneficiary and makes over the profits of the estate to a wrong person, such wrongful recipient of the profits, it has been held in England, does not acquire title by adverse possession against the rightful *cesti que trust*. It being the duty of the trustee to pay over the profits to the beneficiary, payment to a wrong person will not give that person a title, but if one or two beneficiaries is excluded by the other who received the rents to the exclusion of the trustees as well, limitation will commence to run against the excluded beneficiary".

As observed in an English case, *Lister v. Pickford*,^{34-a}

"A trustee who is in possession of land, is so on behalf of his *cesti que trust*, and his making a mistake as to the persons who are really his *cestui que trust* cannot affect the question Suppose that they had imagined *bona fide* that they themselves were personally entitled to the property, and that they were not trustees of it for any one, it would, nevertheless, have been certain that they would have been trustees for the *cestui que trust*, and no time would run while they were in such possession".

Again, as stated in *East Stonehouse Urban Council v. Willoughby Brothers, Ltd.*,^{34-b}

"a trustee cannot by any act of his own make his rightful possession adverse to the real *cestui que trust*".

And on principle

"The Courts are loth to convert a possession which began lawfully into a wrongful and adverse possession";³⁵

And

31. *Charu Chandra Pramanik v. Nahush Chandra Kundu*, 1923 Cal. 1 (7)=36 C.L.J. 35=50 Cal. 49=74 I.C. 630.

32. *Bitto Kunwar v. Kesho Prasad Misir*, (1896) 19 All. 277 (291)=24 I.A. 10 (P.C.).

33. *Kheradmoney v. Doorgamoney*, 4 Cal. 455 (465).

34. 1930 Mad. 563=31 L.W. 526=125 I.C. 227=1930 M.W.N. 111.

34-a. 34 Beav. 575=55 E.R. 757.

34-b. (1802) 2 K.B. 318.

35. *Lallubhai Bapubhai v. Mankuwarbhai*, (1877) 2 Bom. 388 (413).

"possession is never considered adverse if it can be referred to a lawful title".³⁶

Where the relations between the trustee and the *cestui que trust* are not express, but have arisen from implication of law only, then if the trustee assumes an adverse attitude towards his *cestui que trust*, the *cestui que trust* must seek his remedy within the period of 12 years.³⁷ So long as a trustee occupies that position, there is a resultant trust in favour of the settlor, and the trustee's position can only be changed into adverse possession by a conscious and deliberate act.³⁸ Their Lordships of the Privy Council have held in *Srinivasa Moorthy v. Venkata Varada Aiyangar*,³⁹ that no person who has accepted the position of a trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself. There can be no adverse possession against an idol by the shebait.⁴⁰

2236. Where property has been given to a religious and charitable trust, no person other than the duly authorized trustee can alienate by sale or mortgage the property of the trust; and when a trustee does any act in breach or repudiation of the trust, such act is not binding on his successor in the trust.⁴¹ A lessee of debutter properties cannot claim adverse possession for himself under Art. 144, during the lifetime of the head of the mutt who granted him the lease.⁴² Where a mutwalli completely transfers wakf property to a stranger by sale or mortgage, or gift, the period of limitation for a suit by his successor to recover that property begins to run from the date of the alienation.⁴³ Where two brothers *R* and *H*, the then *vahivatdars* of certain en-

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36. *Thomas v. Thomas*, 169 E.R. 701.
37. *Cassamally v. Sir Currimbhai Ebrahim*, 26 Bom. 214 (239).
38. *Ibid.*, 26 Bom. 214 (243); cf. *Mahomed Ibrahim v. Abdul Latif*, 37 Bom. 447 (*Held*, that a person claiming under a resulting trust is always barred by 12 years' rule without reference to the question whether the trustee assumed an adverse attitude).
39. (1911) 34 Mad. 257 (P.C.).
40. *Surendra Krishna Roy v. Bhuvaneshwari Thakurani*, 60 Cal. 54 = 144 I.C. 792 = 1933 Cal. 295.
41. *Shri Ganesh Dharnidhar v. Keshav Govind*, (1890) 15 Bom. 625.
42. *Shiromani G. P. Committee v. Premdas*, 13 Lah. 677 = 140 I.C. 604.
43. *Hamid Miya Sarfuddin v. Nagindas*, 35 Bom.L.R. 252 = 1933 Bom. 217 (In case of successive mortgages by mutwalli, time begins to run from the date of the execution of each successive mortgage); also see *Shri Satyadhyana Tirth v. Bhujung Chintaman*, 1933 Bom. 253 = 144 I.C. 277 = 35 Bom.L.R. 368.

dowed properties divided the properties and worship, there was no question of adverse possession against the shrine. But when later *H*, sold his share of the property to a stranger, time began to run against *R*, for a suit to set aside the alienation on the ground that the endowed properties were inalienable.⁴⁴

Where the property does not vest in the mahant, but vests in the idol, and the Mahant purports to transfer it in his capacity as manager of the idol, adverse possession against the idol commences from the very moment possession is taken under the sale-deed, and it cannot be deemed to be postponed till the mahant died.⁴⁵ In *Periyanam Chetty v. Govinda Rao*,⁴⁶ where certain permanent leases were made by the then Dharmakarta in excess of his powers to grant, the lessees were held to be in adverse possession, and the suit of the succeeding Dharmakarta of the temple was found barred under Art. 144, whether the starting point of the adverse possession be held to be the date of the lease or the date of the death, removal or resignation of the alienating Dharmakarta. The idol in this case could not be treated as a perpetual minor, with the privileges as to limitation of actions, so as to make it impossible for temple property improperly alienated to be acquired by adverse possession.⁴⁷ The doctrine that an idol is a perpetual minor is an extravagant doctrine contrary to the decision of the Privy Council in such cases as 37 Cal. 885. It is open to shebait or any person interested in an endowment to bring a suit to recover the idol's properties for debutter purposes, and it is well recognized that where a non-shebait is holding property in open derogation of the trust, a plea of adverse possession can be sustained.⁴⁸ An idol installed in a particular *asthan* is a juridical person capable of holding property and getting it managed through its manager, *shebait*, or *mahant*. Such a manager, shebait or mahant would represent the idol or the institution for the time being completely, and possession, if adverse, against the mahant for the time being must be deemed to be adverse against the idol or the institution, unless the character of the alienation under which possession was taken could be

44. *Narayan Balwant v. Dattatraya Ram Chandra*, 34 Bom.L.R. 1469; cf. *Surendra Krishna v. Bhubaneshwari*, 1933 Cal. 295=144 I.C. 792=60 Cal. 54 (*Quære*: whether the possession of two joint shebait becomes adverse to the idol when they openly claim to divide the property between them).

45. *Sarabdeo Bharti v. Ram Sali*, 1932 A.L.J. 836.

46. (1932) 137 I.C. 487=1931 M.W.N. 1287=35 L.W. 191=62 M.L.J. 496=1932 Mad. 328.

47. *Ibid.*, 1932 Mad. 328=62 M.L.J. 496; also see *Chittarmal v. Panchulal*, (1926) 48 All. 348=93 I.C. 652=1926 All. 392; Followed *Damodar v. Lakhandas*, 37 Cal. 885 (894) (P.C.); *Dasami v. Paramshameshwar*, (1929) 51 All. 621=116 I.C. 433=1929 All. 315 (318).

48. *Surendrakrishna Roy v. Shree Shree Ishwar Bhubaneshwari Thakurani*, 60 Cal. 54=144 I.C. 792=1933 Cal. 295.

deemed to enure only for the lifetime of a particular manager, shebait or mahant.⁴⁹ Where a mahant alienates properties appertaining to a *math* without any legal necessity, the alienation is not void but is good for the period during which the alienor is in office. Consequently, a suit for recovery of the property wrongfully alienated brought within twelve years of the alienor's death is not barred under Art. 144 of the Limitation Act, as adverse possession commences to run only when the alienating mahant dies.⁵⁰ Similarly, sale of endowed property by mutwalli having beneficial interest is valid during the lifetime of the vendor, and a suit by succeeding mutwalli for recovery of possession of the property sold is governed by Art. 144, Limitation Act, and would be in time if instituted within twelve years from the date of the death of the mutwalli who sold the property.¹ Under the law which obtained prior to its amendment by the Indian Limitation (Amendment) Act (I of 1929) the article applicable to a suit by a mahant to recover math property transferred by the preceding mahant is Art. 144, and the period of limitation does not begin to run until the death of that mahant.²

2237. A distinction has to be made in cases where the incumbent of the office for the time being has a right of beneficial enjoyment of the properties for his lifetime,³ from cases where there is no right of beneficial enjoyment, but the office-holder for the time being is a mere manager with powers analogous to that of a bare trustee, and an alienation by him being void *ab initio*, the possession of the alienee is to be deemed adverse from the date of alienation for the purposes of Art. 144.⁴ Where property dealt with is vested not in the mahant, but in the idol and the mahant is only its representative and manager, the possession of an alienee from the manager is adverse to the right of the idol from the date of transfer.⁵ A claim to recover trust

49. *Mahant Parkashdas v. Janki Ballabh Saran*, (1926) 95 I.C. 27=1926 Oudh 444=3 O.W.N. 1, (Sup.).

50. *Ramcharan Das v. Naurangi Lal*, 60 I.A. 124=12 Pat. 251=1933 P.C. 75=142 I.C. 214=64 M.L.J. 505 (P.C.).

1. *Arumugam Pillai v. Kazhi Mohideen*, (1933) 144 I.C. 541=1933 Mad. 533=64 M.L.J. 706=37 L.W. 737=1933 M.W.N. 1215.

2. *Mahadeo Prasad Singh v. Karia Bharthi*, 62 I.A. 47=57 All. 159=153 I.C. 1100=1935 P.C. 44=68 M.L.J. 499 (P.C.).

3. *Ganapathi v. Mahomed*, 13 Mad. 277; *Subbanna v. Audilakshmanamma*, 23 M.L.J. 260; *Muthuswamier v. Sree Sree Methanithi Swamier*, 38 Mad. 356; *Venkatasubbarayadu v. Haji Silar*, 31 L.W. 396; also see *Abhiram Goswami v. Shyama Charan Nandi*, 36 Cal. 1003 (P.C.); *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose*, 38 Cal. 526 (P.C.).

4. *Gnanasambanda v. Velu*, 23 Mad. 271 (P.C.); *Mahant Damodar v. Adhikari*, 37 Cal. 885 (P.C.); *Badri Narayan Singh v. Mahant Kailash*, 5 Pat. 341.

5. *Damodar Das v. Lakhan Das*, (1910) 37 Cal. 885 (P.C.).

property from an assignee for valuable consideration with notice can be defeated by adverse possession.⁶ Where the hereditary managers of the property endowed for a religious purpose purported to sell and assign the management and the lands of the endowment to the representatives of another institution, against the custom of the foundation, the transfer being beyond their legal competence, conveying no title, the possession delivered to the purchaser was adverse to the vendors.⁷ The mahants of maths, called by whatever names, are only the managers or custodians of the institution and in no case is any property conveyed to or vested in them.⁸ In a suit to set aside an alienation made by a predecessor mahant, the successor mahant cannot get a fresh start for the purpose of limitation from the date of his succession as mahant. The possession of the transferee becomes adverse from the date of the transfer if the transfer is without any legal and justifying necessity and even though the possession is permissive during the lifetime of his vendor mahant, the cause of action in any event accrues on the death of his vendor, and not on the date of the succession of the successor mahant.⁹ There is little or no difference in principle between a transfer under an adverse execution, and a sale by the manager himself.¹⁰ Where the defendant purchased from one of the two co-trustees of a temple the right to manage the affairs of the temple and enjoy certain land which formed the endowment of the temple, and held possession of the land for more than twelve years, it was held that a suit by the other trustee to recover the land was barred by limitation.¹¹ If the defendant's possession is adverse to the ownership of the math after the death of the manager, the operation of the law of limitation would not be affected by the fact that there was no legal manager during the period of prescription.¹² But, if the previous manager has been in possession within twelve years of the suit by successor, the endowment would be within time for a suit to recover the property.¹³

2238. STARTING POINT OF LIMITATION.—Under Art. 144, the only question to be decided is when did the possession

6. *Subbaiya Pandaram v. Mahommad Mustapha*, (1923) 46 Mad. 751 = 50 I.A. 205 = 45 M.L.J. 588 (P.C.).

7. *Gnanasambandha v. Vclu Pandaram*, (1899) 23 Mad. 271 = 10 M.L.J. 29 (P.C.).

8. *Vidyavaruthi v. Balusami Ayyar*, 1922 P.C. 123; Followed in *Badri Narayan v. Kailash Gir*, 1926 Pat. 239.

9. *Badri Narayan Singh v. Kailash Gir*, 1926 Pat. 239 = 93 I.C. 303 = 5 Pat. 341 = 7 P.L.T. 453.

10. *Subbaiya Pandaram v. Mahammad Mustapha*, (1923) 50 I.A. 205 = 46 Mad. 751 = 45 M.L.J. 588 (P.C.).

11. *Kannan v. Nilakandan*, (1884) 7 Mad. 337.

12. *Vithal Bawa v. Narayan Daji*, (1893) 18 Bom. 507.

13. *Abdul Rahim v. Narayan Das*, (1922) 50 I.A. 84 = 50 Cal. 329 = 45 M.L.J. 588 (P.C.).

of the defendant become adverse to the plaintiff. Now, the possession of the defendant does not become adverse to the plaintiff until he becomes entitled to possession of the property.¹⁴ A suit by an adopted son, during the lifetime of the widow, to recover possession of immoveable property alienated by the widow, for a non-necessary purpose, falls within Art. 144, Limitation Act, and time does not run against the adopted son prior to the date of his adoption, as the possession of the defendant does not become adverse to the plaintiff until the plaintiff becomes entitled to possession upon his adoption.¹⁵ Adverse possession against reversioners begins only from the time when they become entitled to possession on the termination of a Hindu widow's or other female life tenant's estate, as reversioners under Hindu Law, are not persons claiming from or through a female heir so as to make possession adverse to her adverse to them.¹⁶ Remote reversioners cannot sue as long as near reversioners are living: and, the *right to sue* for possession by remote reversioners is not derived from or through the near reversioner, and their claim cannot become barred under Art. 144 by reason of any adverse possession against the near reversioners.¹⁷ Subject to the distinction that the rights of an adopted son come into existence as soon as he is adopted by the widow, and the rights of the widow come to an end on adoption, while the rights of a reversioner come into existence on the death of a widow, there is no essential difference in the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption, and the reversioner seeking to enforce his right with regard to property alienated by the widow before her death.¹⁸ As regards absentee co-sharers, any overt act of adverse possession by the person in possession of property starts adverse possession as against the absentee owner thereof, *e.g.*, a mortgage of the property by the plaintiff's step-mother declaring herself in the deed to be the sole owner, would bar plaintiff's claim brought more than twelve years after the transfer.¹⁹

14. *Moro Narayan Joshi v. Balaji Raghunath*, (1894) 19 Bom. 809; also see *Upendranath Roy v. Jitendranath Kundu*, 62 Cal. 921 and *Nagen-drabala v. Bejoy Chand*, (1923) 1923 Cal. 734=74 I.C. 153 (Suit by patni-dar).

15. *Ibid.*; also see *Sitaram Sheokaran v. Rajaram Latuji*, (1918) 48 I.C. 230 (Nag.); *Venkataratnam v. Venkataramiah*, (1914) 25 I.C. 692=27 M.L.J. 569.

16. *Neelakanta Rao v. Narayanaswami Aiyar*, (1917) 37 I.C. 733=31 M.L.J. 847; *Adya Shankar v. Chandrawat*, 150 I.C. 519=1934 Oudh 263.

17. *Sundar v. Salig Ram*, 26 P.R. 1911=9 I.C. 300=34 P.L.R. 1911=33 P.W.R. 1911 (F.B.); Followed 18 P.R. 1895; also see *Harnaman v. Dasondhi*, (1920) 56 I.C. 733 (Punj.).

18. *Hanangoada v. Irgowda*, (1924) 84 I.C. 374=26 Bom.L.R. 829=48 Bom. 654=1925 Bom. 9; Relied on *Moro Narayan v. Balaji Raghunath*, 19 Bom. 809 and *Ramkrishna v. Tripurabai*, 1 I.C. 647=33 Bom. 88.

19. *Khuda Baksh v. Karnam*, (1915) 27 I.C. 610=49 P.L.R. 1915.

The possession of the purchaser from the manager of a joint Hindu family is adverse to other co-parceners from the moment of his obtaining possession.²⁰ A *mutwalli* has no right to create a permanent encumbrance on waqf property: and anything in the nature of a permanent alienation of, or encumbrance upon waqf property created by a *mutwalli* is not binding upon his successors if it is challenged within twelve years from the date of the successor's appointment.²¹ The adverse possession of a vendee of *watan* lands under a sale-deed from a *watandar* for the statutory period of twelve years bars the claim of the succeeding *watandars*.²² Possession becomes adverse against a Mohammadan heir, from the date of the death of the deceased, as each of the heirs becomes entitled to claim his or her share at once.²³ But, possession of a tenant becomes adverse to the landlord from the date of the denial of the relationship of landlord and tenant: and limitation accordingly commenced against the landlord, when the defendant in his written statement denied the relationship, and the ejectment suit had to be filed within twelve years of the denial aforesaid.²⁴ Possession taken during the currency of a lease cannot be adverse as against the lessor until the termination of the lease, the lessor being unable to sue for possession while the lease is still current.²⁵ Art. 144 cannot apply where the possession of the trespasser cannot be deemed adverse against a person not entitled to be in possession at that time.²⁶ In a sale held under Act XI of 1859, what is sold is not the interest of the defaulting owner which is determined on the failure to pay the Government assessment, but the interest of the Crown subject to the payment of the Government assessment, and therefore the period of limitation for adverse possession against the purchaser at revenue sale only commences to run from the date of the sale.²⁷ On the expiration of the term of

20. *Fakirappa Babappa v. Rudrappa Rachappa*, 1932 Bom. 255=34 Bom. L.R. 354=137 I.C. 367.

21. *Fazal Ilahi v. Zafar Ali*, (1916) 32 I.C. 558=36 P.W.R. 1916; Relied on *Bashesarlal v. Natha Singh*, 30 P.R. 1908 (F.B.) and *Thakore Fatehsingji v. Bamanji Ardeshtir Dalal*, 27 Bom. 515=5 Bom.L.R. 274.

22. *Tuka Lakhu Kadam v. Ganu Vithu Kadam*, (1931) 129 I.C. 145=32 Bom.L.R. 1398=1931 Bom. 24=55 Bom. 21.

23. *Mt. Allah Jawai v. Muhammad Baksh*, (1927) 100 I.C. 145 (Lah.).

24. *Hachanuddi v. Asimaddi*, (1927) 100 I.C. 607 (Cal.); also see *Fazal v. Mihan Khan*, (1921) 64 I.C. 352 (Decree conditional on payment not creating a judicial hypothec: suit for ejectment to be filed within 12 years of denial of title by defendant).

25. *Girdharilal v. Mt. Umda Jan*, (1921) 63 I.C. 717=1921 Lah. 17=3 L.L.J. 215.

26. *Secretary of State v. Wased Ali Khan*, (1922) 65 I.C. 866=1921 Cal. 687=34 C.L.J. 141.

27. *Ibid.*, 65 I.C. 866 (875).

a lease for a fixed period, the lease must be taken to have determined in the absence of proof of a fresh tenancy, and the possession of the tenant becomes wrongful, and therefore adverse to the landlord from the date of expiry of the lease.²⁸ The period of adverse possession of a quarry cannot be counted from the time when different sorts of minerals are found at different depths of the quarry.²⁹

2239. EFFECT OF SYMBOLICAL POSSESSION.—

(i) Property not capable of actual possession. (1) If the purchaser of a property in execution of a decree makes an application for delivery of possession, and obtains only formal or symbolical possession, but fails to obtain actual possession by reason of the judgment-debtor or other persons continuing in possession of the property, the remedy is a suit for possession to which the period of limitation prescribed in Art. 144 would apply. Symbolical possession is not real possession nor is it equivalent to real possession under Civil Procedure Code except when the Code expressly or by implication provides that it shall have that effect.³⁰ Formal possession must be deemed equivalent to actual possession when decree is being enforced against judgment-debtor, but as against third parties symbolical possession is of no avail, because they are not parties to the proceedings.³¹

Order 21, R. 95 provides for *actual* possession being given where the nature of the property permits actual possession to be given. Order 21, R. 96 provides for *formal* delivery of possession where the nature of the property does not permit of *actual* possession being given, but it is clear that the legal effect of *formal* possession must be the same as the *actual* possession in the rule immediately preceding. This view has been taken consistently by the Allahabad High Court in a number of cases.³² In *Rajendra Kishore v. Bhagwan Singh*,³³ and *Jang Bahadur v. Hanwant*,³⁴ it

28. *Shravan Shahsing Patil v. Fattu*, (1926) 98 I.C. 911=28 Bom. L.R. 1357.

29. *Bhupendra Narayan Sinha v. Rajeswar Prosad Bhakht*, (1927) 106 I.C. 117=1927 Cal. 956=55 Cal. 35.

30. *Mahadev Sakharan v. Janu Namji*, (1912) 26 Bom. 373 (377) (F.B.) [O.R. *Gopal v. Krishnarao*, (1900) 25 Bom. 275 and *Mahadeo v. Parashram Bhawan Chand*, (1900) 25 Bom. 350].

31. *Jogjobandhu Mookerjee v. Ram Chunder Bysack*, (1880) 4 Cal. 584 (F.B.).

32. *Mangli Prasad v. Debi Din*, (1897) 19 All. 499; *Narain Das v. Lalta Prasad*, (1898) 21 All. 269; *Jagannath v. Milap Chand*, (1906) 28 All. 722; *Rahim Baksh v. Muhd. Hafiz*, (1909) 10 I.C. 319 and *Rajendra Kishore v. Kishore Singh*, (1917) 39 All. 460 (463) and *Sitaram Dube v. Ram Sundar Prasad*, 1928 All. 412=50 All. 813=26 A.L.J. 573.

33. (1917) 39 All. 460=39 I.C. 745=15 A.L.J. 361.

34. (1921) 43 All. 520=1921 All. 9 (F.B.).

was held that where possession has been delivered to a purchaser in execution in accordance with law, that would, as between the parties to the proceedings for delivery of possession give a new start for the computation of limitation, and the possession of the defendant (*i.e.*, the judgment-debtor) would be deemed to be a fresh invasion of the plaintiff's rights and a new trespass upon the property. Zemindari property which is let out to tenants for cultivation is not property of a nature of which actual possession can be obtained by an auction-purchaser. Therefore, in the case of such property the delivery of formal possession to the auction-purchaser under the provisions of O. 21, R. 96, Civil Procedure Code, gives a fresh start of limitation.³⁵ Where an unspecified share in property in the possession of the judgment-debtor is sold in execution, the only sort of possession which could be delivered to the auction-purchaser is constructive possession under O. 21, R. 95, Civil Procedure Code, and such possession when granted would be a valid and effective delivery of possession sufficient to give to the auction-purchaser a fresh start for limitation.³⁶ An auction-purchaser purchasing a judgment-debtor's share in a joint property obtains a perfect title thereto not from the date when the sale is confirmed but from the date of his obtaining symbolical possession following such sale. And a suit by such an auction-purchaser for partition and possession of his share is competent if brought within twelve years from the date of his obtaining symbolical possession.³⁷

(2) But, the views of High Courts are divergent on the question whether the symbolical possession operates as actual possession where the property is capable of delivery of actual possession. The **Calcutta High Court** holds that a suit for possession of land by an auction-purchaser who obtained symbolical possession, is not barred by limitation under Art. 144, Limitation Act, if brought within twelve years from the date of such symbolical possession.³⁸ The delivery of symbolical possession to an auction-purchaser or to a person claiming under him operates as the delivery of actual possession as against the judgment-debtor and gives a fresh start of limitation even in a case coming under O. 21, R. 95, Civil Procedure Code.³⁹ The same

35. *Ramlallan Singh v. Harakh Narain*, (1923) 73 I.C. 920=1922 All. 463=20 A.L.J. 641; *Baijnath v. Sri Bhagwan*, (1926) 96 I.C. 591=1926 All. 691.

36. *Gulab Khan v. Ataulah*, (1928) 110 I.C. 70=1928 Oudh 251=5 O.W.N. 372 (F.B.) (Art. 142 applied).

37. *Ramchand v. Gopal Singh*, 1930 Lah. 914=31 P.L.R. 519=129 I.C. 699.

38. *Hari Mohan Shah v. Baburali*, (1897) 24 Cal. 715; *Brojendra v. Asutosh Roy*, (1922) 70 I.C. 420=1921 Cal. 385.

39. *Bhulu Beg v. Jatindranath Sen*, (1923) 77 I.C. 1035=1923 Cal.

view is taken by the **Madras High Court**⁴⁰ where possession of *inam* lands wrongly classed as *ryotwari* was decreed to the *inamdar*, and symbolical delivery was made in execution of the decree, a suit brought to oust the *ryotwari* tenants who acquiesced in such delivery within twelve years thereof was held not barred by limitation.⁴¹ The **Bombay High Court**, in a Full Bench decision, has held that merely formal possession of immovable property by a purchaser at a Court-sale cannot prevent limitation running in favour of the judgment-debtor, where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same. That symbolical possession is not real possession nor is it equivalent to real possession under Civil Procedure Code except when the Code expressly or by implication provides that it shall have that effect.⁴² Where the plaintiff purchased the land in dispute at a Court-sale held in execution of a decree against the defendant's father and obtained symbolical possession sometime later through the Court; and, at the date of the sale, and subsequently thereto, the defendant was in actual possession of the land in question, a suit filed by the plaintiff more than twelve years from the date of sale, but within twelve years from the date of symbolical possession was held time-barred.⁴³ According to **Bombay High Court**, symbolical possession of the rightful owner can interrupt adverse possession in those cases only in which the Civil Procedure Code recognises symbolical possession.⁴⁴

(3) The **Privy Council** have laid down in *Radhakrishna v. Ram Bahadur*,⁴⁵ that symbolical possession is sufficient to interrupt adverse possession, if the adverse possessors are parties to the proceedings in which symbolical possession is given. Thus, where possession of property purchased at auction

138=27 C.W.N. 24 (Case law discussed); *Harasit Golder v. Jaladhar Biswas*, (1930) 121 I.C. 407=1930 Cal. 15=56 Cal. 1130=33 C.W.N. 963; *Jogendra Krishna v. Joy Shib Chaudhry*, (1926) 96 I.C. 481=1926 Cal. 1172.

40. *Govind v. Venkata*, 17 M.L.J. 598 and *Kamayya v. Mahalakshmi*, 1927 Mad. 849=105 I.C. 243=53 M.L.J. 339 (Diss. from *Govindasami v. Pethaperumal*, 44 I.C. 839).

41. *Narayani Ammal v. Secretary of State*, (1917) 41 I.C. 167 (Mad.).

42. *Mahadev Sakharan Parkar v. Janu Namji*, (1912) 36 Bom. 373=14 Bom.L.R. 115=14 I.C. 447 (F.B.).

43. *Lakshman v. Moru*, (1892) 16 Bom. 722; also see *Shridhar Madhavrao v. Ganpati Punja*, (1918) 43 Bom. 559; cf. *Radhakrishna v. Ram Bahadur*, (1917) 20 Bom.L.R. 502 (P.C.).

44. *Raghunath Waman v. Kondiba Babaji*, (1922) 68 I.C. 91=24 Bom.L.R. 499=1922 Bom. 2=46 Bom. 932; Followed 36 Bom. 373=14 I.C. 447=14 Bom.L.R. 115 (F.B.).

45. (1918) 43 I.C. 268=1917 P.C. 197 (P.C.); Approved *Juggo-bandhu v. Ram Chunder*, 5 Cal. 584=5 C.L.R. 548.

sale in execution of a decree is formally given by the Court, although actual possession may remain with the judgment-debtor, the date of the granting of such formal possession forms as against the judgment-debtor a fresh starting point for limitation in respect of a suit for possession of the property sold brought by the auction-purchaser or his representative.⁴⁶ A suit for possession by an auction-purchaser who has obtained symbolical possession is not barred if brought within 12 years from the date when the auction-purchaser obtained symbolical possession.⁴⁷ If the defendant claims through the mortgagor, he is actually or constructively a party to the decree in execution of which the land was sold, then the plaintiff is entitled as against him to treat the delivery of symbolical possession as equivalent to the delivery of actual possession.⁴⁸ The delivery of symbolical possession even erroneously operates as actual possession against the judgment-debtor and his representative.⁴⁹ Such delivery of symbolical possession puts an end to the adverse possession of the judgment-debtor who is in actual possession of the property and effectually vests the property in suit in the deceased holder so as to give him a fresh cause of action for recovery of actual possession from the judgment-debtor. The operation of this rule is restricted to judgment-debtors. Symbolical possession wrongly given to a decree-holder does not give him a fresh starting point against persons who are not bound by the decree.⁵⁰ An order of executing Court holding that possession of property in suit has been given to the decree-holder is binding on the parties to the execution-proceedings and it is not open to either of them to question the correctness of that order on the ground of any irregularity in procedure except by way of appeal to the Court competent to hear appeals from the orders of the executing Court.¹ Where actual delivery is applied for in execution but only symbolical possession is delivered the judgment-debtor, who is a party to the execution proceedings and is bound by the decree, is not entitled to deny that he was dispossessed, even though he was not actually evicted.

46. *Mangli Prasad v. Debi Din*, (1897) 19 All. 499; Relied on *Juggobundhu Mukerjee v. Ramchunder*, 5 Cal. 584 (F.B.) and *Juggobundhu Mitter v. Purnanand*, (1889) 16 Cal. 530 (F.B.).

47. (1897) 24 Cal. 715.

48. *Jankinath Saha v. Baikuntha*, 1922 Cal. 176=36 C.L.J. 140=27 C.W.N. 259; also see *Harajit v. Jaladhar*, 33 C.W.N. 963 (964)=56 Cal. Cal. 1130=1930 Cal. 15=121 I.C. 407 (Symbolical possession against representative of judgment-debtor).

49. *Maharaj Pratap Udai Nath v. Bhaian Sunderbans Koer*, 1923 Pat 76=3 Pat. L. T. 628=71 I.C. 999.

50. *Harbhagwan v. Taja*, 1926 Lah. 35=89 I.C. 596=26 P.L.R. 546.

1. *Piara Ram v. Sahawa*, (1928) 109 I.C. 561=1928 Lah. 910; Reld. on 5 Cal. 584=5 C.L.R. 548 and *Jahuri Lal v. Peman*, 68 I.C. 182=2 Lah. L. J. 563.

He cannot, therefore, claim to be in adverse possession from the date of original entry.² The Patna High Court observes in *Ram Prasad Ojha v. Bakshi Bindeshwari Prasad*,³ that

“when it is said that symbolical possession is not binding upon a third party but actual possession is, it is only meant that when a decree-holder or an auction-purchaser has been put in actual occupation of the party every body else has been ousted from it, and consequently dispossessed. This is an obvious fact and not a question of law. On the other hand, if the Court simply proclaims that the decree-holder or auction-purchaser has been given possession but on account of the nature of the property they have not been placed in physical occupation of the property itself, such a delivery of possession can be binding only upon those who are parties to those proceedings or on those who claim through them”.

(4) Where the adverse possessor was *not a party* to the execution proceedings, the symbolical possession obtained by the decree-holder does not avail against defendants who were in actual possession of the property in dispute for they were not parties to the proceedings.⁴ Symbolical possession given in execution proceedings amounts to an actual transfer of possession as between the parties to the suit, but such possession has no such operation against third persons who are not parties to the suit.⁵ Delivery of symbolical possession does not in any way affect the possession of, or give start to a fresh period of limitation against persons who are not parties to the suit or execution proceedings.⁶ Symbolical possession is insufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given; as regards persons not so parties, only actual dispossession can interrupt their adverse possession.⁷ The same principle has been extended to the case of purchasers at sales for arrears of revenue.⁸ Odgers, J., held in *Renganatha Iyer v. Srinivasa Iyengar*,⁹ that symbolical possession is

2. *Dharmalla Kamayya v. Bhimrasetti Mahalakshmi*, 1927 Mad. 849 =53 M.L.J. 339=26 L.W. 285=1927 M.W.N. 670=105 I.C. 243.

3. 1932 Pat. 145=13 Pat. L. T. 121=11 Pat. 165.

4. *Harjivan v. Shivram*, (1894) 19 Bom. 620.

5. *Runjit Singh v. Bunwarilal*, (1884) 10 Cal. 993.

6. *Jobeda Khatun v. Tulsi Charan Das*, (1923) 77 I.C. 564=36 C.L.J. 472=1923 Cal. 82; Folld. 5 Cal. 584 (F.B.) and 16 Cal. 530 (F.B.).

7. *Ibid.* (1923) 77 I.C. 564 (566); Reld. on *Radha Krishna v. Ram Bahadur*, 43 I.C. 268 (P.C.); see *Satish Chander v. Brojo Gopal*, 46 I.C. 104=22 C.W.N. 807; *Ramjan Mahomed v. Chunder Mohun*, 7 C.L.J. 640; *Doyanidhi v. Kelai*, 11 C.L.R. 395; *Narain Das v. Lalta Prasad*, 21 All. 269; *Saadulla v. Joynafunnessa*, 32 I.C. 703.

8. *Ibid.*, (1923) 77 I.C. 564 (566); Reld. on *Mozuffer Wahid v. Abdus Samad*, 6 C.L.R. 539; *Mir Waziruddin v. Deoki Nandan*, 6 C.L.J. 472; *Dursan Singh v. Bhawani Koer*, 19 I.C. 974=17 C.W.N. 984 and *Sabodra Mudali v. Sarbosobba Dasi*, 27 I.C. 258=42 Cal. 638=20 C.L.J. 941=19 C.W.N. 1030.

9. (1925) 90 I.C. 1037=1926 Mad. 42 (44).

sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given. But as regards persons not so parties, only actual dispossession can interrupt their adverse possession. The Oudh Court has taken the view that where the defendant is a private purchaser, time runs not from the date when he has taken possession but when the sale to the plaintiff is confirmed.¹⁰

2240. **ONUS PROBANDI.**—See notes under Art. 142: Ss. 2134-2142-A; also see notes under Art. 144, S. 2202.

In *Radha Gobind Roy v. Inglis*,¹¹ their Lordships of the Privy Council, held, affirming the judgment of the Calcutta High Court, that where plaintiff has established his title to land, the burden of proving that the plaintiff has lost that title by reason of the adverse possession of the defendant, is upon the defendant. This is not inconsistent with their Lordship's earlier pronouncement in 8 M.I.A. 199—*Maharajah Koowur v. Baboo Nundlal Singh*, where in the case of a plaintiff who was

"seeking to disturb the possession, admitted to have existed for about eleven years, of defendants, who insisted on a possession of much longer duration as a statutory bar to the suit,"

it was held

"that the *onus* clearly lay on plaintiff to remove that bar by satisfactory proof that the cause of action accrued to him on a dispossession within twelve years next before the commencement of the suit: and, therefore, that he, or some person through whom he claimed, was in possession during that period".

In cases falling under Art. 142 of the Limitation Act, the plaintiff has to give the proof of his alleged possession and dispossession within 12 years of the suit. But, in a case falling under Art. 144 of the Limitation Act, as 7 C.L.R. 364 (P.C.) appears to be, where the constructive possession of the rightful owner continued till within 12 years of the suit, the defendant had to prove the adverse possession for more than 12 years.¹² In *Karan Singh v. Bakar Ali Khan*,¹³ their Lordships in dealing with the contention that the plaintiff must prove that he was in possession within 12 years held that it was not correct under the Limitation Act IX of 1871. Their Lordships observed:—

"It would have been correct under the old law, under which the suit must have been brought within twelve years from the time of the cause of action but under the present law it may be brought within twelve years

10. *Chunni v. Ashrafan*, 42 I.C. 192 (193); *Mahesh v. Manohar*, 33 I.C. 657=18 O.C. 369.

11. 7 C.L.R. 364 (P.C.).

12. *Rakahl Chandra Ghose v. Durgadas*, 1922 Cal. 557=26 C.W.N. 724 (731, 732).

13. (1882) 9 I.A. 99=5 All. 1 (P.C.).

from the time when the possession of the defendant or of some person through whom he claims became adverse to the plaintiff."

This case referred to Art. 145, Act IX of 1871 (now Art. 144) : and, is distinguishable from the case of the *Secretary of State v. Chelikani Rama Rao*,¹⁴ (discussed in notes under Art. 142, Limitation Act), where the plaintiff sought a declaration of title to property by adverse possession for the statutory period against the Crown, and the ordinary rule of *onus* resting in such cases upon the plaintiff was applied to the facts of that case. In *Innasimutu Udayan v. Upakarath Udayan*,¹⁵ a suit for the proprietary possession of land was defended on the ground of limitation, resting on the defendant's possession, displacing the plaintiff's case that her predecessor in title had possessed the land within 12 years before the suit. The defendant had been admittedly in possession for seven years before suit, and there was the additional evidence raising the inference that the same possession had continued for more than 12 years. It was held that the burden of rebutting this inference had not been discharged by evidence given by the plaintiff, while the evidence for the defendant had amply sustained the burden originally laid upon him to show his twelve years' possession. This case is by no means of an exceptional nature as considered by some writers. There was no allegation of possession and dispossession calling for the application of Art. 142, Limitation Act, and under Art. 144, the *onus* resting on the defendant was discharged on the basis of plaintiff's admission coupled with the additional evidence showing that the plea of adverse possession by defendant was well sustained.

2241. There are numerous decisions of various High Courts drawing a broad distinction between cases
Indian decisions. falling under Art. 142, and those covered by Art. 144 of the Limitation Act. Where the plaintiff claims possession by reason of dispossession or discontinuance of possession, alleging or implying possession within 12 years of the suit, the *onus* is upon him to show that his title is still subsisting. But, where the plaintiff stands upon his title, and has discharged the *initial onus* of establishing only his title, the burden is thrown on the defendant to dislodge that title by proving his adverse claim against the plaintiff, or his predecessors for over 12 years before suit. The defendant has to prove *when* his possession became adverse to plaintiff's proved original title, and that the defendant has acquired a title by adverse possession for the statutory period, before the institution of the suit.

14. (1916) 43 I.A. 192=39 Mad. 617=20 C.W.N. 1311 (P.C.); also see *Radhamoni Debi v. The Collector of Khulna*, (1903) 27 Cal. 943 (P.C.) (Alleged title by adverse possession for more than the period of limitation).

15. (1899) 23 Mad. 10 (P.C.).

2242. In *Parmanand Misr v. Sahib Ali*,¹⁶ the Allahabad High Court pointed out the plain and clear distinction as to the *onus* of proof between a case in which the plaintiff sues to obtain possession of land, and that which the defence to a suit for the possession of land is twelve years' adverse possession by the defendant.

"In each case it is for the plaintiff to plead his title, and if that title is put in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. In the second case, in which the defence is twelve years' adverse possession, the defendant whose title, if any, is twelve years' adverse possession, must plead and make out the title he alleges, and thus show that the title of the plaintiff which otherwise had been proved or admitted was lost."

It was held in *Inayet Husen v. Ali Husein*,¹⁷

"that in every suit for possession, the plaintiff must prove not only a legal title to possession, but a subsisting title not barred by the law of limitation. The effect of that law is not only to bar the remedy on the expiry of the prescribed period of limitation, but to extinguish the right. It is therefore for the plaintiff to show by some *prima facie* evidence that he has a subsisting title not extinguished by the operation of limitation before the defendant can be called upon to substantiate his plea of adverse possession".

But, this was dissented from in *Jai Chand v. Girwar Singh*,¹⁸ on the strength of the Privy Council decision in *Secretary of State v. Chelikani Rama Rao*,¹⁹ where the Privy Council observed that

"Nothing is better settled than that the *onus* of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition".

Where the title was shown to be with plaintiff, it was held that the defendant had to prove his adverse possession.²⁰ The same view was taken in *Ram Surat Singh v. Badri Narain Singh*,²¹ that in cases falling under Art. 144, the *onus* lies on the defendant to plead and prove that his possession became adverse and continued adverse for more than twelve years before the suit. In suits for possession of immovable property on the basis of title, the plaintiff on proof of his title is entitled to a decree, unless the defendant succeeds in esta-

16. (1889) 11 All. 438 (443).

17. (1897) 20 All. 182 (185); Relied on *Parmanand v. Sahibali*, 11 All. 432 and *Jafar Husain v. Mashuq Ali*, 14 All. 193; also see *Mazhar Husain v. Bihari Singh*, Followed 14 All. 193.

18. (1919) 52 I.C. 366=41 All. 669 (673)=17 A.L.J. 814.

19. 39 Mad. 617=35 I.C. 902=1916 P.C. 21=31 M.L.J. 324=20 C.W.N. 1311=43 I.A. 192 (P.C.).

20. *Shiv Prasad Singh v. Muncshwar Dube*, 1924 All. 924.

21. 1927 All. 799 (2)=50 All. 89.

blishing his adverse possession for a period of more than twelve years.²²

2243. The **Bombay High Court** takes the view that under Art. 144, it is not for the plaintiff to prove that he has been in possession within 12 years before suit, but it is for the defendant to show that he has held adversely to the plaintiff for 12 years.²³ In cases under Art. 144, the plaintiff may rest content with proof of title only in the first instance, and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than 12 years before suit.²⁴ Where plaintiff's ownership is admitted, but the defendant tenant alleges adverse possession, it is for him to prove when the alleged adverse possession commenced.²⁵

In *Vasudeo Atmaram v. Eknath Balkrishna*,²⁶ Heaton, J., referred to the general principle that any one suing in ejectment must prove possession within 12 years, as possession is commonly the effective assertion of title which is relied on. But it is not the only one. There is another which in some cases is equally good, and that is an assertion of title made in Court, and established by a decree. That is good against those who are party defendants to the suit; and if the same title is re-asserted and made good in a later suit against other opposing parties, it is good against them also and entitles to possession whether the title claimant has or has not been in possession within 12 years, unless the opponent can defeat title by adverse possession. The burden of proof of adverse possession lying on the defendant at the outset, was shifted on to plaintiff, where the defendant's admitted possession since many years was not in virtue of some title derived from plaintiff, but could only be regarded as that of trespassers.²⁷

Though S. 110 of the Evidence Act recognises a presumption that the person in possession also has a good title, there is no corresponding section saying that the person with the title should be pre-

22. *Kanhaiyalal v. Girwar*, 1929 All. 753=51 All. 1042; Relied on 39 Mad 617=1916 P.C. 21 and 41 All. 669=52 I.C. 366; also see *Ali Ham-mad v. Ghu Pathak*, 47 All. 389=1925 All. 454.

23. *Sayad Nyamutula v. Nana*, (1888) 13 Bom. 424.

24. *Faki Abdullah v. Babaji Gungaji*, (1890) 14 Bom. 458; also see *Shinto v. Janki*, (1892) 18 Bom. 51 (Adverse possession against mortgagee); *Hamanta Kolaji v. Makadev Kondaji*, (1893) 18 Bom. 513 (Adverse possession between co-sharers).

25. *Talshibhai Naranbhai v. Ranchhod Gobar*, (1902) 26 Bom. 442; also see *Swamirao Shriniwas v. Bhimabai Dadappa*, 62 I.C. 101=23 Bom. L.R. 1416=45 Bom. 1020.

26. (1910) 35 Bom. 79.

27. *Sambhu v. Nama*, (1911) 35 Bom. 438 (441).

sumed to be in possession.²⁸ This presumption can only come in under S. 114 of the Evidence Act: but in case of open land, if the plaintiff established his title over the property he can rely upon the presumption that possession went with the title in the absence of satisfactory evidence in rebuttal.²⁹

2244. In *Gopaul Chunder v. Nilmoney*,³⁰ Garth, C.J., distinguished the Privy Council case in *Karan Singh v. Bakar Ali Khan*,^{30-a} on the ground that the suit was not brought (under Art. 143 of the Act of 1871) to recover possession as upon a dispossession. The **Calcutta High Court** has held, following the Privy Council decisions, that in cases governed by Art. 144, Limitation Act, if the plaintiff succeeds in proving a clear title, the burden lies on the defendant to prove adverse possession for the statutory period and the possession to be adverse must have all the qualities of adequacy, continuity and exclusiveness.³¹

2245. It is well established that under Art. 144, Limitation Act, the suit must be brought within 12 years from the time when the possession of the defendant, or of some person through whom he claimed, became adverse to the plaintiff.³² Possession of a plaintiff proved till a certain date, through his tenants, must be presumed to have continued till dispossession, unless there is evidence to the contrary.³³ A person in possession of property must be deemed to be so in his own right, unless the presumption can be displaced by proving facts which are sufficient to rebut it.³⁴ In all cases where the plaintiff ostensibly comes under Art. 144, Limitation Act, basing his claim on his title, it is incumbent on the defendant to prove that he has acquired a clear proprietary title by twelve years' adverse possession.³⁵ The rule that the *onus* is upon plaintiffs to prove

28. *Kashinath Gyanoba v. Ganesh Sitaram*, 1923 Bom. 361=77 I.C. 506.

29. *Mahamedsaheb Ibrahimsaheb v. Tilakchand Abheerchand*, (1922) 1922 Bom. 243=24 Bom.L.R. 373=66 I.C. 764=46 Bom. 920.

30. (1884) 10 Cal. 374 (Dist. 5 All. 1=9 I.A. 99 P.C.).

30-a. 9 I.A. 99 (P.C.).

31. *Jobeda Khatun v. Tulsi Charan Das*, (1923) 77 I.C. 564=36 C.L.J. 472=1923 Cal. 82; Relied on 39 Mad. 617=20 C.W.N. 311=43 I.A. 192 (P.C.) and 44 Mad. 883=1922 P.C. 181 (P.C.); also see 41 All. 669=52 I.C. 366=17 A.L.J. 814; 62 I.C. 1=1921 Pat. 305 (F.B.).

32. *Butashah v. Sobha Singh*, 122 P.R. 1883; *Din Muhammad v. Mehr Baksh*, 30 P.R. 1902.

33. *Dullah v. Mt. Sardarani*, (1927) 100 I.C. 336=9 L.L.J. 9=28 P.L.R. 55=1927 Lah. 777.

34. *Mamman v. Kallu Mal*, (1928) 113 I.C. 145=1928 Lah. 959.

35. *Mt. Jano v. Narsingh Das*, (1929) 117 I.C. 803=1929 Lah. 549; Relied on *Kuthali Moothavar v. Peringati Kunharankutty*, 44 Mad. 883=66 I.C. 451=41 M.L.J. 650=1921 P.C. 181; also see *Mohammadyar v. Mohammadyar*, 1929 Lah. 596; Relied on 1916 P.C. 21=39 Mad. 617=43 I.A. 192 (P.C.).

their possession prior to the time when they were admittedly dispossessed applies only to the case of a plaintiff falling under Art. 142.³⁶

2246. The Madras High Court, relies upon the Bombay view for holding that where Art. 144 of the Limitation Act applies to a suit, the burden of proving adverse possession lies on the defendant.³⁷ Where the defendant pleaded adverse possession to a suit by plaintiff for possession, but admitted that his possession was originally permissive and was unable to show when it became adverse, it was held that the plaintiff's suit was not barred by time, and the *onus* lay on the defendant to show when his possession became adverse.³⁸ In a suit for possession where it was found that plaintiff had title, and that defendant was in possession within 12 years, and there was no evidence that any third person was in possession between the time when plaintiff ceased to be in possession and the time when the defendant came into possession, the plaintiff was presumed to have been in possession within 12 years, and to such a case the proper article applicable was Art. 144, and not Art. 142 of the Limitation Act.³⁹

2247. In a suit falling under Art. 144, the *onus* is upon the defendant to prove that his possession has been adverse for 12 years before the institution of the suit.⁴⁰ Where in a suit for possession the plaintiff has established his title, the *onus* is on the defendant to plead and prove adverse possession for the statutory period, under Art. 144, Limitation Act,⁴¹ and to show that he had got title at the time of action by adverse possession.⁴² In *Kameshwar Singh v. Faturi Missra*,⁴³ where it was admitted that the plaintiff had title to the lands; and that up till the time that the defendants went into pos-

36. *Daulumal v. Rawal Baksh*, 1930 Lah. 608=122 I.C. 81=31 P. L.R. 231.

37. *Ahima v. Kutti*, (1890) 14 Mad. 96; Relied on 13 Bom. 424 and 14 Bom. 458.

38. *Tha Ka Nataraja Aiyar v. Ki Subramania Aiyar*, (1909) 1 I.C. 806=5 M.L.T. 294.

39. *Mayyikaran v. Kalandikatti*, (1927) 99 I.C. 971=38 M.L.T. 137; Relied upon *Madan Mohan Singh v. Braj Biharilal*, 57 I.C. 717=5 P.L.J. 592=1 P.L.T. 505.

40. *Radhakanta Lal v. Bhagwat Prasad*, (1920) 55 I.C. 247=1 P. L.T. 192; cf. *Midnapore Zemindary Company v. Panday Sardar*, (1917) 41 I.C. 114=3 P.L.W. 143=2 P.L.J. 506 (*Onus* on plaintiff in cases falling under Art. 142); also see and cf. *Shiva Prasad Singh v. Hira Singh*, (1921) 62 I.C. 1=6 P.L.J. 478 (F.B.) (Suit for ejectment—Possession follows title where evidence of possession valueless on both sides).

41. *Dharichna Kuar v. Keshava Prasad*, (1926) 97 I.C. 135 (Pat.).

42. *Ram Prasad Ojha v. Bindeshwari Prasad*, 1932 Pat. 145=13 P.L.T. 121=11 Pat. 165.

43. 1934 Pat. 339=149 I.C. 453.

session and cultivated them they were *parti* and jungle lands; and the defendants laid no claim to anything but limited tenancy only as against the admitted proprietor, the Zemindar, it was held that the defendant must either show title to tenancy right by contract or by the fact that he has been in possession for the necessary period, and the *onus* was equally upon him to show the date upon which he came into possession, and his title began.

2248. In *Maung Tun U v. Maung Myat Tha Zan*,⁴⁴ the Lower Burma Chief Court held that if the case
Rangoon. fell under Art. 142, the plaintiff would have to show that he or his predecessor-in-title was in possession (joint or separate) within twelve years of the filing of the suit, but that if Art. 144 was the right article to apply, the burden of proving adverse possession for twelve years before the suit would fall upon the defendant. In a suit to which Art. 144 applies it is for the plaintiff in the first place to prove title, and if the plaintiff succeeds in proving title, the onus of proving adverse possession for twelve years lies upon the defendant.⁴⁵ The plaintiff has in a title suit for possession in the first place only to show that the defendant's occupation is permissive only and not adverse.⁴⁶ The rule laid down is that "If Art. 142 applies, the onus would be upon the plaintiff to prove that his suit is not time-barred. It is otherwise if the case falls within Art. 144."⁴⁷

2249. The Nagpur Judicial Commissioner's Court follows
Nagpur. the view held by other High Courts in holding that in cases falling under Art. 144 of the Limitation Act, it is not incumbent on the plaintiff to establish possession within twelve years of suit. He has to prove title and it then rests on the defendant to prove that he and those under whom he claims have been in possession for over twelve years before suit.⁴⁸

2250. Where the plaintiff bases his claim on title which is
Oudh. admitted by the defendant, the burden of proof is on the defendant to prove adverse possession under Art. 144, Limitation Act.⁴⁹ In a suit falling under

44. (1913) 21 I.C. 335=6 Bur.L.T. 188.

45. *Ma Nyein Me v. Ma May*, (1916) 32 I.C. 568 (L.B.).

46. *Maung Gyi v. U Shew Gyok*, 42 I.C. 890 (L.B.); Relied on 11 All. 438 (439); cf. *Muthia Chetty v. Seena V. Thevar*, 56 I.C. 951=12 Bur.L.T. 234 (*Onus* on plaintiff in a case under Art. 142, Limitation Act).

47. *Maung Sin v. Maung So Min*, 1931 Rang. 40=8 Rang. 556=129 I.C. 511; also see *Maung Aung Tun v. Maung San Nyun*, 105 I.C. 598=1928 Rang. 13.

48. *Sakharam v. Deoba*, (1922) 68 I.C. 320=1923 Nag. 2.

49. *Faqir Baksh Singh v. Prag Singh*, (1928) 108 I.C. 109=5 O.W.

this article, the initial *onus* is on the plaintiff to establish his title, and he is not under an obligation to prove his possession within twelve years of the suit. On the contrary, when the plaintiff's title has been proved or is admitted, the burden is on defendant to establish that he or the person through whom he claims has or have been in possession adverse to the plaintiff for over twelve years before the suit. The defendant must also prove when his possession became adverse.⁵⁰ Where in a suit for possession the plaintiff has established his title the onus is on the defendant to plead and prove adverse possession for the statutory period, under Art. 144, Limitation Act.¹ An admitted or proved title subsists all through, until complete adverse possession is established.² Thus, in cases falling under Art. 144, where the defence was one of title acquired by adverse possession for more than twelve years it is not necessary for the plaintiff to prove his possession within twelve years from the commencement of the suit.³

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
145.	Against a depositary or pawnee to recover moveable property deposited or pawned.	Thirty years.	The date of deposit or pawn.

SYNOPSIS.

- 2251. Corresponding provisions.
- 2252. **Scope and application.**
- 2252. Suits against a depositary or pawnee.
- 2253. Not affected by demand and refusal. Cf. Art. 49.
- 2254. **"Depositary" and "Deposit".**
 - (1) English Law.
 - (2) Roman Law.
 - (3) Meaning of the expression.
 - (4) Involuntary bailment.
- 2255. **Moveable property.**
 - (1) Property recoverable *in specie*.
 - (2) Deposit of money.
 - (3) Deposit of Government securities.

N. 121=1928 Oudh 246; Followed *Secretary of State v. Chellakani Rama Rao*, 39 Mad. 617=35 I.C. 902=43 I.A. 192=20 C.W.N. 1311 (P.C.); Relied on *Swamirao Shriniwas v. Bhuniabai Badappa*, 62 I.C. 101=23 Bom. L.R. 1416=45 Bom. 1020.

50. *Sukhdeo v. Mt. Ram Dulari*, (1926) 92 I.C. 825=1926 Oudh 313; also see *Yaqub Khan v. Sheo Dulary*, 1930 Oudh 310.

1. *Ahmadullah v. Bashir Ahmad*, (1926) 94 I.C. 855=1926 Oudh 313.

2. *Inderpal Singh v. Thakur Din Singh* (1924) 78 I.C. 895=1924 Oudh 266=27 O.C. 77=10 O.L.J. 646.

3. *Mt. Azim v. Md. Saadat Ali*, 1931 Oudh 177=8 O.W.N. 349; also see and cf. *Mt. Zahida Begam v. Mumtaz Ali Khan*, 1931 Oudh 382=134 I.C. 599=126 I.C. 703.

(4) Property not recoverable in specie.

(5) Not applicable to immoveable property.

2256. Illustrative cases.

2257. Starting point of limitation.

NOTES.

2251. CORRESPONDING PROVISIONS.—This article is same as Art. 145 of Sch. II, Act XV of 1877: and corresponds with Art. 147 of Sch. II, to Act IX of 1871. The third column of Art. 147, Act IX of 1871 ran as follows:—

“Unless where an acknowledgment of the title of the depositor or pawnor or of his right of redemption, has, before the expiration of the prescribed period, been made in writing, signed by the depositary, or pawnee, or some person claiming under him, and, in such case, the date of the acknowledgment.”

In view of S. 19 of the Act, the omission of these words in the Act XV of 1877, has made no material alteration in the law. Under Act XIV of 1859, similar provision was made in S. 1, cl. (15) of that Act.

Suit against a depositary or pawnee.

2252-56. SCOPE AND APPLICATION.—2252. This article is a specific article which contemplates a suit,

“against a depositary or pawnee to recover moveable property deposited or pawned”;

while Art. 49 applies to a suit *generally* “for other specific moveable property”, giving only a period of 3 years from date of wrongful possession.⁴

2253. The fact of the possession by the depositary after demand being wrongful does not make Art. 49 applicable.⁵ All actions for the recovery of a deposit of moveable property are, by the express words of Art. 145, comprised within it and no exception is

Not affected by demand and refusal. made as regards deposits where **demand and refusal** make the continuance of possession unlawful.⁶ Article 49 does not

Cf. Art. 49.

seem to deal with suits for recovery of property deposited with another, but covers suits in respect of property wrongfully taken or wrongfully detained. It does not apply to suits in respect of goods deposited strictly so

4. *Gangineni Kondiah v. Gottipati*, (1909) 33 Mad. 56; *Promotho Nath Mullick v. Prodymano Kumar Mullick*, (1922) 69 I.C. 900=26 C.W.N. 772=1921 Cal. 416.

5. *Gangineni Kondiah v. Gottipati*, 5 I.C. 1=33 Mad. 56=7 M.L.T. 282=20 M.L.J. 41; and *Promotho Nath v. Prodymano Kumar*, (1922) 69 I.C. 900 (906)=26 C.W.N. 772=1921 Cal. 416; also see *Ajneswar Karmakar v. Kailash Chandra Ghose*, 1929 Cal. 143=107 I.C. 473 (The mere fact of possession by the depositary after demand becoming wrongful does not take the case out of Art. 145).

6. *Promotho Nath v. Prodymano Kumar*, 69 I.C. 900 (906)=1921 Cal. 416.

called, for safe custody only, where on a demand being made for their return and refusal, those goods become wrongfully detained.⁷ Article 49 applies to the suit looked upon as one in Tort.⁸ But, the mere fact that a demand was made by the plaintiff for the return of the same property and there was a refusal on the part of the depositary does not make the possession of the latter unlawful within the meaning of Art. 49, and thereby attract the application of that article and reduce the limitation to one of three years from the date of refusal.⁹ In *Narmadabai v. Bhavani Shankar*,¹⁰ Sir Lawrence Jenkins, C.J., observed that

“it is argued that as there was a demand and refusal, Art. 145 ceased to be applicable. But, it is a general principle that if a man be entrusted with property for safe custody, he cannot better his position by wrongfully dealing with it.”

Thus, when goods are deposited, the article governing is Art. 145; and Art. 49 in no way affects the application of Art. 145 of the Limitation Act.¹¹ In any case, it may be observed that

“if there be two articles which may cover the case, the one, however, more general, and the other more particular or specific, as a principle of construction the more particular and specific article ought to be regarded as the one governing the case”.¹²

And Arts. 48 and 49 were deemed to be more general and Art. 145 more particular and specific for a case like this.¹³

2254. The term “depositary” was used by the Indian Law Commissioners to denote persons holding possession of moveable property originally delivered to them to be kept for the owner.¹⁴

There is no provision in the English Law corresponding to Art. 145,¹⁵ and the principle underlying certain English authorities,¹⁶ that the possession of the depositary for safe custody ought to be deemed to be the possession of the owner until an application and

7. *Kistappa Chetty v. Lakshmi Ammal*, (1923) 72 I.C. 842=44 M. L.J. 431=17 L.W. 467=1923 M.W.N. 284=32 M.L.T. 217=1923 Mad. 578.

8. *Kalyan Mal v. Kishan Chand*, (1919) 41 All. 643=17 A.L.J. 888=55 I.C. 45.

9. *Ma Shwe On v. Ma Saw*, (1929) 116 I.C. 468=6 Rang. 547=1928 Rang. 309.

10. 26 Bom. 430=4 Bom. L. R. 72; Folld. in *Gangineni v. Gottipati*, 5 I.C. 1=33 Mad. 56 and *Ma Shwe On v. Ma Saw*, 6 Rang. 547.

11. *Per Das, J.*, in *Ma Shwe On v. Ma Saw*, 116 I.C. 468=6 Rang. 547=1928 Rang. 309.

12. *Sharoop Das v. Joggeswer*, (1899) 26 Cal. 564 (567).

13. *Narmadabai v. Bhavanisankar*, (1902) 26 Bom. 430.

14. Rustomji, p. 861: citing the Report of 25th March, 1843; Shepherd's Limitation Act, p. 37.

15. *Gangineni v. Gottipati* (1909) 33 Mad. 56 (60).

16. *Wilkinson v. Verity*, (1871) L.R. 6 C.P. 206; *Miller v. Dell*, (1891) 1 Q.B. 468; *In re Tidd*, (1893) 3 Ch. 154 (156).

refusal or other denial of the right, cannot be the foundation on which Art. 145 of the Limitation Act rests. "We have to apply the law in India as we find it".¹⁷

The Indian Contract Act, I of 1872, passed by the Indian Legislature shortly after the Limitation Act of 1871 gives no definition of "*deposit*" though it is one of the species of bailments dealt with in Chapter IX of the Act. A deposit, according to English Law, is a gratuitous bailment. Section 162 of the Indian Contract Act refers to the termination of a gratuitous bailment by the death of the bailor or bailee. Section 158 refers to bailment for safe custody where the bailee is to receive no remuneration. But neither of these sections has anything to say as to the time at which the bailee is bound to return the thing bailed. Section 159, however, goes on to provide that the lender of a thing *for use* may at any time require its return if the loan was gratuitous even though he lent it for a specific time or purpose.¹⁸

(ii) Roman Law.

(2) In Sohm's Institutes of Roman Law, it is said

"*Depositum* arises when *A* delivers a moveable thing to *B* for the purpose of gratuitous safe custody":

And, again that

"the depository is not interested in the contract. He derives no benefit from the transaction . . . The depositor on the other hand is interested in the transaction; it is for his benefit that the contract exists".¹⁹

In Sandar's Justinian, we have the following:

"Here (in deposit) the benefit is entirely on the side of the person who commits the thing to the care of one who receives it gratuitously. . . . He has, however, no right to make use of the thing."

It is further pointed out that,

"as it is deposited for the benefit of the person depositing it, that person can reclaim it *when he pleases* and need not like the *commodans* wait for the expiration of the time agreed on".²⁰

Domat, in his Civil Law in Ss. 691, 692 and 697 defines a deposit, and states it as the obligation of the depository even when a term has been agreed upon to return it when demanded. He says:—

"A deposit is a covenant by which one person gives to another something to keep which he is to restore whenever the depositor shall think fit to call for it. The deposit ought to be gratuitous for otherwise it would be a hiring and the letting to hire where the depository would let out his care . . . Since it is the nature of the deposit that the things are not deposited for the behoof of the depository, as things lent are for the use of the borrower, but for the bare advantage of the depositor, he may take back the thing

17. (1909) 33 Mad. 56 (61).

18. *Gangineni Kondiah v. Gottipati*, (1909) 33 Mad. 56 (59, 60)=5 I.C. 1.

19. *Ibid.*, 33 Mad. 56 (59)=5 I.C. 1; cf. *Kistappa v. Lakshmi*, (1923) 44 M.L.J. 431=1923 Mad. 578=72 I.C. 842.

20. *Ibid.*, 33 Mad. 56 (59)=5 I.C. 1.

deposited *whenever he pleases even* although the time of restitution were regulated by the contract".²¹

(3) Schwabbe, C.J., has observed in *Kishtappa Chetty v. Lakshmi Ammal*,²² that there are obiter dicta

(iii) Meaning of the expression. in some cases to the effect that the word "*depositum*" there must be confined to the strict meaning of the term in Roman Law.²³

"There are six kinds of bailments referred to in Roman Law and set out in detail in the famous judgment of Holt, C.J., in *Coggs v. Bernard*.²⁴ But, the Indian Limitation Act was meant to provide a simple guide to cover every possible case that might come before the Courts in India,"

He adds,

"I cannot believe that it was the intention of the framers of the statute that the various District Munsifs throughout India or other subordinate Judges who have to administer the law should study either *Coggs v. Bernard* or the Roman Law in order to ascertain what was the true meaning of Art. 145".

He thinks

"they meant to use the simple and plain language, and in using the word 'depository', they meant simply to say that, where one man's property was handed by that man to another he became a depository of it, unless of course, there was something, in the term of the handing over, which would prevent his being treated as a person with whom it was deposited at all".²⁵

(4) A deposit is one of the species of bailments, and bailments are of two kinds, voluntary and involuntary. (iv) Involuntary bailment—Legal re-presentative. Where the depository dies, and the deposit passes into the hands of his widow or son the latter becomes an involuntary bailee, and a suit to recover the deposit from such involuntary bailee is governed by Art. 145.²⁶ A suit against a defendant for recovery of articles deposited with his deceased son for safe custody and alleged to be in defendant's possession is governed by Art. 145 and not Art. 48 of Sch. I to the Limitation Act.²⁷

2255. MOVEABLE PROPERTY.—(1) It has been generally considered that Art. 145 applies to a deposit which is recoverable in specie. This view was held in an early Calcutta decision

21. *Gangineni v. Gottipati*, (1909) 33 Mad. 56 (59)=5 I.C. 1.

22. (1923) 72 I.C. 842=1923 Mad. 578=44 M.L.J. 431.

23. *Narayanasamy Thevar v. Aiyasamy Iyengar*, 18 I.C. 921=24 M.L.J. 184 and *Gopalasami Iyer v. Subramania Sastri*, 12 I.C. 207=35 Mad. 636=22 M.L.J. 152.

24. 1 Sm. L. C. (11th Edn.), 173 (191); 2 Ld. Raym. 909=92 E.R. 107; Reld. in 37 Mad. 175.

25. *Kistappa Chetty v. Lakshmi Ammal*, (1923) 72 I.C. 842=1923 Mad. 578=44 M.L.J. 431; Folld. in *Bibhuti Bhushan Datta v. Anadi Nath Dutt*, 61 Cal. 119=150 I.C. 398=58 C.L.J. 502=1934 Cal. 87.

26. *Promothnath Mullick v. Prodymno Kumar Mullick*, 1921 Cal. 416=26 C.W.N. 772=69 I.C. 900.

27. *Krishnaswamy Iyengar v. Gopala Chariar*, (1924) 84 I.C. 1026=20 L.W. 758=1925 Mad. 185=1925 M.W.N. 143.

under the corresponding Art. 147 of Act IX of 1871. See *Radhanath Bose v. Bama Churn Mookerjee*.²⁸ The meaning of the term "deposit," as used in Art. 60, and in Arts. 133 and 145, has been considered in *Ishur Chunder v. Jibun Kumari*,²⁹ where it is observed that

"in the latter two instances, which have to do with moveable property, it is clear from the context that the deposit meant is a deposit of goods to be returned in specie, and that is in accordance with the old use of 'deposition', (*depositum*) with which all lawyers are familiar."

This view was followed in *Secretary of State v. Fazal Ali*.³⁰ The case of *Upendro Lall Mukhopadhyaya v. The Collector*,³¹ is not an authority for the contrary proposition; although Field and O'Kineally, JJ., felt inclined to apply Art. 145 to a case where the suit was to recover a deposit of money made by the plaintiff as security for the discharge of his duties as manager of an estate under the Court of Wards; but, it was unnecessary to decide this question in the affirmative, as Art. 120 was applied in the absence of a specific rule which would reduce the period of limitation to less than 6 years. This Art. 120 was applied again where money was deposited with a lessor as security to ensure payment of rent payable under a contract of lease.³²

(2) The above view was not accepted as correct by the **Madras High Court**. In *Govindasami Pillai v. The Municipal Council, Kumbakonam*,³³

Dposit of money. Art. 97 was applied to suit for recovery of money deposited under lease subsequently cancelled. It was held that the thirty years' period prescribed by **Art. 145, Limitation Act, relates to goods and not money**. Similarly, in *Balakrishnudu v. Narayanasawmy*,³⁴ it was held that Art. 145 of the Limitation Act is not applicable to deposits of money: and the term "deposit" in that article means only deposit of goods to be returned in species when wanted. Wallis, J., seems to confine the operation of the article only to cases known in Roman Law as *depositum*, and would not even apply it to cases of *commoditum*. The same view has been taken in *Gangi-*

28. (1876) 25 W.R. 415.

29. (1888) 16 Cal. 25 (29) (Art. 60 applied to deposit of money).

30. (1891) 18 Cal. 234 (241).

31. (1885) 12 Cal. 113 (Art. 120 applied to suit to recover security deposit).

32. *Sakhawat Ali v. Baldeo Sahai*, (1910) 13 O.C. 286=8 I.C. 370; Refd. to 12 Cal. 113.

33. (1917) 42 I.C. 519=33 M.L.J. 577=6 L.W. 401=1917 M.W.N. 585=22 I.C. 60.

34. (1912) 37 Mad. 175; Refd. to *Coggs v. Barnard*, (1703) 1 Sm. L. C. 173; s.c. 2 Ray. 809; also reld. on *Ishur Chunder v. Jibun*, (1889)

neni v. Gottipatti.^{34-a} Similarly, in *Ganesh Lal v. Churni Lal*,³⁵ the Punjab Chief Court held that the period of limitation for recovery of cash deposits would not exceed six years from the date of the loan or deposit. But, in *Gobind Prasad v. Chairman of Patna Municipality*,³⁶ the term "moveable property" was held to include money and not *restricted* in its application to cases where property is recoverable in specie. According to Mookerjee, J., the term "deposit" in Art. 145 has a wider meaning than the ordinary implication of deposit of specific property returnable in specie³⁷; and Holmwood, J., considered that a return of a deposit made in current coin is a return in specie, that term having always been recognised as meaning when applied to money, current coin of the realm as opposed to bullion. In *Nandlal Bose v. Asutosh Ghose*,³⁸ Walmsley, J., was of opinion that Art. 145, Limitation Act, applies to a suit to recover money deposited by the plaintiff as security for his appointment. But, in *Jasoda Bibi v. Parmanand*,³⁹ the Allahabad High Court held that Art. 145 is inapplicable to a claim in which it was never intended that the specific coins deposited should be returned: and, the same view was taken in *Kalyan Mal v. Kishen Chand*.⁴⁰ Also see *Dalipa v. Labhu Ram*,⁴¹ where it was held, that Art. 145 does not apply to a deposit of money, except in the case of coins which are ear-marked and where it is the intention of the parties that the identical shall be returned to the depositor.

(3) In *Kristo Kamini Dassi v. Administrator-General of Bengal*,⁴² Sale, J., applied Art. 145 to a suit for recovery of Government securities, or their equivalent in money, deposited by plaintiff's predecessor, observing that

16 Cal. 25 and *Perundevitayar v. Nammalwar*, (1895) 18 Mad. 390=5 M.L.J. 203.

34-a. (1909) 33 Mad. 56 (59).

35. 74 P.R. 1882.

36. (1907) 6 C.L.J. 535.

37. *Ibid.*; Reld. on *Asghar Ali Khan v. Khurshed Ali Khan*, (1901) 28 I.A. 227 and *Jagjivan v. Gulam Jilani*, (1883) 8 Bom. 17; also see *Administrator-General v. Kristo Kamini*, (1904) 31 Cal. 519=8 C.W.N. 500.

38. (1920) 55 I.C. 515 (Cal.); Reld. on 6 C.L.J. 535; cited 12 Cal. 113.

39. (1894) 16 All. 256=1894 A.W.N. 72.

40. (1919) 41 All. 643=17 A.L.J. 888=55 I.C. 45.

41. (1918) 47 I.C. 592=4 P.R. 1919 (*Per Rattigan, C.J.*); also see *Dorabji Jehangir v. Muncherji B. Panthaki*, (1894) 19 Bom. 353 and s.c. on appeal 19 Bom. 775 (Art. 60 applied to deposit of money).

42. (1903) 7 C.W.N. 476; also see *Bibuthi Bhushan v. Anadinath*, 1934 Cal. 87=61 Cal. 119.

"it seems immaterial whether it be regarded that the transaction was one of deposit or whether it can be described as a loan of the Government securities; in either case it seems to me that the article applicable would be Art. 145".

This decision was upheld on appeal, see *Administrator-General v. Kristo Kamini Dasse*.⁴³ Maclean, C.J., observed that the subject-matter of the transaction was *not cash*, but Government notes and obviously moveable property and the depositary was bound to return them on being required by the depositor to do so. Further, that though the object of the transaction was to enable the depositary to use the notes for raising or obtaining funds wherewith to pay the purchase-money of the house, the transaction could not be regarded as a loan, or other than a deposit under Art. 145, because if the depositary pledged or sold the notes, he was bound in one case to redeem them, and in the other to replace them, so that the depositor was entitled, not to the return of the mere money value of the notes, but to the return of the notes themselves, on which the depositary was to draw interest and pay it to the depositor. Stevens, J., agreed with this view. But, Hill, J., held to the contrary, observing that

"an essential characteristic of a deposit properly so-called is that the thing deposited *should not be used* by the depositee, and his liability is to *return in specie* the very thing deposited, when his right to retain it has determined, the general property in the subject-matter of deposit remaining meanwhile in the depositor".

He was of opinion, with reference to the facts of the case, that

"the transaction amounted to what is known in law as a *loan for use*" "and it fell under that particular species of gratuitous bailments, to which the term *mutuum* has been applied and of which the distinguishing characteristics are that the property in the subject of the bailment passes to the borrower, and that he satisfies the obligation cast upon him by the contract, if he restores, not the actual thing lent, but some other thing of the same kind."

(4) In *Gangahari Chakrabarti v. Nabin Chandra Banikya*,⁴⁴ **Deposit of gold jewellery — Property not recoverable in specie.** *Sir Asutosh Mookerjee and Newbould, JJ.*, held that the limitation of thirty years from the date of deposit under Art. 145, Limitation Act is applicable to a suit against a depositary to recover moveable property even when the property is not recoverable in specie. In this case, the plaintiff had made over to a goldsmith ornaments to be melted and made into new ornaments, without fixing the time within which the work was

43. (1904) 31 Cal. 519=8 C.W.N. 500; Folld. in *Gangahari Chakrabarti v. Nabin Chandra Banikya*, (1916) 34 I.C. 959=20 C.W.N. 232=23 C.L.J. 145; also see *Ajneswar Karmakar v. Kailash Chandra Ghose*, 1929 Cal. 143=107 I.C. 473.

44. (1916) 34 I.C. 959=20 C.W.N. 232=23 C.L.J. 145; Folld. 7 C.W.N. 476 and 31 Cal. 519=8 C.W.N. 500; also see *Ajneswar Karmakar v. Kailash Chandra Ghose*, 1929 Cal. 143=107 I.C. 473.

finished, and failing to get the ornaments on repeated demands, instituted a suit for the return of the gold, or its price. It was held that Art. 145 governed the suit, but that in any case Art. 49 or 115 applied. In *Gurbaksh Singh v. Khairati Ram*,⁴⁵ the **Lahore High Court** (Broadway and Currie, JJ.) seems to have applied Art. 145 to the case not only of *depositum*, but *commoditum* of the Roman Law. In this case certain jewellery was deposited with a friend for the purpose of being used in a wedding, and thereafter returned when depositor asked for it. The transaction was held to be a deposit, and not a loan. This conflicts with the view taken by the **Oudh Chief Court** (Srivastava, J.) in *Choturgun v. Shahzady*.⁴⁶ Where the plaintiff sued for refund of certain gold and silver kept in the custody of the defendant or lieu of the price thereof, alleging that he handed over some tolas of gold, also some silver ornaments to the defendants for making ornaments but the defendant never made the ornaments and refused to return the gold and silver, it was held that Art. 145 applied, even when that property is not recovered in species. Where the plaintiff's mother deposited ornaments, cloths and money with defendant for safe custody, and on demanding their return she was refused, and after her death, plaintiff her minor son sued to recover the property or its value, it was held that Art. 145 applied to the suit so far as it concerned the deposited ornaments. The **Bombay High Court** has thus confined the operation of the article to deposits other than money.⁴⁷

(5) This article is restricted to "moveable property", and has no application to suits dealing with the rights to officiate at ceremonies, which have been held to be of the nature of immovable property.⁴⁸

Not applicable to immovable property.

(6) This article is not applicable when a deposit creates an *express* trust, such as would vest the property for a specific purpose within the meaning of S. 10 of the Limitation Act.⁴⁹

45. 1930 Lah. 913=129 I.C. 199=31 P.L.R. 907.

46. 1930 Oudh 395=7 O.W.N. 769=126 I.C. 682=6 Luck. 80.

47. *Narmadabai v. Bhavani Sankar*, (1902) 26 Bom. 430; also see and cf. *Kalyan Mal v. Kishan Chand*, (1919) 41 All. 643 (Suit for return of gold mohurs, with some pictures and manuscripts: *Held*, Art. 60 applied to former suit and Art. 145 to latter claim).

48. (1867) 4 Bom.H.C. A.C.J. 155; also see *Bali Panda v. Jadumoni*, (1910) 38 Cal. 284=15 C.W.N. 36 and cf. *Raghu Pandey v. Vasoy*, 10 Cal. 73 (Mortgage of right to officiate at funeral ceremonies).

49. See notes under S. 10, Limitation Act; also *Burdick v. Garrick*, L.R. (1870) 5 Ch. 240; cf. *Administrator-General v. Kristo Kamini Dass*, (1904) 31 Cal. 519=8 C.W.N. 500.

2256. ILLUSTRATIVE CASES.—

(1) A suit for the redemption of a chattel, falling under Cl. (X) of S. 3 of the Dekkan Agriculturists' Relief Act (XVII of 1879), is covered by Art. 145 of the Limitation Act, which describes a suit against a pawnee to recover moveable property pawned.⁵⁰ The word "mortgaged" in Cl. (2) of S. 3 applies only to immoveable property.⁵⁰

(2) The right of a Hindu to *birt*, or to officiate at funeral ceremonies is not moveable property.¹

(3) Where the plaintiff handed over a jewel to the defendant to procure a loan for the plaintiff, and the defendant got back the jewel after the plaintiff had paid off the loan, but refused to return the same to the plaintiff on his demand it was held that Art. 49 and not Art. 145 applied to the suit, as the plaint did not allege that there was an agreement that the jewel should remain in deposit with the defendant after the repayment of the loan.²

(4) A suit for recovery of camels made over to defendant for grazing purposes, or for their value, was held to fall under S. 1, Cl. (15), Act XIV of 1859; but, it was observed that the receiver might be regarded as a depositary and thirty years would be the limit to an action against a depositary.³

(5) Where *A* instituted a suit to recover from the Secretary of State for India in Council the surplus sale proceeds of certain taluks sold for arrears of Government revenue, and which were in the hands of the Collector, it was held that the Collector was not a depositary of the money within the meaning of Art. 145 of the Limitation Act.⁴

(6) A suit by *thakurs* (Deities) themselves for removing themselves from the custody of the defendants to the custody of the plaintiffs other than themselves is not a suit for moveable property, within Art. 145; and the case naturally came under Art. 120, Limitation Act.⁵

(7) A suit against a *sapurddar* or temporary officer of the Court in charge of attached property, for the return of the property by the successful objecting owner of the property falls under Art. 145, Limitation Act.⁶

2257. STARTING POINT OF LIMITATION.—Where moveable property is deposited and the depositary on demand by the depositor refuses to return the thing deposited, the period of limitation applicable to a suit to recover property is that prescribed

50. *Kashiram Mulchand v. Hiranand Suratram*, (1890) 15 Bom. 30 (32); also see *Ramaswami v. Palaniappa*, 122 I.C. 37=30 L.W. 898; and *Nga Lu Gale v. Nga Po Jhan*, (1914) 1 L.W. 695=24 I.C. 310 (P.C.) (Mortgage of oil-well).

1. (1867) 4 Bom.H.C., A.C.J. 155.

2. *Gopalsami Ayyar v. Subramania Shastri*, (1911) 35 Mad. 636, s.c. 1911 M.W.N. 190=10 M.L.T. 572; Followed in *Mt. Laddo Begam v. Jamal-ud-din*, (1919) 42 All. 45=17 A.L.J. 907; cf. *Kishtappa Chetty v. Lakshmi Ammal*, (1923) 72 I.C. 842=1923 Mad. 578=44 M.L.J. 431.

3. *Gyanchand v. Muhamda*, 23 P.R. 1872.

4. *Secretary of State v. Fazal Ali*, (1891) 18 Cal. 234 [O.R. in *Secretary of State v. Guru Proshad Dhur*, (1892) 20 Cal. 51 (F.B.) (S. 10, or Art. 120 applied).]

5. (1910) 38 Cal. 284=15 C.W.N. 36.

6. *Lakshmichand v. Dulichand*, (1923) 75 I.C. 787=1924 Nag. 12.

in Art. 145 of the Limitation Act. According to the nature of deposit as a gratuitous bailment, a depositor may take back the thing deposited *whenever* he pleases even although the time of restitution was regulated by the contract.⁷ In *Seeti Kutti v. Kunhi Pathuma*,⁸ Srinivasa Ayyangar, J., observed

“that though under Cl. (15) of S. 1 of Act XIV of 1859 the beginning of the period of limitation was the date of the transaction in suits to recover moveable and immoveable property alike, irrespective of the time fixed by the contract for such recovery, and though the same provision was re-enacted in 1871, in the Act of 1877, the starting point was altered so as to coincide with the date of the accrual of the cause of action as regards suits to redeem mortgages of immoveable property”.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
146.	Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged.	Thirty years.	When any part of the principal or interest was last paid on account of the mortgage-debt.

SYNOPSIS.

2258. Corresponding provisions.

2259. Scope and application.

(i) cf. Art. 135.

(ii) not applicable to cases of non-payment.

(iii) effect of part-payment.

NOTES.

2258. CORRESPONDING PROVISIONS.—This article is the same as Art. 146 of Act XV of 1877; and, it corresponds to Art. 149 of Sch. II of Act IX of 1871, where the period of limitation was sixty years. Under S. 6 of Act XIV of 1859, the limitation prescribed for such suits was a period of twelve years. (*Vide* cl. 12 of S. 1.)

2259. SCOPE AND APPLICATION.—(1) *See* Art. 135 for similar suits in mofussil Courts. A suit against the mortgagor, or *anybody* else is covered by Art. 135⁹; while Art. 136 expressly

7. *Gangineni v. Gothipati*, (1909) 33 Mad. 56 (59).

8. (1915) 40 Mad. 1040 (F.B.) at p. 1063; cf. *Luchmee Bux v. Runjeet Ram*, (1873) 20 W.R. 375 (376).

9. *Shurnomoyee v. Srinath Das*, (1885) 12 Cal. 614 (620) (Affirmed in 16 Cal. 639 (P.C.)).

refers to suits by mortgagee against the mortgagor only. The present article applies to suits against mortgagors, and their representatives.¹⁰

(2) The third column mentioning the date of payment of any part of the principal or interest as the starting point indicates that this article can have no application where no payment of principal or interest has been made by the mortgagor. Under the corresponding Art. 149 of Act IX of 1871, it was held in *Ram Chunder Ghosaul v. Juggutmohini Dabee*,¹¹ that Art. 149 of Act IX of 1871, only applies to cases in which some part of the principal or interest of the mortgage-debt has been paid. Cases of non-payment would be covered by Art. 144 of the Limitation Act. The 28th section of Limitation Act extends the doctrine that twelve years' adverse possession of land not only bars the remedy of the rightful owner, but extinguishes his right to property other than land; but Garth, C.J., queried whether the principle would apply to debts.

(3) Unlike S. 20 of the Limitation Act, this article does not require that the part-payment to be operative is to be made by any particular person, and has to be recorded in any particular manner. But, a payment by stranger would not, therefore, be effective as giving a start to the limitation under this article. The principle to be deduced from the case of *Maria Chinnery v. Eyre Evans*,¹² was applied in *Krishna Chandra Saha v. Bhairab Chandra*,¹³

"that a mortgagee cannot, by the acts of the parties entitled only to the equity of redemption, be deprived of his right to resort to any estate comprised in his mortgage so long as he has not released or given it up and so long as that mortgage is legally kept alive".

This was followed in *Domilal Sahu v. Roshan Dobay*,¹⁴ where a payment of part of the principal was made by the mortgagor, who was then the debtor. It was held that the words of S. 20 are general and plain, and there is nothing in the section to indicate that the extension is only to operate against the person making the payment. Section 20 does not say that a payment under the section saves limitation only against the person making the payment.¹⁵ In *Sarada Charan Chakravarti v. Durgaram De Sinha*,¹⁶ the manager

10. *Brojonath v. Khelut Chunder*, (1871) 16 W.R. P.C. 33=14 M.I. A. 144.

11. (1878) 4 Cal. 283; compare 3 Bom. 312 (332) (The statement contained in 3rd column is very awkward and defective).

12. (1864) 11 H.L.C. 115.

13. (1905) 32 Cal. 1077 (1081).

14. (1906) 33 Cal. 1278.

15. *Sarada Charan Chakravarti v. Durgaram De Sinha*, (1910) 37 Cal. 461 (463).

16. *Ibid.*

of a Hindu family was held to have the same authority to acknowledge a debt as to borrow for family necessity, and the sub-section of S. 21, Limitation Act now expressly mentions a manager and a lawful guardian as "duly authorised agent" within the meaning of S. 20, Limitation Act. The third column of Art. 146, is not in any way affected or controlled by S. 20, Limitation Act, that section being altogether inapplicable to a suit for possession. A part payment of the principal would be sufficient for the purposes of Art. 146, even though it does not appear in the handwriting of the payer.¹⁷

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
146-A.	By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years.	The date of the dispossession or discontinuance.

SYNOPSIS.

2260. Corresponding provisions.
 2261. **Scope and application.**
 (1) Suit by or on behalf of local authority.
 2262. (2) Suit for possession of a public street or road.
 2263. (3) The operation of S. 28 upon Art. 146-A.
 2264. *Illustrative cases.*

NOTES.

2260. CORRESPONDING PROVISION.—This article was first enacted in 1900, by Act XI of 1900. There was no corresponding provision in the Acts of 1871 or 1877.

2261. SCOPE AND APPLICATION.—(1) This article only applies to suits by or on behalf of any local authority.¹⁸ Consequently, it was not applied to a suit for ejectment from land recorded as the thoroughfare or shamilat.¹⁹ Again, this article makes a special provision for a particular class of suits by local authorities. The 30 years' limitation is applicable only to suits by local authority to recover public street or road. Any other suit for possession must be governed by the ordinary rule of 12 years under Art. 144, Limitation Act, and if that period has expired, then the right of the Municipality to other immoveable property becomes

17. Rustomji, p. 865.

18. *Achhar Singh v. Badhawa Singh*, 124 P.R. 1912=15 I.C. 285.

19. *Ibid.*

extinguished under S. 28 of the Limitation Act.²⁰ Where a person has been in possession of certain land adversely to the Municipal Committee for over the statutory period and has acquired a title to the land by prescription, this would affect the powers of the Municipal Committee to remove the encroachments on it under S. 168 of the District Municipalities Act, Madras Act IV of 1884, as the site ceases to be a street.²¹ This view is to be distinguished from the view taken in *Basaveswaraswami v. Bellary Municipal Council*,²² where it was observed that the acquisition of title by adverse possession and the loss of title in the Municipality has nothing to do with the Municipality's power under the statute to remove encroachments. In *Dakore Town Municipality v. Travedi Anupram*,²³ it was observed that the Municipality was the creature of the statute with duties *inter alia* to preserve the passage along public streets. It mattered not for the Municipality whether the encroachment had been in existence for 12 years or more. The only question is whether the Municipality could justify their action with reference to their statutory powers under the District Municipal Act (Bombay Act III of 1901, Ss. 113 and 122 of the Act.) Where statutory powers are conferred, it cannot be the intention of the legislature that those powers should be nullified by the application of Art. 146-A, Limitation Act.²⁴ In *Tayaballi v. Dohad Municipality*,²⁵ the earlier view taken in *Abaji Ragho v. Jalgaon Municipality*,²⁶ seems to have been doubted whether the effect of Art. 146-A read with S. 29, Limitation Act, was to deprive a Municipality of its powers to remove encroachments or to carry out the duties imposed upon it by the legislature. The Sind Judicial Commissioner's Court and the Lahore High Court dissent from the Bombay view.

2262. (2) The words "Public Street or Road" are defined in this Act, and the definition of these words **Public street or road.** would have to be taken as given in the particular Municipal Acts. In order to establish that a road is a public road, it is sufficient if acts of user by the public are shown to have been acquiesced in by the owner of the land over which the

20. *Karachi Municipality v. Shamoo Ladha*, (1915) 30 I.C. 13 (16) (Suit concerning a corner space adjoining a public street).

21. *The Chairman v. Subba Pandither*, (1913) 20 I.C. 956=38 Mad. 456.

22. 17 I.C. 158=23 M.L.J. 479=1912 M.W.N. 1080; also see *Durlabji Hansraj v. Municipal Corporation, Karachi*, 159 I.C. 247 (Sind).

23. (1913) 38 Bom. 15 (17).

24. *Durlabji Hansraj v. Municipal Corporation, Karachi*, (1935) 159 I.C. 247 (Sind).

25. 22 Bom. L. R. 951=58 I.C. 326=1920 Bom. 9.

26. 23 Bom. L. R. 1028=64 I.C. 202=1922 Bom. 111=46 Bom. 335; also see *The Municipal Commissioner, Amritsar v. Mt. Gujri*, (1935) 159 I.C. 639 (Lah.).

road passes, and that those acts are of such a character as to warrant the inference that the owner intended to make over to the public the right to use as a public highway.²⁷ The expression "Road" or "Highway" is not to be construed narrowly, as Art. 146-A is intended to safeguard the interest of public bodies which are not expected to be as vigilant over their rights as private individuals.²⁸ "Road" in that article includes the portion which is used as road as also the lands kept on two sides as part of the road for the purposes of the Road.²⁹ In England, the right of the public to the use of land, as a highway, is not regarded as in the nature of property or proprietary right,

"but in passing the Metropolis Local Management Act, 1855, the Legislature considered that, in order to enable local bodies and authorities to execute their functions properly in regard to the management of highways it was necessary to give to them some further powers and greater rights than those which had been originally possessed, under the General Highways Act, 1835 (5 & 6 Will. IV, c. 50) by the surveyor of highways, and the object was carried out by giving to them over and above the easement of passage which the public had and which they might be able to enforce as representing the public and over and above the rights of control and management to which they would succeed as invested with the functions of the old surveyor of highways, some right of property in the soil, or a portion of the soil of the street."³⁰

The same course was also adopted by the Indian Legislature. It has been held that the vesting of roads in a Municipal Corporation (by Bengal Act V of 1876, S. 32), did not pass to the Municipality the soil beneath the roads.³¹ The Bengal Act III of 1864, S. 10, does not deprive any person of any right of private property that he may have in land used as public road and it does not vest the sub-soil of the land in the Municipality.³² The decision of the **Allahabad High Court** in *Nihal Chand v. Azmat Ali Khan*,³³ proceeds on the same view as to the effect of S. 38 of the N.-W.P. and Oudh Municipalities Act XV of 1873. The decision of the **Madras High Court**, in *Municipal Commissioners v. Sarangapani Muda-*

27. *Anderson, J. v. Juggadumba Dabi*, (1880) 6 C.L.R. 282.

28. *Anukul Chandra Chakravarti v. Chairman of Dacca Dt. Board*, 1928 Cal. 485=32 C.W.N. 396=113 I.C. 24.

29. *Ibid.*, 1928 Cal. 485; *Reld. on Rex v. Robert Wright*, (1832) 3 B. & A. 681 and *Turner v. Ringwood Highway Board*, (1870) 9 Eq. Cas. 418; also see *Karachi Municipality v. Shamoo Ladha*, (1914) 30 I.C. 13 (Road includes such adjacent land as might be necessary to make a public thoroughfare).

30. *Per Thesiger L.J.*, in *Rolls v. Vestry of St. George*, L. R. 14 Ch. D. 785 (801), cited in *Sundaram Ayyar v. The Municipal Council*, (1901) 25 Mad. 635 (639).

31. *Chairman of Naihati Municipality v. Kishori Lal Goswami*, 13 Cal. 171.

32. *Madhu Sudhun Kundu v. Promoda Nath Roy*, 20 Cal. 732.

33. 7 All. 362.

liar,³⁴ is not reconcilable with the course of decisions of other High Courts, and was disapproved in *Sundaram Ayyar v. The Municipal Council of Madura*.³⁵ Article 146-A introduced by Act XI of 1900, cannot be reasonably restricted to streets or roads formed by the Municipality on lands belonging to or acquired by it in proprietary right.³⁶

2263. (3) "The operation of S. 28 of the Limitation Act upon this new article will be to extinguish the right of high-

Operation of S. 28, way on the expiration of thirty years from the date upon the article. of dispossession of the municipality by encroach-

ment and thus free the land from the burden of highway, if the person encroaching upon the highway be the owner of the land. If the owner of the land on which the highway exists, be a third party, an encroachment of a permanent character on the public highway will also, as a general rule, operate as occupation of the soil and dispossession of the owner of the soil equally with the municipality, and his ownership will be extinguished in favour of the trespasser at the expiration of the ordinary period of limitation, viz., twelve years, and at the expiration of thirty years the ownership thus acquired by the wrongdoer will be freed from the burden of highway. But if the highway has been dedicated to the public by the Crown, the right of the Crown as owner of the land can be extinguished only at the expiration of sixty years' adverse possession or occupation by the trespasser."³⁷

Bhashyam Ayyangar, J., has suggested in *Madathapu Ramaya v. Secretary of State*, that it is desirable to raise the period of 30 years in Art. 146-A to 60 years.³⁸ Following the above view, it has been held in *Basaweswaraswami v. The Bellary Municipal Council*,³⁹ that the right of a Municipal Council to the street, which must be taken to include the drain, was vested in the Municipality for the purposes for which the Council was constituted. Their right was not a mere right of easement, but was a special kind of property in the site previously unknown to the law but created by statute.

"Although it is not open to the municipality to give up the rights of the public or to affect the right of way possessed by the public by any act of their own, that would not affect the capacity of a person in hostile possession to acquire rights which would affect the public."⁴⁰ . . . "It must be taken to be now well established that although the soil may be in one person, another person may be the owner of a building above the soil, and that the right to occupy a portion of space above the soil may be acquired by limitation."⁴¹

34. 19 Mad. 154.

35. 25 Mad. 635 (648).

36. *Ibid.*, 25 Mad. 635 (650).

37. *Ibid.*

38. (1903) 27 Mad. 386 (400); see *Basaweswaraswami v. Bellary Municipality*, (1912) 38 Mad. 6, as to the anomalous results of the fixing the period at thirty years instead of sixty years as in the case of the Crown.

39. (1912) 38 Mad. 6; Reld. on *Rolls v. Vestry of St. George*, (1880) 14 Ch D. 785 (785 and 796) and *Municipal Council v. Young*, 1898 A.C. 457.

40. *Ibid.*, 38 Mad. 6 (10).

41. *Ibid.*, 38 Mad. 6 (10); see Lightwood's *Time Limit on Actions*,

2264. ILLUSTRATIVE CASES.—

(1) Where a verandah had been standing on a part of a public street for over thirty years, the site was held to have become the property of the person to whom the verandah belonged by the operation of S. 28 and Art. 146-A, Limitation Act. In such a case the Municipality had no power to issue a notice under S. 122 of the Bombay District Municipal Act for the removal of the verandah.⁴²

(2) Similarly, where upon a portion of a street or drain vested in the Calcutta Municipal Corporation, a *rowak* or platform was built by the plaintiff, and it had been in existence for about fifty years as an integral part of his building, it was held that the municipality had lost their right to that portion of the land having regard to the provisions of Art. 146-A of the Limitation Act.⁴³

(3) An owner of a house who has encroached on a public street obtains a good title after thirty years' adverse possession, and the municipality cannot remove such an encroachment under S. 122 of the Bombay District Municipalities Act.⁴⁴

(4) In the *Municipal Commissioners v. Sarangapani Mudaliar*,⁴⁵ where the Municipality of Madras sued to recover, as forming part of a highway, a strip of land adjoining the house of the defendant on which a pial had been erected more than 45 years before the suit, it was held that assuming the land in question was originally included in the street, the defendant had acquired a title by adverse possession against the municipality, which was not entitled to call in aid the provisions of Art. 149, Limitation Act.

(5) Where the street itself was admitted to be a public street, the drains were taken to vest in the municipality under S. 24 of the Madras District Municipalities Act, even though the sites of the drains belong to private owners. It was held that the plaintiffs could acquire adverse title against the municipality only if they did open acts, by which the municipality were prevented from enjoying the drains as drains; that is from carrying off the water of the street falling into the drains by the drains.⁴⁶

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
147.	By a mortgagee for foreclosure or sale.	Sixty years.	When the money secured by the mortgage becomes due.

pp. 17 and 18 and *Laybown v. Grideley*, (1892) 2 Ch. 53; also see *Midland Ry. Co. v. Wright*, (1901) 1 Ch. 738; and *Mohanlal v. Amritlal*, 3 Bom. 174 (No custom can be admitted to override the provisions of the Limitation Act).

42. *Tayab Ali Abdullabhai v. The Dohad Municipality*, (1920) 58 I.C. 326=22 Bom. L. R. 931.

43. *Ashutosh Sadukhan v. The Corporation of Calcutta*, (1919) 49 I.C. 93=28 C.L.J. 494.

44. *Abaji Ragho Mhalas v. The Municipality of Jalgaon*, (1921) 64 I.C. 202=46 Bom. 335; also see *The Chairman v. Subba Pandithar*, (1913) 20 I.C. 956=38 Mad. 458 and cf. *Dakore Town Municipality v. Travedi Anupram*, (1913) 38 Bom. 15 (17).

45. (1895) 19 Mad. 154.

46. *Arunachella Chettiar v. The Municipal Council of Mayavaram*, (1920) 55 I.C. 493=1920 M.W.N. 229=11 L.W. 202=38 M.L.J. 222.

SYNOPSIS.

- 2265. Previous History.
- 2266. Foreclosure or sale.
- 2267. Section 31, Limitation Act (now repealed).
- 2268-70. **Scope and application.**
 - 1. English mortgages.
 - 2. Equitable mortgages.
 - 3. Mortgages by conditional sales.
- 2271. Foreclosure and possession.

NOTES.

2265. PREVIOUS HISTORY.—No period of limitation was expressly prescribed by Act XIV of 1859 for a suit for money secured by a mortgage or otherwise charged upon immoveable property, nor for a suit for possession, nor for foreclosure by a mortgagee. Under Cl. (12), S. 1 of that Act, a period of 12 years were given from the date of mortgage, if a demand was not necessary; or 12 years from the date of demand where a demand was necessary.⁴⁷ This applied to a suit to foreclose an English mortgage, or to enforce an equitable mortgage in a Court established by Royal Charter. There was no corresponding provision in Act IX of 1871. A suit for foreclosure was given 12 years from the date when the debt became due, under Art. 132, Limitation Act⁴⁸; or Art. 149 of that Act, which was somewhat unfortunately worded, providing for a mortgagee recovering the lands mortgaged. Article 149 of Act IX of 1871 was re-enacted as Art. 146 in Act XV of 1877, but with a reduced period. This article corresponded in form to Art. 135 of Act XV of 1877, also, except that it applied only to suits before a Court established by Royal Charter in the exercise of its ordinary Original Civil Jurisdiction.

2266. The Allahabad,⁴⁹ Bombay,⁵⁰ and Madras,¹ High Courts
Foreclosure or sale. applied this article to simple mortgages, where the relief sought was for sale. The

47. *Chetti Gaunda v. Sundaram*, 2 Mad. H.C.R. 51; *Krishna Row v. Hachappa*, 2 Mad. H.C.R. 307; *Raja Kaundan v. Muthammal*, 3 Mad. H.C.R. 92; *Jounna Venkatsawmy v. Basireddy*, 5 Mad. H.C.R. 364; also see *Sarwar Hossein Khan v. Gholam Mahomed*, B.L.R. Supp. Vol. 879; *Munnoo Lall v. Pigue*, (1868) 10 W.R. 379; and *Junneswar v. Mahabeer*, (1875) 1 Cal. 163 (P.C.).

48. *Ramchander Ghosaul v. Juggut Monmohinee Dabee*, (1878) 4 Cal. 283 (12 years rule applied to a suit for foreclosure); also see *Ganpat Pandurang v. Aday Dadabhai*, (1877) 3 Bom. 312; and *Khemji Bhagwandas v. Rama*, (1886) 10 Bom. 519; also *Shiblal v. Ganga Prasad*, (1884) 6 All. 551.

49. *Shiblal v. Ganga Pershad*, (1884) 6 All. 551 (F.B.); also see *Sheoratan v. Mahipal*, (1884) 7 All. 258 (F.B.); *Kishanlal v. Ganga Ram*, (1890) 13 All. 28.

50. *Motiram v. Vitai*, (1888) 13 Bom. 90 (F.B.); also see *Govinda v. Kalnak*, (1886) 10 Bom. 592; *Bulaki v. Tukaram*, (1889) 14 Bom. 377; *Manekji v. Rustamji*, (1889) 14 Bom. 269; *Onkar v. Goverdhan*, (1890) 14 Bom. 577; and *Venkatesh v. Narayan*, (1890) 15 Bom. 183.

1. *Aliba v. Nanu*, 9 Mad. 218; see *Rangasami v. Kumarappa*, 10 Mad. 509; *Narayana v. Venkataramana*, (1902) 25 Mad. 220 (F.B.).

Calcutta High Court applied this article to a special kind of mortgage, known as English mortgage, and including only that class of suits in which the remedy was either foreclosure or sale in the alternative.² In *Vasudeva v. Srinivasa*,³ their Lordships of the Privy Council interpreted Art. 147 of Act XV of 1877.

Their Lordships were dealing in that case with a suit for sale of the hypotheca brought by a simple mortgagee, and they noticed the

“question as to which there had been great diversity of opinion among the several High Courts in India for many years past, almost from the time of the passing of Act of 1877”.

According to one view, Art. 147 applied to every suit by a mortgagee, in which he asks either for foreclosure or for sale. According to the other view, Art. 147 applied only to the class of mortgages (English mortgages) in which the suit may be, and in fact always is, brought for “foreclosure or sale,” while Art. 132 means what the corresponding Art. 132 of Act IX of 1871 meant, viz., suits “for money charged upon immoveable property”. Their Lordships were

“of opinion that the narrower construction of Art. 147, limiting its application to the one class of mortgages in which alone the suit can be, and always is, brought for ‘foreclosure or sale,’ is a legitimate construction, and gives reasonable effect to the language used”.

The narrower construction escaped the necessity of attributing to the Legislature a great and sudden change of policy. It also gave effect to the ordinary presumption, that the Legislature, when it repeats in substance in a later Act an earlier enactment, that has obtained a settled meaning by judicial construction, intends the words to mean what they meant before. The other construction failed in both these particulars.⁴

2267. Act IX of 1908, enacted S. 31, to remove the hardship caused by the decision of the Privy Council, in *Vasudeva v. Srinivasa*,^{4-a} overruling the decisions of the High Courts of Madras, Bombay and Allahabad, which had applied Art. 147, according to its language, to every suit by a mortgagee in which he asked for sale whether with or without a prayer for foreclosure in the alternative. The result of this pronouncement was to place the bar of limitation under Art. 132, against a large number of mortgage suits for which the period of limitation had hitherto been believed to be sixty years. According to the Privy Council decision, Art. 147 of the Limitation Act applied to the one class

2. *Girwar Singh v. Thakur Narain*, (1887) 14 Cal. 730 (F.B.).

3. (1907) 30 Mad. 426=11 C.W.N. 1005=6 C.L.J. 379 (P.C.).

4. *Vasudeva v. Srinivasa*, (1907) 30 Mad. 426 (433)=34 I.A. 186=17 M.L.J. 444 (P.C.).

4-a. *Ibid.*

of mortgage in which alone a suit could be and always was brought for "foreclosure or sale," in the *alternative*, and not distributively, *viz.*, to **English mortgages**. It is to be noticed, however, that under S. 67, cl. (a) of the **Transfer of Property Act**, as amended by the Transfer of Property Act (XX and XXI of 1929), the right of foreclosure has been taken away from English mortgages, which now stand on the same footing as simple mortgages allowing only a suit for sale, falling under Art. 132, Limitation Act.

Section 31, Limitation Act, was repealed by the Repealing and Amending Act, VIII of 1930; and replaced by S. 15, sub-cl. (2) of Act XXI of 1930, which was intended to provide relief for those cases whereas in Bombay suits to enforce equitable mortgage were held to be governed by Art. 147.

2268. SCOPE AND APPLICATION.—(1) As held by the **Calcutta High Court** in *Girwar Singh*

(i) English mortgages.

v. Thakur Narain Singh,⁵ an English mortgage was the only class of mortgage which

permitted a suit for the alternative relief of "*foreclosure or sale*," under Art. 147, Limitation Act XV of 1877. This view was approved by the Privy Council decision in *Vasudeva v. Srinivasa*,⁶ above noticed. The recent amendment of S. 67, Transfer of Property Act (by Acts XX and XXI of 1929), now enacts that

"nothing in this section shall be deemed (a) to authorise any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure".

This amended section has no retrospective effect (*see* S. 63, Transfer of Property Act): and, action for "foreclosure", is not possible even in the case of English mortgages, except where the mortgage dates prior to this change.

2269. (2) Prior to the amendment of Art. 132 by Act XXI of 1929, the **Bombay High Court** took

(ii) Equitable mortgages.

the view that a suit by such a mortgagee to enforce his remedies by "*foreclosure or*

sale," would come under Art. 147 of the Limitation Act.⁷ The **Calcutta** and **Madras** High Courts held that Art. 132 was applicable to such cases, as the only relief allowed to such a mortgagee was by way of an action of sale. The Legislature has adopted this view by the amending provisions in S. 96 of the Transfer of Property Act (*see* Act XX of 1929), and also S. 69, noticed above. The rights of a mortgagee by deposit of title-deeds do not include a right of foreclosure under the present law, and Art. 147 is no longer applicable to such suits, except as provided for by S. 15,

5. (1887) 14 Cal. 730 (F.B.).

6. (1887) 30 Mad. 426=34 I.A. 186 (P.C.).

7. *Manekji v. Rustomji*, (1889) 14 Bom. 269; *Khushal v. Punnamchand*, (1897) 22 Bom. 154.

sub-cl. (2) of Act XXI of 1930, which gives a period of two years' grace for suits by the class of persons affected by the change in law shortening the period of limitation from sixty years to twelve years, by the amendments of 1929. This article is now left without any scope for operation at all, except in the case of English mortgages not governed by the present Transfer of Property Act as in territories to which the Act has not been applied or extended.⁸

2270. (3) In *Nilcomal v. Kamini*,⁹ and *Aman v. Azgar*,¹⁰ the

(iii) Mortgages by **Calcutta High Court** held that no action for "foreclosure or sale", lies in suits conditional sale. based on mortgages by conditional sale,

where the only remedy was by way of foreclosure under the provisions of the Bengal Regulation XVII of 1806. This was prior to the passing of the Transfer of Property Act, 1882. A mortgage by conditional sale, before the operation of the Transfer of Property Act, 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee, whose suit for possession, unless brought within twelve years from the date "when the mortgagor's right to possession determined" was barred by Art. 135 of Sch. II of Act XV of 1877.¹¹ The mortgagee's right of suing for possession having been thus extinguished, was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of Transfer of Property Act, 1882.¹² A mortgage by conditional sale, can now sue for foreclosure, but not for sale (*see* S. 69 of Transfer of Property Act) and this article cannot apply even in cases where the right had not become extinguished prior to 1882.¹³

2271. Under S. 87 of the Transfer of Property Act, provi-

Foreclosure, and possession. sion is made for payment of amount due. If such payment is not so made, the

plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged

8. Mitra's Limitation Act, Vol. II, p. 1797.

9. (1891) 20 Cal. 269.

10. (1899) 27 Cal. 185.

11. *Srimath Das v. Khetter Mohun Singh*, (1888) 16 Cal. 693 (P.C.); also see *Shurnomoyee v. Srinath Das*, (1885) 12 Cal. 614 (Art. 135, applied to suits for possession by such mortgagees) and cf. *Modunmohun v. Ashad*, (1883) 10 Cal. 68 (Art. 144 applied to suit for possession as absolute owner, although foreclosure proceedings not taken within 12 years of the date of default).

12. *Ibid.*, (1888) 16 Cal. 693 (P.C.).

13. *Sheoram Sinah v. Babu Singh*, (1925) 48 Cal. 302.

property: and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff under O. 34, R. 3, Civil Procedure Code, it is not absolutely necessary to ask for possession in a foreclosure suit¹⁴; and, a suit for possession as absolute owner would lie within twelve years of the final decree for foreclosure.¹⁵ A suit may also be filed for possession as mortgagee, when dispossessed.¹⁶

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
148.	Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	Sixty years.	When the right to redeem or to recover possession accrues: Provided that all claims to redeem arising under instruments of mortgage of immoveable property situate in Lower Burma which had been executed before the first day of May 1863 shall be governed by the rules of limitation in force in that province immediately before the same day.

SYNOPSIS.

2272. Previous History.

2273-79. Scope and application.

2273. (1) Suit to redeem or recover possession.

2274. (2) Relationship of mortgagor and mortgagee.

2275. (3) Mortgagee and charge-holder distinguished.

14. Ghose, 2nd Edn., p. 490.

15. *Pugh v. Heath*, (1882) 7 A.C. 235.

16. *Aman Ali v. Asgar*, (1899) 27 Cal. 185.

- 2276. (4) Application to different kinds of mortgages.
- 2277. (5) Suit by puisne mortgagee to redeem prior mortgage.
- 2278. (6) Immoveable property mortgaged.
- 2279. (7) Suits not within this article.
- 2280. **Starting point of limitation.**
- 2281. Illustrative cases.
- 2282. Payments, and acknowledgments.
- 2283. *Onus probandi*.

NOTES.

2272. PREVIOUS HISTORY.—There was no limitation to suits for redemption of mortgages, before the enactment of cl. 15 of S. 1, Act XIV of 1859.¹⁷ Under this provision, unless there was evidence of an acknowledgment such as to satisfy its requirements, the suit in respect of mortgages prior to 1797, would be time-barred if not brought before 1st January, 1862.¹⁸ The acknowledgment had to be made within sixty years from the date of the mortgage.¹⁹ The limitation enacted in Act XIV of 1859, S. 1, cl. 15, embraced every kind of mortgage, including usufructuary mortgages.²⁰

Act IX of 1871, made provision for suits against a mortgagee of immoveable property for the *recovery* of the same, within sixty years *from* the date of the mortgage, unless there was an acknowledgment of the mortgagor's title or right of redemption, within sixty years of the date of the mortgage.²¹ In Art. 148 of Sch. II of Limitation Act IX of 1871, there were no words "*to redeem or*", which were introduced in the Act XV of 1877, to extend the scope of the Art. 148, so as to include suits for redeeming simple mortgages as well.

2273-2276. SCOPE AND APPLICATION.—(1) The mortgagor sues to *recover possession*, if the mortgage debt has been already paid off, and he sues *to redeem*, if any money remaiss due to the mortgagee.²² The sixty years' period allowed for redemption is applicable only to a **suit to recover possession**

17. *Daia v. Sarfraz*, (1877) 1 All. 425 (427).

18. *Fatimatulnissa v. Sunderdass*, (1900) 27 Cal. 1004 (1006 and 1011) =27 I.A. 103 (P.C.).

19. *Indurai Bhauri Desai v. Shival Navubhai*, (1925) 87 I.C. 699=1925 Bom. 339; *Dhondi Shivaji Rajivade v. Lakshman Mhashuji Khaire*, 1930 Bom. 55=31 Bom. L. R. 1287=122 I.C. 862.

20. *Luchmee Buksh Roy v. Runjeet Ram Pandey*, (1873) 20 W.R. 375 (P.C.); *Fatimatulnissa v. Sunder Dass*, (1900) 27 I.A. 103=27 Cal. 1004 (P.C.); also see *Muhammad Akbar v. Izzatulnissa*, (1906) 28 All. 333.

21. *Fatimatulnissa v. Sunder Das*, (1900) 27 I.A. 103=27 Cal. 1004 (P.C.); also see 1925 Bom. 339 and 1930 Bom. 55.

22. Mitra's Limitation Act, Vol. II, p. 1800; see S. 60, Transfer of Property Act, for the right of the mortgagor to redeem: also see Ss. 63 and 64 of the Act; also see S. 62, Transfer of Property Act, for the right

from a person who has obtained possession as mortgagee and not to a suit to recover possession from a trespasser even though the land may have been hypothecated as security for a debt payable to the trespasser. The mere fact of the person who takes possession being also the creditor does not convert his possession into that of a mortgagee.²³ Where *A* hypothecated some land to *D*, in 1859; and in 1863, *D* sued *A*, and the Court, wrongly treating the deed as a deed of conditional sale, gave *D* a decree and after one year, *D* was put in possession as owner; and *A* sued for redemption of the land after more than forty years, it was held that as *D* was not entitled to possession under the deed and as he illegally got possession as owner, his possession was not that of a mortgagee but as a trespasser and as such he could not be ejected after he had been in possession for over twelve years.²⁴ A person in possession of a property as *usufructuary mortgagee* under a void mortgage, for more than twelve years, acquires by prescription, the rights of a mortgagee, and is as such accountable to the mortgagor for the rents and profits not only of the last three years preceding the suit for redemption but for the whole period of his possession.²⁵ If the mortgages are void, continuous possession for over twelve years from the date of the mortgage cannot acquire an absolute title to the suit lands.²⁶ **Adverse possession of a limited mortgagee interest is a good plea to a suit in ejectment to the extent of that interest.**²⁷ A partial interest in land may be lost by adverse possession as well as the whole interest²⁸; and, a person does not acquire by virtue of adverse possession a higher title than he prescribed for.²⁹ A mortgage of an occupancy holding is not permitted by law, but where a mortgagee of an occupancy holding enters into possession of the holding and continues in possession thereof for more than twelve years, he prescribes for title as a mortgagee, and the mortgagor can recover possession of the holding only by redemption. The period of limitation for a suit by redemption in such a case, however, is sixty years as provided by Art. 148 of the Limitation Act.³⁰

of the usufructuary mortgagor to recover possession and see S. 91, Transfer of Property Act, as to who may sue for redemption.

23. *Jirva Khan v. Lakhmi Chand*, (1911) 11 I.C. 429=146 P.W.R. 1911=232 P.L.R. 1911.

24. *Ibid.*

25. (*Sontayana*) *Gopala Dasu v. (Inapatlupula) Rami*, (1921) 44 Mad. 946.

26. *Ibid.*

27. *Madhava v. Narayana*, (1886) 9 Mad. 244.

28. *Budesab v. Hanmanta*, 21 Bom. 507.

29. *Sundara Gurukkal v. Subramania Archakar*, (1912) 16 I.C. 960.

30. *Mahamangal Rai v. Kishun Kundu*, (1927) 100 I.C. 346=1927 All. 311.

2274. (2) This period of sixty years prescribed in Art. 148, for suits for redemption can, however, only

(ii) Relationship of mortgagor and mortgagee.

Where a mortgage confers no right of possession on the mortgagee, and the latter obtains possession of the mortgaged property in assertion of a proprietary title, his possession will be adverse to that of the mortgagor.³¹ Where no judicial hypothec is created by a decree for ejectment conditional on the payment by decree-holder of a certain sum as compensation for improvements to the defendant, and there is no relation of mortgagor and mortgagee established between the plaintiff and defendant, the suit does not lie for redemption of the land on payment of the sum specified in decree.³² Where a person who has been in possession of certain property as ostensible owner for a long time is sought to be redeemed on the allegation that he is a mortgagee, the mortgage must be proved by very good evidence.³³ A mortgagor's right to take over accessions after redemption is not the subject-matter of a suit for redemption within Art. 148, Limitation Act. The redemption being already complete, the relationship of mortgagor and mortgagee no longer subsists, and the subsequent suit for accession can only be governed by Art. 144.³⁴

2275. See definition of "mortgagee" given in the Transfer of Property Act, S. 58. See also S. 59-A of the said Act newly added by Act XX of 1929. Art. 148 refers only to a suit against a mortgagee, and has no application to a suit against a charge-holder.³⁵ Thus, it is not applicable to a suit by co-sharer who is seeking to recover his share from the other co-sharer who has redeemed the entire mortgage.³⁶ There is

31. *Munnalal v. Hamid Ali*, (1924) 79 I.C. 39 (Lah.).

32. *Fazal v. Mihan Khan*, (1921) 64 I.C. 352 (Lah.); Reld. on *Muhammad Shah v. Mahant Sadhu Ram*, 137 P.R. 1889 and *Shamir v. Ladha Singh*, 4 I.C. 854=100 P.R. 1909.

33. *Maung Po Ni v. Ma Shwe Kyi*, (1924) 84 I.C. 373=2 Rang. 397=1925 Rang. 7.

34. *Muhammad Khudadad Khan v. Girdhari Ram*, (1917) 42 I.C. 468=163 P.W.R. 1917.

35. *Wazir v. Girdhari*, (1923) 71 I.C. 847=1923 Lah. 311; *Naraindas v. Siraj Din*, (1926) 92 I.C. 980=1926 Lah. 238.

36. *Vasudev v. Balaji*, 26 Bom. 500 (503)=4 Bom. L. R. 178; *Ramchandra v. Ganesh*, 57 Bom. 134; also *Faki Abbas v. Nuruddin*, 16 Bom. 191 and *Ramchandra v. Sadashiv*, 11 Bom. 422; *Mt. Radha v. Ajudhia Pershad*, 1933 Lah. 91=141 I.C. 404; *Munia v. Ramasami*, 41 Mad. 650 (657)=45 I.C. 867=34 M.L.J. 528; also see *Purnachandra v. Baroda*, 45 I.C. 783=22 C.W.N. 637=46 Cal. 111 (116); *Jai Kishun v. Budhanand*, 38 All. 138 (145)=14 A.L.J. 41; *Ramnarayan v. Ram Devi*, 63 I.C. 282 (283)=6 P.L.J. 680=1923 Pat. 98; *Ram Agre v. Ram Udit*, 8 O.W.N. 637=132 I.C. 261; *Wajibuddin v. Ahmad Ashraf*, 2 Luck. 618=1927 Oudh

a conflict of authority on the question whether a mortgagor redeeming the whole mortgage becomes a mortgagee of the portion redeemed belonging to other co-owners.³⁷ See notes under Art. 144, *ante*. But is no longer good law under the present Transfer of Property Act. See and cf. S. 95 of the Transfer of Property Act. The old section ran as follows:

"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, *he has a charge* on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

The section has now been amended by Act XX of 1929, and runs as follows:

"Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under S. 92 against his co-mortgagors, *be* entitled to add to the mortgage-money recoverable from them such proportion of the expenses, etc., etc."

And, in view of the terms of S. 92 of the new Transfer of Property Act which says that

"any of the persons referred to in S. 91 (other than the mortgagor) and any *co-mortgagor* shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure, or sale of such property, *the same rights as the mortgagee whose mortgage he redeems* may have against the mortgagor or any other mortgagee."

the redeeming co-mortgagor is now subrogated into the position of a *mortgagee* and his co-mortgagors must *redeem* their share of the property. A suit by them for the purpose will thus come within this article.³⁸

2276. (4) In Act IX of 1871, corresponding Art. 148 contemplated only suits against mortgagees

(iv) Application to different kinds of mortgages.

for *recovery of possession* of mortgaged property, and there were no words "to redeem or," as were to be found in Art. 148

of Sch. II to Act XV of 1877. The clause in Act IX of 1871 therefore did not apply to suits for redeeming property subject to a simple mortgage. However, Act XV of 1877, by introducing the words "*to redeem or*" extended the scope of the article so as to

347=104 I.C. 400; *Jhandu v. Nur Mahomed*, 32 P.L.R. 622; *Gandaram v. Munshi Ram*, 32 P.L.R. 649; *Basanta v. Dhanna*, 55 I.C. 450.

37. *Rajkumari Debi v. Mukundalal*, (1920) 25 C.W.N. 283; *Ashfaq v. Wazir*, 14 All. 1 (F.B.).

38. *Jairam v. Bhikaji*, 1930 Nag. 300=127 I.C. 889=13 N.L.J. 166=27 N.L.R. 152; also see *Umar Ali v. Asmat*, (1931) 35 C.W.N. 409=1931 Cal. 251=53 C.L.J. 154=130 I.C. 889=58 Cal. 1167 (F.B.); also see *Ashfaq Ahmad v. Wazir Ali*, 14 All. 1=A.W.N. (1891) 211 (F.B.); *Folld. in Shiamlal v. Mt. Hukum Kuar*, (1928) 113 I.C. 832=1929 All. 100; cf. *Aziz Ahmed v. Chhotelal*, (1928) 50 All. 569; *Rameswar v. Sheoram*, (1927) 105 I.C. 308=1922 Oudh 552; also cf. *Parvati Ammal v. Venkatarama*, (1924) 47 M.L.J. 316; also see *Ahmad Zaman Khan v. Baldeo Das*, 144 I.C. 152=1933 All. 228.

include suits for redeeming **simple mortgages** as well. This article would now apply to all mortgages. In numerous cases Art. 148 has been applied to suits for the redemption of **usufructuary mortgages**.³⁹ Where a usufructuary mortgage was executed in 1852, under Bengal Regulation XV of 1793, and there was to be no accounting on either side under terms of the mortgage, it was held that the suit to redeem the mortgage on payment of the principal sum within sixty years from the date of the mortgage was within time.⁴⁰ In *Bakhtawar Begam v. Husaini Khanam*,⁴¹ Art. 148 has been applied to a mortgage by conditional sale, where there was at the time of execution a contemporaneous agreement "that the sale would be cancelled on payment of the amount of consideration in nine years". This was held to give a right to redeem only on the expiry of the nine years. Where a mortgage-deed provided that the mortgagor would be entitled to redeem after the expiry of ten years and would obtain a reconveyance on payment of the principal and interest, it was held that a suit brought more than sixty years after the expiry of the period fixed in the deed of mortgage for redemption was barred under the provisions of Art. 148, Limitation Act.⁴² A **lekha mukhi mortgage** is a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of the mortgage-debt, the mortgagor undertaking no personal liability and the mortgagee not being entitled to sue for the debt.⁴³ The **lekha mukhi** is a kind of running mortgage in which the proprietor's share of the produce is made over to the creditor, who pays the revenue and keeps a running account of the receipts and disbursements. The limitation for redemption of a *lekha mukhi* mortgage begins to run from the date of mortgage, under Art. 148 of the Limitation Act.⁴⁴

2277. A second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgage from the previous mortgagee or the purchaser in execution of the latter's decree. The

Suit by a puisne mortgagee to redeem prior mortgage.

39. *Parmanand Misr v. Sahib Ali*, 11 All. 438; *Zingari Singh v. Bhagwan Singh*, A.W.N. (1889) 187; *Kallu v. Halki*, 18 All. 295 (297); also see *Luchmee Buksh Roy v. Runjeet Ram Panday*, (1873) 13 B.L.R. 177 and *Fatamatulnissa Begum v. Soonder Das*, (1900) 27 I.A. 103 (P.C.) cited in *Muhammad Akbar Husain Khan v. Izzatunnisa*, (1906) 28 All. 333 (335).

40. *Habibullah v. Abdul Hamid*, (1912) 34 All. 261.

41. (1913) 36 All. 195 (P.C.).

42. *Mohini Mohan Misra v. Sarat Sundari Debi*, (1925) 86 I.C. 353 (Cal.).

43. *Khandulal v. Fazal*, (1919) 51 I.C. 956=1 Lah. 89.

44. *Dittamal v. Ilahi Baksh*, (1927) 101 I.C. 549=28 P.L.R. 123=9 L.L.J. 63=1927 Lah. 828; Folld. *Khandulal v. Fazal*, 1 Lah. 89=51 I.C. 956.

second mortgagee's right of redemption is a suit falling under Art. 148 of the Limitation Act, as it is not merely a right to enforce payment of a charge under Art. 132. The **Patna High Court** took this view in *Ramjhari v. Kashinath*⁴⁵; and this view is further supported by the decisions of the **Allahabad**,⁴⁶ **Calcutta**,⁴⁷ **Lahore High Court**,⁴⁸ and the **Oudh Chief Court**.⁴⁹ A Full Bench of the **Calcutta High Court** in *Sayamali Molla v. Anisuddin Molla*,⁵⁰ holds that whenever a suit for redemption is brought by a person entitled to redeem against a mortgagee, Art. 148 of the Limitation Act and no other article applies to it.

2278. As to the meaning of the term "immoveable property", see notes under Art. 142 (S. 2146), *ante*.
Immoveable property mortgaged. **pro-** A right to officiate as priest at funeral ceremonies of Hindus is regarded as immoveable property, and a suit for redemption of such right, therefore, falls under Art. 148, and not under Art. 145, Limitation Act.¹ A grove consisting of *mahna* trees is immoveable property for the purpose of a mortgage and a suit for redemption of such a grove is governed by Art. 148, Limitation Act.² A mortgage of an occupancy holding is not permitted by law but where the mortgagee prescribes a title for the limited interest by entering into possession as mortgagee and continuing in such possession for more than 12 years, a suit by the mortgagor against the mortgagee for possession of the holding is a suit for redemption under this article and time runs from the date of the mortgage.³ This article is also applicable to a suit by the purchaser of the equity of redemption in part of the mortgaged property.⁴ Where the purchaser of the limited interest of a mortgagee is in possession, a suit by the mortgagor for redemption against the mortgagee's assigns falls under Art. 148, Limitation Act.⁵ But, Art. 134 would apply where the

45. 1926 Pat. 337=94 I.C. 84=5 Pat. 513=7 P.L.T. 788; Not folld. *Nidhiram v. Sarbessar*, (1910) 5 I.C. 877=14 C.W.N. 439; *Appayya v. Venkataramanayya*, 1925 Mad. 150 and *Lakshmanan Chettiar v. Sellamuthu Naicker*, 1925 Mad. 76. See Art. 132.

46. *Priyalal v. Bhora*, 1923 All. 271=79 I.C. 498=45 All. 268; *Narotam Das v. Sanwal Das*, 1934 All. 946=4 A.W.R. 70.

47. *Har Persad v. Dalmardan Singh*, (1905) 32 Cal. 891=1 C.L.J. 371=9 C.W.N. 728; also see *Sayamali v. Anisuddin*, (1929) 119 I.C. 135=57 Cal. 704=1929 Cal. 609 (F.B.).

48. *Budha v. Mab Rai*, (1918) 48 I.C. 916; *Basanta v. Indar Singh*, 1920 Lah. 504 and *Sundar Das v. Beli Ram*, 1933 Lah. 503=142 I.C. 805.

49. *Ram Adhar v. Shanker Baksh*, 1935 Oudh 139.

50. 1929 Cal. 609=57 Cal. 704=119 I.C. 135 (F.B.).

1. *Raghoo Pandey v. Kassey*, 10 Cal. 73 (74).

2. *Chandi v. Sat Narain*, (1924) 81 I.C. 650=1925 Oudh 108.

3. *Mahamungul v. Kishun*, 1927 All. 311=100 I.C. 346.

4. *Wazir Ali v. Ali Islam*, 40 All. 683 (685).

5. *Drigpal v. Kallu*, 37 All. 660; *Muthu v. Kambalinga*, 12 Mad. 316; *Bhagwan Sahai v. Bhagwan Din*, 9 All. 97; see notes under Art. 134.

transfer is of an absolute interest in favour of a purchaser who has no knowledge that he was purchasing the limited interest of a mortgagee.⁶ This article will also apply

Second suit when maintainable. where the relationship of mortgagor and mortgagee subsists between the parties, in spite of a previous decree in a suit for redemption which has not been executed within time. In *Hanmant v. Shidu Sambhu*,⁷ the consent decree for possession on payment of specified amount, which was not executed in time, had not put an end to the mortgage, and plaintiff was held entitled to bring a second suit for redemption in the shape of an application under S. 47, Civil Procedure Code. The conflict of view arising on this question has been noticed in *Ellarayan v. Nagaswami Aiyar*.⁸ The **Bombay High Court** has held in *Shridhar v. Ganu*,⁹ that a previous dismissal of a suit for redemption of a mortgage is not an order extinguishing the right of a mortgagor for redemption within the meaning of S. 60, Transfer of Property Act, and so a second suit for redemption is not barred. In *Basangouda v. Rudrappa*,¹⁰ where a suit for redemption was brought on behalf of a minor on the allegation that the plaintiff had acquired the mortgagor's right under a deed of gift, and the matter was compromised without leave of Court, and the Court passed an order dismissing the suit with costs ignoring the provisions of O. 32, R. 7, Civil Procedure Code. Subsequently, after the death of mortgagor's widow, the plaintiff as next reversioner instituted another suit for redemption of the same mortgage, it was held that the second suit was not barred by *res judicata*, and that the dismissal of the first suit did not extinguish the equity of redemption. In *Ramji v. Pandharinath*,¹¹ a

6. See notes under Art. 134, *ante*; *Mehunga v. Zaman Ali Shah*, 1931 Lah. 464=132 I.C. 184.

7. (1923) 72 I.C. 556=1923 Bom. 300=25 Bom. L. R. 358=47 Bom. 692 (695); Folld. *Ramji Bapuji v. Pandarinath*, 49 I.C. 894=43 Bom. 334=21 Bom. L. R. 56; also see *Muhamdi Begum v. Tufail*, 48 All. 17=1926 All. 20=92 I.C. 260; Reld. on *Hari Ram v. Indraj*, 69 I.C. 167=44 All. 730=1922 All. 377 and *Arura v. Bur Singh*, 84 I.C. 67=5 Lah. 371=1925 Lah. 31.

8. (1926) 49 Mad. 691=50 M.L.J. 612; also see *Shah Mehdi Hasan v. Ismail Hasan*, (1920) 42 All. 517.

9. 1928 Bom. 67=52 Bom. 111; Reld. on *Rama Talsa v. Bhagchand*, (1914) 39 Bom. 41=27 I.C. 249=16 Bom. L. R. 687; *Ram Chandra v. Hanmanta*, (1920) 22 Bom. L. R. 939=44 Bom. 942=58 I.C. 42; cf. *Shankar Baksh v. Dya Shankar*, (1887) 15 Cal. 422=15 I.A. 66 (P.C.) (Redemption suit dismissed in default: and dismissal not set aside: held bar to another redemption suit).

10. 1927 Bom. 87=99 I.C. 814=28 Bom. L. R. 1507.

11. (1918) 43 Bom. 334 (F.B.); also see *Ramchandra Laxman v. Balbhim Babaji*, (1922) 25 Bom. L. R. 211; *Khushaba Ramji v. Budhaji Sukharam*, (1921) 46 Bom. 348; *Govind Gangadhar v. Narayana Damodar*, (1931) 33 Bom. L. R. 844.

Full Bench of the Bombay High Court has held (Shah, J., dissenting) that a mortgagor, who has brought a suit for redemption and obtained a decree *nisi* which neither the mortgagor nor the mortgagee has applied to be made absolute, can bring a second suit for redemption, and the same would not be barred by S. 11 or S. 47 of the Civil Procedure Code. The **Allahabad High Court** takes the view that if a decree does not expressly contain an order for foreclosure or extinction of the mortgagor's equity of redemption on default of payment within the prescribed time the mortgagor may bring a second suit for redemption but he could not if the decree does not contain such an order.¹² This is supported by a decision of the **Lahore High Court** in *Arura v. Bur Singh*.¹³ But the **Madras and Calcutta High Courts** have taken a different view,^{13-a} where it has been held that a mortgagor who had sued and obtained a decree of redemption cannot maintain a second suit to redeem the same mortgage, his only remedy being to execute his decree in the first suit and that the decree in the first suit would operate as a bar whether or not it provided that on non-payment within the time limited the equity of redemption should be foreclosed. This overrules the view taken in some earlier rulings to the contrary.¹⁴ The **Calcutta High Court** has taken the view in *Siva Pershad v. Nundolal*,¹⁵ following the Full Bench case of *Mohendro Narain v. Gopal Mondal*,¹⁶ that where a suit to set aside a sale in execution of a mortgage decree was brought on the ground that there was no such decree in existence, as only a decree *nisi* and not a decree absolute directing the sale had been made, it was held that the suit was not maintainable. An order directing a sale in such a case would be sufficient authority under S. 89 of Transfer of Property Act even if the order did not take the form of a decree such as is prescribed for a decree absolute in the case of a suit for foreclosure. It is outside the scope of the present comments to discuss in minute detail the conflict of view existing on the point.¹⁷ For the purposes of Art. 148, it is sufficient to observe that when the right of redemption is not extin-

12. *Sitaram v. Madholal*, (1901) 24 All. 44 (F.B.); *Hari Ram v. Indraj*, (1922) 44 All. 730; *Shah Mehdi Hasan v. Ismail Khan Hasan*, (1920) 42 All. 517; *Muhamadi Begam v. Tufail Husain*, 48 All. 17.

13. (1924) 5 Lah. 371.

13-a. *Vedapuratti v. Vallabha*, (1902) 25 Mad. 300 (F.B.).

14. *Sami Achari v. Somasundaram*, (1882) 6 Mad. 119; *Periandi v. Angappa*, (1884) 7 Mad. 423; *Karuthasami v. Jagannatha*, (1885) 8 Mad. 478; *Ramuni v. Brahma Datta*, (1892) 15 Mad. 366; cf. *Vedapuratti v. Vallabha*, 25 Mad. 300 (F.B.).

15. (1890) 18 Cal. 139.

16. 17 Cal. 769 (F.B.).

17. *Ranga Aiyangar v. Narayana Chariar*, (1915) 39 Mad. 896=30 M.L.J. 13; *Ellarayan v. Nagaswami*, (1926) 49 Mad. 691; cf. *Rama v. Bhagchand*, (1914) 39 Bom. 41 and *Dasharatha v. Nyal Chand*, (1891) 16 Bom. 134.

guished by act of parties, or by an order or decree of Court; or under operation of rule of *res judicata*, and a second suit for redemption is maintainable, Art. 148, and no other article applies to the suit. (Also see notes under Arts. 178, 179 and 181, Limitation Act.)

2279. It has been noticed above that a **relationship of mortgagor and mortgagee**, must subsist between the parties before a suit can fall under Art. 148, Limitation Act. See S. 2274, *ante*. When a mortgagor after

Suits not within this Article.

Suit for accessions. suit is not really one for redemption.¹⁸

Suit on subsequent agreement.

Where after the expiration of the term of a mortgage, the mortgagee was allowed to remain in possession, under a fresh agreement to restore the property free from the mortgage lien after enjoying absolute possession for a fixed term, it was held that a suit to recover the property did not fall under Art. 148, but must be brought within 12 years from the expiration of the term stipulated in the agreement.¹⁹

What is a redemption suit.

A **redemption suit** is one in which the plaintiff, accepting the position of a mortgagor or of a person interested in the equity of redemption, asks for possession in accordance with the terms of the mortgage on payment of the amount due under it.²⁰

Suit for setting aside a mortgage and for possession.

A suit for annulment of mortgage made without necessity by plaintiff's father, is not a suit for redemption, but for possession contrary to the terms of the mortgage, and after setting aside the father's alienation and falls under Art. 126, Limitation Act.²¹ In *Uttam v. Raj Krishna*,²² where

Invalid sale of equity of redemption.

a mortgagee in possession gave the mortgaged property in lease to the mortgagor, and on his default in payment of rent, the mortgagee obtained a decree for arrears, and in execution purchased the property himself in contravention of S. 99 (old), Transfer of Property Act, it was held that the mortgagor could not redeem the mortgage *without setting aside the auction-sale under* Art. 12 and in any case, the suit would not be for redemption but to enforce the trust, even if the mortgagee was treated as a trustee

18. *Muhammad Khudadad Khan v. Girdhari Ram*, (1917) 42 I.C. 468 (Punj.).

19. *Gopal v. Desai*, 6 Bom. 674 (680).

20. *Chokhey Singh v. Hardeo Singh*, (1921) 64 I.C. 757=24 O.C. 330=1921 Oudh 196 (197).

21. *Ibid.*, 24 O.C. 330=1921 Oudh 196 (197)=64 I.C. 757.

22. 47 Cal. 377 (396)=24 C.W.N. 229 (F.B.).

of the equity of redemption for the mortgagor, and the suit would fall under Art. 120, Limitation Act.

Redemption by purchaser of equity of redemption.

Where the plaintiffs mortgaged certain property with possession to Y, and subsequently the plaintiffs sold the equity

of redemption in a portion of the property to G and the defendants; and later on the defendants successfully sued to redeem the original mortgage, but did not implead the plaintiffs as parties; and the plaintiffs then sued to redeem the mortgage and recover possession of the property, it was held that the decree for redemption which the defendants had obtained created a charge in their favour by virtue of S. 95, Transfer of Property Act, and the suit by the plaintiffs to recover possession was governed by Art. 144, and not

Art. 148 of the Limitation Act.²³ This article does not apply where the right of redemption is extinguished by foreclosure, and the mortgagee's position is changed to

Foreclosure proceedings extinguishing right of redemption.

that of an owner.²⁴ Where the foreclosure proceedings under the Bengal Regulation were completed by the expiration of the year of grace, the mortgagor has 12 years within which to sue to open up the foreclosure, but he cannot sue for redemption under Art. 148 of the Limitation Act.²⁵ **A deed of conditional sale may execute itself**, in the absence of any rule of law as in Bengal Regulation XVII of 1806, or S. 60 of the Transfer of Property Act, or of any rule of property established by judicial decision, and Art. 148 will not apply where the title of the mortgagee has become absolute by virtue of the terms of the contract immediately on default of payment within the time stipulated.²⁶ The right to redeem may be extinguished by 12 years' adverse possession of the equity of redemption, even before the expiry of the 60 years

Adverse possession of equity of redemption.

allowed by Art. 148, Limitation Act.²⁷ In *Lala Kanhoo v. Manki Bibi*,²⁸ it was held that if a stranger receives the rents and profits from the mortgagee in possession,

his adverse possession of the equity of redemption for 12 years

23. *Ramchandra v. Ganesh*, 1933 Bom. 114=35 Bom. L. R. 48=144 I.C. 8.

24. *Karorimal v. Ramji Lal*, (1920) 2 Lah. 53 (F.B.).

25. *Burmamoyi v. Dinobundhoo*, (1880) 6 Cal. 564 (571); also see *Hossein v. Abdool Ali*, (1867) 8 W.R. 476.

26. *Mitra's Limitation Act*, Vol. II, p. 872; citing *Mallikarjunudu v. Mallikarjunudu*, (1884) 8 Mad. 185 and *Ram Singh Jakal Singh v. Parsaram*, 97 I.C. 725 (Sind) (Art. 144 applied); cf. *Jai Ram v. Makunda*, (1904) 26 All. 337.

27. *Chinto v. Janki*, (1892) 18 Bom. 51; also see and cf. *Tarubai v. Venkatrao*, (1902) 27 Bom. 43; *Ammu v. Ram*, (1879) 2 Mad. 226 and *Muhammad v. Mul Chand*, 27 All. 395.

28. (1902) 6 C.W.N. 601.

will extinguish the mortgagor's right even when the mortgagee continues in possession and the period of redemption is still running. Where the mortgagor surrendered possession to the mortgagee in recognition of his proprietary right after the termination of foreclosure proceedings, it was held that this operated as a bar or defence to a suit for redemption.²⁹ An invalid purchase of equity of redemption does not establish a plea of adverse possession.³⁰ In a suit for redemption of a mortgage, neither the original mortgagee nor his son can rely on the 12 years' rule of limitation unless he can prove a subsequent valid sale by the mortgagor or his representative, changing the character of the possession of the mortgagee into that of an owner.³¹ However, although a mere assertion of an adverse title by a mortgagee in possession does not enable him to abbreviate the period of 60 years,³² it is well recog-

Adverse possession of mortgagee.

nised that adverse possession by mortgagee is possible, when his possession is adverse to mortgagor as a trespasser,³³ *e.g.*, where the mortgagee takes possession under a foreclosure clause in the deed, or otherwise when the deed does not confer on the mortgagee a right to possession of the property, and the mortgagee obtains possession in assertion of a proprietary title. Where a Court by its decree pronounces a mortgage-debt to be satisfied and the mortgagor entitled to immediate possession, this is equivalent to a declaration that the relation between the parties of mortgagor and mortgagee has come to an end. Therefore, where in foreclosure proceedings under the Bengal Regulation, the mortgagor deposited within the year of grace in Court the full amount necessary to redeem the mortgage, but the mortgagee refusing to accept the money so deposited brought a regular suit for foreclosure and possession, and despite its dismissal, the mortgagee continued in possession, it was held that the mortgagee was adversely in possession within the meaning of Art. 144 of the Limitation Act.³⁴

Assignee for valuable consideration.

As observed in *Ammu v. Ramakrishna*,³⁵

29. *Bashir Husain v. Chandrapal Singh*, (1922) 68 I.C. 223 (Oudh).

30. *Bhagwant v. Kondi*, (1889) 14 Bom. 279.

31. *Dasarath v. Nyhal*, (1891) 16 Bom. 134.

32. *Ali Ahmed v. Lulta Baksh*, (1878) 1 All. 655.

33. See notes under Art. 144, *ante*; also see *Mg. San Chein v. Ma Daung*, (1924) 82 I.C. 829 (Rang.); *Pratap Bahadur v. Maheshwar Baksh*, (1908) 2 I.C. 57 (Oudh); *Jowahar v. Amar Chand*, (1926) 8 Lah. L. J. 152; *Munna Lal v. Hamid Ali*, (1924) 79 I.C. 39 (Lah.) and *Lachi Rai v. Jagannath Sahu*, (1927) 26 A.L.J. 149; cf. *Pokpal v. Bishan*, (1897) 20 All. 115 (In case of a usufructuary mortgage, the mortgagee's holding over was held not in adverse possession).

34. *Mt. Zaibunissa v. Parichhat*, (1914) 25 I.C. 611 (All.).

35. 2 Mad. 226; also see *Pannalal v. Rameshar*, (1915) 29 I.C. 403 (All.).

"Art. 148 applies to suits for redemption, and to such suits instituted against mortgagees or persons claiming under them except purchasers for value, but it does not apply to suits against strangers, nor to suits which are not suits for redemption".

The term "mortgagee" in Art. 148 includes an assignee of a mortgage.³⁶ A suit for redemption against a sub-mortgagee as such is governed by Art. 148, Limitation Act.³⁷ But this article does not apply to transferees for a valuable consideration which would be covered by Art. 134 of the Limitation Act.³⁸ A valuable consideration in the sense of law may consist either in some right, interest, profit, or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.³⁹ Article 148 cannot apply where the defendant and his predecessors-in-title had been in adverse possession for more than 12 years at the date of suit.⁴⁰ The mortgagee's suit for redemption against the mortgagee and a *third* person who has dispossessed the mortgagee is governed by Art. 144, and not by Art. 148, Limitation Act.⁴¹

2280. STARTING POINT OF LIMITATION.—The

<p>Accrual of the right to redeem.</p>	<p>starting point of limitation for a period of 60 years under this Act runs not from the date of the mortgage, but from the time</p>
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when the right to possession, or the right to redeem accrues.⁴² Their Lordships of the Privy Council have held that the right of redemption and the right of foreclosure are co-extensive.

"Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But, there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period, and take back the property. Such a provision is usually to the advantage of the mortgagor."⁴³

36. *Bhagwan Sahai v. Bhagwan Din*, 9 All. 97; *Arumuga v. Chockalingam*, (1892) 15 Mad. 331.

37. *Ma Myat Gyi v. Ma Ma Nyan*, (1924) 84 I.C. 985=2 Rang. 561; also see *Dirghpal Singh v. Kallu*, 30 I.C. 956=37 All. 660=13 A.L.J. 945 and *Chinto v. Janki*, (1892) 18 Bom. 51.

38. See notes under Art. 134.

39. *Currie v. Misa*, (1875) L.R. 10 Ex. 153 (162).

40. *Secti Kutti v. Kunhi Pathuma*, 40 Mad. 1040 (F.B.); *Gurdial v. Munnalal*, (1921) 61 I.C. 627 (All.); also see *Puttappa v. Timmaji*, 14 Bom. 176.

41. *Chinto v. Janki*, (1892) 18 Bom. 51; *Jai Govind v. Abhairaj Singh*, 77 I.C. 125 (Mad.).

42. *Vadju v. Vadju*, (1880) 5 Bom. 22; also see *Hussain v. Hussain*, 29 All. 471 and *Prannath Roy v. Rookea Begum*, (1859) 7 M.I.A. 323; cf. *Bhagwat Das v. Parshad Singh*, (1888) 10 All. 602; *Rase Ammal v. Rajarathnammal*, 23 Mad. 33 (35, 36).

43. *Bakhtawar Begam v. Husaini Khanum*, (1913) 36 All. 195 (P.C.); cf. *Babaji v. Vithu*, (1882) 6 Bom. 734 (The rule of law does not apply to cases falling under the Dekhan Agriculturists' Relief Act).

Where a mortgage-deed stipulated that the mortgagor would "pay the interest every year, and the principal in ten years", it was held that the advance by the mortgagee to the mortgagor was for a period of ten years certain, and under the ordinary rule, while on the one hand the mortgagee could not enforce his rights during the period of ten years, on the other the mortgagor was not entitled, before that period had expired, to redeem the property.⁴⁴ Under the rule enunciated above, a mortgagor, cannot therefore redeem before the time limited for payment, unless he reserves such a right by the mortgage contract. Case law has been reviewed in *Rama v. Wamanrao*,⁴⁵ by the Nagpur Judicial Commissioner's Court, where the conclusion is reached that,

"unless in a usufructuary mortgage securing possession to the mortgagee for a fixed term, there is either a special condition for the earlier redemption or there is a pleading and proof of fraud, duress or undue influence owing to which the period was fixed, the mortgagor or his representative or transferee cannot offer or claim to redeem and recover back possession from the mortgagee before the expiry of the specified period".

This agrees with the view taken in *Bala v. Ghasi*,⁴⁶ that

"in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption only arises on the expiry of the specified period".

Following the Privy Council view, it has been held by the **Madras High Court**, that a mortgagor cannot be allowed to redeem the mortgage before the expiry of the term mentioned in the mortgage-deed unless there is a contract to the contrary in favour of the mortgage; and especially in the case of a usufructuary mortgage, the mortgagee is entitled to insist on his full term of enjoyment where there are no clear words in the mortgage-deed permitting the mortgagor to redeem before the expiry of the period.⁴⁷ In the Amending Act XXI of 1929, the legislature has made a verbal alteration in S. 60 of the Transfer of Property Act, to give effect to this view.

2281. ILLUSTRATIVE CASES.—

(1) A provision in a mortgage-deed providing for payment by the mortgagor on or before a certain date is sufficient indication of an inten-

44. *Raghubar Dayal v. Budhulal*, (1885) 8 All. 95.

45. (1924) 79 I.C. 870 (Nag.): cited *Jivanlal v. Dhunde*, 16 C.P. L.R. 59 (Term whether created for benefit of mortgagor as well as mortgagee); *Raja Setracherla v. Suriyanarayan*, 2 Mad. 314; *Puran Singh v. Kesar Singh*, 39 P.R. 1907; *Ram Prasad v. Jagrup*, 15 I.C. 880=10 A.L.J. 157; *Sarbdaman Singh v. Bijai Singh*, 24 I.C. 705=36 All. 551 (553); *Sayad Abdul Hak v. Gulam Jilani*, 20 Bom. 677; *Dalthawan Singh v. Amardeo Singh*, 23 I.C. 926=12 A.L.J. 492 and *Bala v. Ghasi*, 64 I.C. 730=17 N.L.R. 202.

46. 64 I.C. 730=17 N.L.R. 202 (204).

47. *Mylavarappa Rangappa Naidu v. Basanna Simon*, (1926) 94 I.C. 639=23 L.W. 367=1926 Mad. 594; *Bir Mohamed v. Nagoor*, 25 I.C. 576=27 M.L.J. 483.

tion to allow him to redeem before that date, especially where a stipulation is made applicable only to the balance of the mortgage debt.⁴⁸

(2) Where the plaintiff's ancestor executed a sale-deed of certain property in favour of the defendant's ancestor who

Stipulation for re-emption within fixed time. simultaneously executed an agreement to re-convey; and the latter deed provided that if within a period of seven years (*audar miad sat sal*) the vendors paid to the vendee Rs. 300, which was the consideration for the sale, the vendee would re-convey the property; it was held that the transaction amounted to a mortgage by conditional sale, and the mortgagor had no right to redeem the mortgage before the expiry of seven years from the date of the mortgage, and that time did not begin to run until after seven years from the execution of the mortgage.⁴⁹

(3) Where a usufructuary mortgage provided that that the mortgagee would retain possession of the mortgaged land

Usufructuary mortgage. and that he would realise rents, and that afterwards if the mortgagor repaid the money, then

Provision for delivery of possession. the land would be released, and the mortgagee did not get possession for some six years: it was

held in a suit for redemption of the property, that under the terms of the mortgage-deed, the right of redemption did not arise until after possession had been delivered to and enjoyed by the mortgagee.⁵⁰

(4) Where the plaintiffs mortgaged certain land to the defendants, and placed them in possession under a mortgage-

Provision for discharge of debt out of income. deed, which provided that the profits of the land should be taken towards the discharge of the mortgage debt, and that when it was so discharged, possession should be surrendered to the

mortgagor; and it was found on accounts being taken of the proceeds of the land that the principal and interest had not been discharged thereby, held, that the right to redeem had not accrued to the plaintiffs, and that a suit for accounts and for a decree for redemption on payment of the balance due, should be dismissed.¹

(5) Where a usufructuary mortgage provided that the mortgagors should be entitled to redeem and to obtain possession of the mortgaged property or payment of the principal amount, and the profits were to be taken by the mortgagee in lieu of *interest* only, and no date for the redemption of the mortgage was specified, it was held that the mortgage became liable to be redeemed immediately after it was made.² If there was an express provision in a usufructuary mortgage that the mortgage was redeemable at any time at the will of the mortgagor, the mortgagor's right to redeem would accrue on the date of the mortgage.³

(6) In case of a *Lekha Mukhi* mortgage, the right to redeem accrues immediately from the date of the execution of the mortgage and time runs from that date.⁴

48. *Chandu v. Koaja Pujari*, (1915) 30 I.C. 370 (Mad.).

49. *Kalka Prasad v. Bhiyan Din*, (1909) 31 All. 300.

50. *Mahamed Ismail v. Sharfatullah*, (1925) 90 I.C. 763 (Cal.).

1. *Tirugnana Sambanda v. Nallatambi*, (1892) 16 Mad. 486.

2. *Soni Ram v. Kanhaiyalal*, (1913) 35 All. 227 (P.C.).

3. *Anwar Husain v. Lalmir*, 26 All. 167 (171).

4. *Khundulal v. Fazil*, 1 Lah. 89 (90); *Dittu Mal v. Ilahi*, 101 I.C. 549=28 P.L.R. 123=1927 Lah. 828.

2282. See notes to Ss. 19 and 20. Section 20, Limitation Act does not extend the period of limitation in favour of the *mortgagor*, who must sue for *redemption* within sixty years prescribed by Art. 148, Limitation Act.⁵ Section 20 is meant to extend the time for suit by a mortgagee to recover a debt secured by a usufructuary mortgage, but is not intended to override the general provision as regards limitation for suits for redemption which is to be found in Art. 148, Limitation Act.⁶ The same point was raised in *Khilanda Ram v. Jinda*,⁷ where Rattigan, J., observed that "no doubt by the general law the right to redeem and the right to foreclose are co-extensive rights. In the present case we have to apply the provisions of the law of limitation, which is a special law, and we cannot enlarge exceptions of time allowed by that law beyond their legitimate limits".

An acknowledgment of the mortgagor's title by one of several mortgagees as agent for the others is wholly ineffectual, and does not bind the rest. So, too, is an acknowledgment by one of several heirs of the original mortgagee without effect. The expression "*some person claiming under him*" in Art. 148 of the Act means some person claiming under him the *entirety* of the mortgagee's right.⁸

2283. The *onus* is on the plaintiff to prove that a suit for the redemption of a mortgage is brought within time (*e.g.*, that the mortgage term expired within sixty years). If owing to plaintiff's failure to disclose the date of the mortgage, it cannot be ascertained whether the acknowledgment made was within sixty years of the mortgage, the suit will have to be dismissed as time-barred.⁹ The acknowledgment in itself should import that the person making the acknowledgment is then under an existing liability.¹⁰ Where the defendant in possession denies the existence of the alleged mortgage, the *onus* is on the plaintiff to prove his own right as mortgagor clearly and indefeasibly against the *prima facie* complete title of the defendant. Mere statements that the property had been mortgaged, which failed to establish any particular mortgage, did not shift the burden of proof, or require the mortgagee to show what were the terms of such mortgage, or his right to retain possession under it.¹¹

5. *Anwar Husain v. Lalmir Khan*, (1903) 26 All. 167; Followed in *Markunday v. Mahabir*, (1928) 110 I.C. 560.

6. *Kallu v. Halki*, (1896) 18 All. 295.

7. 115 P.R. 1883.

8. *Bhogilal v. Amritlal*, (1892) 17 Bom. 173.

9. *Khiali Ram v. Taik Ram*, (1916) 38 All. 540; *Rajah Kissen Datt v. Narendra*, (1875) 3 I.A. 85.

10. *Ittapan Kuthiravattat Nayer v. Nanu Sastri*, (1902) 26 Mad. 34.

11. *Ramchandra Apaji v. Balaji*, (1884) 9 Bom. 137.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
149.	Any suit by or on behalf of the Secretary of State for India in Council.	Sixty years.	When the period of limitation would begin to run under this Act against a like suit by a private person.

SYNOPSIS.

2284. Previous History.
 2285-88. Scope of article.
 2285. Relates to suits only.
 2286. Not applicable to suits by persons with derivative title.
 2287. Suit for declaration against Government.
 2288. Suits by or against municipality.
 2289. Illustrative cases.
 2290. Adverse possession against Government.
Onus probandi.

NOTES.

2284. PREVIOUS HISTORY.—This article is same as Art. 149, Sch. II, Act XV of 1877, and corresponds to Art. 150 of Act IX of 1871, which contained the words “any suit *in the name of* the Secretary of State, etc.,” which were replaced by the present words “*by or on behalf of*” in Art. 148 of Sch. II, to Act XV of 1877. Under the Act of 1871, this article applied to suits by private persons for their own benefit, in the name of Secretary of State.

The Bengal Regulation II of 1805 made similar provision in Cls. (1) and (2) of S. 2, but the law gave no extension of the period of sixty years, for a suit by Government to establish its right and title. In the case of *The Collector of Rungpore v. Prosunno Coomar Tagore*,¹² where the Government sued to establish its right and title to a *julkur*, it was held that the *onus* was on plaintiff to remove the bar of limitation pleaded by the defendant, by showing that he (the plaintiff) had possession within the period prescribed by law. Under this Regulation II of 1805, sixty years was fixed as the absolute limit beyond which neither fraud nor any other special allegation would give a cause of action.¹³ In a suit by Government against ghatwals, the defendants were found to have been in possession “for a very long time”; and, although they had failed to prove possession in excess of 60 years, the *onus* was held to lie on the Government to prove possession within 60 years.¹⁴ This Regulation was repealed by Act VIII of 1868.

12. (1866) 5 W.R. 115.

13. *Bromanund Gossain v. The Government*, (1866) 5 W.R. 136; cf. *Secretary of State v. Chelikani Rama Rao*, 35 I.C. 902=39 Mad. 617=43 I.A. 192 (P.C.).

14. *Ibid.*

Under Act XIV of 1859, by S. 17, it was enacted that "this Act shall not extend to any public property or right, nor to any *suits* for the recovery of public revenue by the laws or rules of limitation in force".

A suit by plaintiff claiming as lessee under the Government was not taken out of the operation of Cl. (12), S. 1, Act XIV of 1859, or bring it within the reservation of S. 17 of the Act.¹⁵ The question being of private rights, the plaintiff could not stand in the position of the Government and have the benefit of 60 years' limitation instead of 12 years.¹⁶

2285. SCOPE OF THE ARTICLE.—(1) This article relates to suits by or on behalf of the Government.¹⁷ The legislature makes no difference between Government and its subjects in the case of appeals and applications.¹⁸ Government is not entitled to any exemption from the provisions of the Indian Limitation Act, except in the matter of *suits* for which an express provision is made in its favour.¹⁹ An application by Government, under the Code of Civil Procedure, to recover the amount of Court-fees from a party ordered by the decree to pay the same,²⁰ or an application for execution,²¹ is subject to the ordinary period of limitation as in the case of another person. An application by Government under Bengal Land Revenue Assessment (Resumed Lands) Regulation, 1819, for assessment of revenue is not a suit so as to make Art. 149, Limitation Act applicable.²²

2286. (2) Article 149, Limitation Act applies only to suits brought by the Secretary of State or on his behalf, and not to suits brought by persons deriving title from him.²³ Thus, a purchaser of the rights of Government cannot claim the special period of sixty

15. *Assoo Meah v. Rajoo Meah*, (1868) 10 W.R. 76.

16. *Rughoonath Surmah v. Gobind Chunder Roy*, (1870) 14 W.R. 170.

17. *Secretary of State v. Dinshaw Naoroji*, (1925) 87 I.C. 1002=1925 Sind 275; also see *Secretary of State v. Keta*, (1895) 19 Mad. 165.

18. *The Collector of Broach v. Desai Raghunath*, (1883) 7 Bom. 552 note; *Govind Lakshman v. Narayan Moreshwar*, 11 Bom.H.C.R. 111.

19. *Appayya v. The Collector*, (1881) 4 Mad. 155.

20. *Ibid.*, (1881) 4 Mad. 155 (Art. 178, applied).

21. *The Collector of Beerbhoom v. Sreehurry Chuckerbutty*, (1874) 22 W.R. 512.

22. *Mahabannissa v. Secretary of State*, (1926) 98 I.C. 334=1926 Cal. 1064=53 Cal. 561.

23. *Kuthaperumal v. Secretary of State*, (1906) 30 Mad. 245; Followed in *Suryanarayana v. Naidu*, (1926) 97 I.C. 253 (Mad.).

years within which to bring a suit for possession, or any further time than is allowed to any other purchaser by the ordinary law of limitation.²⁴ The sixty years' period of limitation provided by this article, is not applicable to a suit brought by a person claiming title under settlement *pottas* from Government.²⁵ Art. 149 does not apply to a case where there is no contention that the right of the Crown to recover possession was included in the grant to the plaintiff.²⁶ Where the assignees from the Secretary of State join him as a co-plaintiff with themselves in a suit, the period of limitation will not be sixty years under Art. 149, Limitation Act; such article applying only to suits brought on behalf of the Secretary of State.²⁷ A trespasser who has been in adverse possession of lands belonging to Government for more than twelve years, though less than sixty years, can successfully set up the plea of adverse possession against a person claiming title under a grant from Government, event though the twelve years' period of the trespasser's adverse possession had wholly or partly expired before the date of grant.²⁸ A transferee from Government of property held adversely by third party is not entitled to the sixty years' rule of limitation under Art. 149, but to the ordinary twelve years' rule under Art. 144 of the Limitation Act, the period commencing from the date when the possession of the third party became adverse to Government.²⁹

2287. This article applies only to suits brought by or on behalf of the Government. It does not
 Suit for declaration
 against Government. apply to a suit brought by a private person against the Government.³⁰ However, a suit for declaration against the Government that the plaintiff by prescription has become the owner of certain property which belonged to Government, must fail unless the plaintiff is able to show that he has been in adverse possession of the property for more than sixty years, inasmuch as Art. 149, Limitation Act, permits the Government to sue for the recovery of the property at any time

24. *Kuthaperumal v. Secretary of State*, 30 Mad. 245; also see *Hossein Buksh v. Ameena Katoon*, (1873) 20 W.R. 231 and *Boondi Roy v. Bunsee Thakoor*, (1875) 24 W.R. 64; *Nawab Bahadur v. Gopinath Mandal*, (1910) 6 I.C. 392 (Cal.).

25. *Jagadindra Nath Roy v. Hemanta Kumari Debi*, (1904) 32 Cal. 129=31 I.A. 203 (P.C.); also see *Madhow v. Lokenatha*, 5 M.L.T. 107=2 I.C. 314.

26. *Moolchand v. Amarnath*, (1917) 39 I.C. 971=79 P.W.R. 1917=140 P.L.R. 1917.

27. *Pullanappally Sankaran Nambudri v. Vittil Thalakat Muhamod*, (1905) 28 Mad. 505.

28. *Ayyagari Venkata Suryanarayana v. Makka Venku Naidu*, (1926) 97 I.C. 253=1926 Mad. 1155.

29. *Annada Mohun Roy v. Kina Das*, (1924) 81 I.C. 675=1924 Cal. 394=28 C.W.N. 66.

30. *Secretary of State v. Bavotti*, 15 Mad. 315 (318).

within sixty years of the date when the right to sue accrues, and until that period has elapsed the Government's right in the property is not lost as provided by S. 28 of the Limitation Act.³¹ All unoccupied sites are the property of the Government unless an individual can establish in his own right a title to such unoccupied property against the Government by adverse possession for sixty years.³² When the original title in certain lands is admitted to have been with Government, a person seeking to establish his right to them by adverse possession must prove his possession for full sixty years. The fact that the claimant is able to prove possession for a long time, *i.e.*, forty years, would not entitle him to a presumption as to possession for sixty years, nor cast on the Government the onus of showing possession of proprietary right within sixty years.³³ In the case of a **claim to Crown lands by adverse possession**, it is misleading to talk of proof of "subsisting title" by Government, when there is a finding of original title in the Government, which title has not been displaced by proof of adverse possession.³⁴ Apart from the longer period of limitation allowed to Government by Art. 149, there is no discrimination in the Act between the Government and the subject as regards the requisites of adverse possession.³⁵

2288. (4) The period of sixty years cannot be taken advantage of by a municipality in respect of lands vested in them.³⁶ Where the Secretary of State for India in Council sued to recover certain sums alleged to have been misappropriated by the Secretary and the accounts clerk through the gross negligence of the defendants councillors, it was held that the suit was governed by Art. 149 of the Limitation Act and having been brought within sixty years of the embezzlement was not time-barred.³⁷ Where Crown land has been handed over to a municipal committee for management, a suit for possession by the committee against the

31. *Abdul Wahab v. Secretary of State*, (1926) 96 I.C. 447=7 Lah. 210=8 L.L.J. 309=1926 Lah. 437.

32. *Vasta Balwant v. Secretary of State*, (1921) 61 I.C. 440=1921 Bom. 177=45 Bom. 789=23 Bom.L.R. 238.

33. *Secretary of State v. Sreeramamoorthi Chettiar*, (1925) 91 I.C. 179=1926 Mad. 125=22 L.W. 546; cf. *Secretary of State v. Kota*, (1895) 19 Mad. 165.

34. *Ibid.*

35. *Secretary of State v. Debendralal Khan*, 61 I.A. 78=61 Cal. 262=147 I.C. 545=66 M.L.J. 134=1934 P.C. 23.

36. *Municipal Commissioners v. Sarangapani*, 19 Mad. 154; cf. *Sundaram v. Municipal Council*, 25 Mad. 635.

37. *Manilal Gangadas Desai v. Secretary of State*, (1916) 33 I.C. 428=40 Bom. 166=17 Bom.L.R. 1115.

defendant who has interfered with their possession is governed by Art. 149 of the Limitation Act.³⁸

2289. ILLUSTRATIVE CASES.—

(1) Where a Zemindar sold a *ghatwali* mehal as a *mal mehal*, and not merely his right to receive the quit-rent from the ghatwal, and the vendee in collusion with the former ghatwal granted him a *mokarrari* tenure, thus changing the nature of the tenure from a ghatwali in a mal tenure, it was held that the Government had a right to sue so as to maintain its own nominee in possession of the land as ghatwal, and that the limitation of sixty years was applicable to such a suit.³⁹

Suits under this article.

Suit to maintain Government nominee as ghatwal.

(2) In *Koylash Bashiny Dossee v. Gocoolmoni Dossee*,⁴⁰ it was held that, apart from the law of limitation, the Government, or an auction-purchaser, or a Zemindar is entitled to resume any *lakheraj* grant made subsequent to the 1st December, 1790. In the case

Suit to resume lakheraj grant.

of Government or any person claiming under Government, Art. 149 provides the period of 60 years; and it therefore follows that the Government or an auction-purchaser claiming under the Government must sue within 60 years after the cause of action arose to resume *lakheraj* land, even although held on a grant alleged to have been made after 1790. In the case of a mere auction-purchaser, Arts. 121 and 130 would apply, and a purchaser at a revenue-sale would have 12 years within which to bring his suit; but, this period of 12 years would be subject to the limitation of sixty years, which would be a bar to Government. In other words, if the period of sixty years expired before the expiry of twelve years' period in any case in which the purchaser would be subject to the sixty years' rule, such purchaser would only have so much of the twelve years' period, as was also covered by the sixty years' period.

(3) Though the Government's right to assess land revenue is a sovereign right, and hence not subject to the statute of limitation under ordinary circumstances, there is nothing to prevent the Government from divesting itself of such right by making regulations for assessment and collection of revenue which might under certain circumstances give exemption from assessment of land revenue. The effect of proviso 4 to S. 28 of Assam Regulation (II of 1805) is to exempt land from assessment if the owner can prove 60 years' possession of it without payment of any revenue during that period and thus to introduce the rule of 60 years' limitation. Proviso 2 of that Regulation merely authorises assessment of lands excepted from the permanent settlement if they do not fall under any of the saving clause.⁴¹

Suit under Assam Regulation (II of 1805).

Suit under S. 9, Sp. R. Act.

(4) A suit by the Secretary of State for India under S. 9 of the Specific Relief Act is governed by Art. 149 and not Art. 3 of the Limitation Act.⁴²

38. *Labha Singh v. Municipal Committee of Amritsar*, 36 P.L.R. 251=1934 Lah. 960.

39. *Petamber Dey v. Juggunnath Roy*, (1872) 18 W.R. 130.

40. (1881) 8 Cal. 230 (235).

41. *Ananda Kumar Bhattacharjee v. Secretary of State*, (1916) 43 Cal. 973.

42. *Secretary of State v. Dinshaw Naoroji*, (1925) 87 I.C. 1002=1925 Sind 275.

(5) In a suit instituted by the Crown for a declaration of title to certain forest land in Malabar, where there is no presumption that forest lands are the property of the Crown, the defendants alleged that the land had been in their possession for more than 60 years. It was held that it was incumbent on the Crown, under Art. 149, Limitation Act, to show possession of the proprietary right claimed within 60 years, or, if the defendant proved possession, that such possession commenced, or became adverse within such period.⁴³

(6) The provisions of the Limitation Act do not apply to the Bhagdari Act (Bombay Act V of 1862); and the Collector can move to get the process of a Civil Court set aside or quashed by taking proceedings under the Act at any time.⁴⁴ The Preamble to the Bhagdari Act declares it to be necessary, for reasons of State Policy to prevent the alienations of portions of a *bhag* and the Act provides that portions of a *bhag* shall not be sold, in fraud of the Act, and the Collector can get a sale set aside without time running against him.⁴⁵

2290. ADVERSE POSSESSION AGAINST GOVERNMENT—ONUS PROBANDI.—We have noticed in S. 2287, *ante*, that a suit for declaration by a private person *against* the Government that he has acquired proprietary title by adverse possession of the property requires a proof of adverse possession for more than sixty years, inasmuch as Art. 149, Limitation Act permits the Government to sue as plaintiff for the recovery of the property at any time within sixty years of the date when the right to sue accrues.⁴⁶ As regards *onus* in such suits it is to be borne in mind that where original title in certain lands is admitted to have been with Government, a person seeking to establish his right to them by adverse possession must prove his possession for full sixty years.⁴⁷ In some early Madras cases, namely, *Secretary of State v. Vira Rayan*,⁴⁸ *Secretary of State v. Kota*,⁴⁹ and *Raja Chelikani Rama Rao v. Secretary of State*,⁵⁰ a view was taken that if a person had been in possession of land for a long period, it was incumbent on the Crown to show possession of the proprietary right

43. *Secretary of State v. Vira Rayan*, (1880) 9 Mad. 175; cf. *Secretary of State v. Sreeramamoorti*, (1925) 91 I.C. 179=1926 Mad. 125 and 39 Mad. 617 (P.C.).

44. *The Collector of Broach v. Desai Raghunath*, (1883) 7 Bom. 546; also see *Dala v. Praga*, 4 Bom.L.R. 797; *Jethabhai v. Nathabhai*, 6 Bom.L.R. 428=28 Bom. 399.

45. *Ibid.*, (1883) 7 Bom. 546.

46. *Abdul Waheb v. Secretary of State*, (1926) 96 I.C. 447=7 Lah. 210=8 L.L.J. 309=1926 Lah. 437.

47. *Secretary of State v. Sreeramamoorthi*, (1925) 91 I.C. 179=22 L. W. 546=1926 Mad. 125.

48. 9 Mad. 175.

49. 19 Mad. 165.

50. 33 Mad. 1=5 I.C. 882=7 M.L.T. 128=20 M.L.J. 66.

within sixty years; in other words, that it was incumbent on the Government to establish not merely original title, but a "subsisting title". This was also the view taken in some early Calcutta cases, e.g., *Bromanand Gossain v. The Government*.¹ This view has now been directly negatived by the **Privy Council** in *Secretary of State v. Chellikani Rama Rao*.² After referring to the view of **Madras High Court** expressed as follows:—

"Though the title was originally in the Crown, still as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within sixty years before the notification,"

their Lordships remark,

"In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessor's possession for sixty years, their Lordships' opinion is, as stated, that this is erroneous. But with reference to the 'subsisting title', it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental; until adverse possession against the Crown is complete, that is to say, it is for sixty years, that fundamental fact remains, and that fact forms 'subsisting' title"

As observed by the **Madras High Court** in *Secretary of State v. Sreeramamoorthy Chettiar*,

"it is clear from this *dictum* that it is misleading to talk about 'subsisting title', when there is a finding of original title in the Government which title has not been displaced by proof of adverse possession".³

Their Lordships of the Privy Council stated in the ruling above-mentioned that the question simply is

"Do the claimants establish adverse possession"; "if they do not the basis of their claim fails". "Under the Indian Limitation Act no adverse possession can be effectively pleaded against the Court for a period of less than sixty years."⁴

To prove adverse possession against the Government, it is not sufficient to prove possession for a long period, but possession for the whole period of sixty years must be affirmatively proved. To hold, on mere probabilities and evidence of long possession, that possession was for sixty years, is not allowable.⁵

As regards forest lands, and old wastes and all unoccupied sites, the presumption is that such tracts belong to the Government unless that presumption is displaced by positive evidence that the

1. (1866) 5 W.R. 136.

2. 35 I.C. 902=39 Mad. 617=31 M.L.J. 324=20 C.W.N. 1311=43 I.A. 192 (P.C.).

3. (1925) 91 I.C. 179=22 L.W. 546=1926 Mad. 125.

4. (1916) 39 Mad. 617 (629) (P.C.).

5. *Krishna Shastri v. Singaravelu*, 1925 Mad. 780; Relied on 39 Mad. 617 P.C., *supra*.

right has in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals; or rights have been consciously allowed to grow up adversely to the Government.⁶ A person claiming an unoccupied village site as against the Government must prove either that he has got a title better than the title of the Government or that he has obtained a title by adverse possession, that is to say, by possession for sixty years.⁷ The presumption in favour of Government may be rebutted by proof of acts of undoubted ownership, such for instance, as the granting of leases, cutting of timber, etc.⁸ A licensee cannot claim title only from possession, however long, unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence.⁹ In order to constitute adverse possession, the possession must be adequate in continuity, publicity and in extent to show that it is possession adverse to the competitor.¹⁰

"If the rights of the Crown have been openly usurped it cannot be heard to plead that the fact was not brought to its notice. The Limitation Act is indulgent to the Crown in one respect only, namely, in requiring a much longer period of adverse possession than in the case of a subject; otherwise there is no discrimination in the statute between the Crown and the subject as regards the requisites of adverse possession. It is not necessary in order to establish adverse possession that the proof of acts of possession should cover every moment of the requisite period".¹¹

It is true that the periods of possession of a series of independent trespassers cannot be added together and utilised by the last possessors to make up the statutory total period of adverse possession. But the plaintiff can add his adverse possession to that of himself and his predecessors.¹² Where the plaintiffs claimed adverse possession in respect of fishery rights against the Crown since 1859, and it appeared that throughout the whole period from 1859 on-

6. *Kodoth Ambu Nair v. Secretary of State*, (1924) 80 I.C. 835=1924 P.C. 150=47 Mad. 572 (P.C.).

7. *Vasta Balwant v. Secretary of State*, (1921) 61 I.C. 440=45 Bom. 789=23 Bom.L.R. 244.

8. *Secretary of State v. Manjeshwar Krishnayya*, (1904) 28 Mad. 257.

9. *Kodoth Ambu Nair v. Secretary of State*, (1924) 80 I.C. 835 (839) (P.C.); also see *Bank of Upper India v. Digamber Singh*, (1910) 33 All. 229 (All.).

10. *Radhamoni Devi v. Collector of Khulna*, 27 I.A. 136 (140)=27 Cal. 943 (P.C.); Followed in *Secretary of State v. Debendralal Khan*, (1934) 147 I.C. 545=1934 P.C. 23=66 M.L.J. 134=61 Cal. 262 (P.C.); also see *The Collector of Trichinopoly v. Muthukumara Pillai*, (1927) 101 I.C. 96=25 L.W. 349=1927 Mad. 456.

11. *Secretary of State v. Debendralal Khan*, 147 I. C. 545 (547)=1934 P. C. 23=61 Cal. 262 (P. C.); also see and cf. *Ayyagiri Venkata Suryanarayana v. Makka Venku Naidu*, (1926) 97 I.C. 253=1926 Mad. 1155 (A trespasser who has been in adverse possession of land belonging to Government for more than 12 years, though less than 60 years, can successfully set up the plea of adverse possession against a person claiming title under grant from a Government).

12. *Ibid.*, 147 I.C. 545 (550)=1934 P.C. 23=61 Cal. 262 (P.C.).

wards there was no evidence of any attempt by the Crown to assert or exercise any fishery rights in the disputed portions of the river; and at the very beginning of the limitation period fisheries in the river were found to be in private hands to the knowledge and without challenge by the Crown, it was held that this showed the Crown's acquiescence in the usurpation of its rights if usurpation it was.¹³

Where a person and his ancestors had been in uninterrupted possession and enjoyment of a *natham poramboke* land for over sixty years by putting up a *pacca* thatched building thereon for tethering cattle and storing hay, and had enclosed the site by a fence all round, it was held that the person in possession acquired title by adverse possession.¹⁴

SECOND DIVISION: APPEALS.

Article.	Description of Suit.	Period of Limitation.	Time from which Period begins to run.
150.	Under the Code of Criminal Procedure, 1898, from a sentence of death passed by a Court of Session.	Seven days.	The date of the sentence.

SYNOPSIS.

- 2291. Corresponding provisions.
- 2292. General provisions.
- 2293. Sentence of death.

NOTES.

2291. CORRESPONDING PROVISIONS.—There was no corresponding provision in Act IX of 1871. But S. 271-A of the Code of Criminal Procedure, 1872, gave a period of seven days for an appeal "*from a sentence of death passed by a Sessions Judge*". Art. 150 of Act XV of 1877 made a like provision, in Sch. II of that Act. The present article is the same as Art. 150 of Act of 1877, with the words "passed by a Court of Sessions" in place of the "passed by a Sessions Judge".

2292. GENERAL PROVISIONS.—Sections 3, 4, 5 and 12 apply to appeals as well as to suits to applications.

2293. SENTENCE OF DEATH.—This sentence may be passed for offences under Ss. 121, 194, 302, 305, 307 and 396 of the Penal Code, and must be passed for a conviction under S. 303, Indian Penal Code.

13. *Secretary of State v. Debendralal Khan*, 147 I.C. 545 (549).

14. *The Collector of Trichnopoly v. Muthukumara Pillai*, 101 I.C. 96 (98)=25 L.W. 349=1927 Mad. 456.

Article,	Description of Suit.	Period of Limitation.	Time from which Period begins to run.
150-A.	Under the Code of Criminal Procedure, 1898, from a finding rejecting a claim under section 443 of that Code.	Seven days.	The date of the finding.

SYNOPSIS.

2294. Previous History.

NOTES.

2294. **PREVIOUS HISTORY.**—This article is new, being added by the Criminal Law Amendment Act XII of 1923, S. 42, which received the assent of the Governor-General on the 16th March, 1923.

Section 443 of the Code of Criminal Procedure, 1898, forms part of Chapter XXXIII (special provisions relating to cases in which European and Indian British subjects are concerned), which has been newly added by the Criminal Law Amendment Act of 1923, above referred to, on the lines recommended by para. 27 of the Racial Distinctions Committee report.

Article.	Description of Suit.	Period of Limitation.	Time from which Period begins to run.
151.	From a decree or order of any of the High Courts of Judicature at Fort William, Madras, Bombay, Lahore and Rangoon, in the exercise of its original jurisdiction.	Twenty days.	The date of the decree or order.

SYNOPSIS.

2295. Previous history.
 2296. Original jurisdiction.
 2297. Date of the decree.

NOTES.

2295. **PREVIOUS HISTORY.**—This article corresponds to Art. 151 of Act XV of 1877, where the 1st column had the words “or the Chief Court of the Punjab, or the Chief Court of Lower Burma” in place of the present words “Lahore and Rangoon”. There was no corresponding provision in Act IX of 1871.

2296. **ORIGINAL JURISDICTION.**—Under Statutes 24 and 25, Vic., c. 104 of 1861, S. 1, authorized the establishment of High Courts at Fort William in Bengal and at Madras and Bombay, and S. 9 of the Act specified jurisdiction and powers of the

High Courts including original and appellate jurisdiction on civil, criminal, admiralty, testamentary, matrimonial, etc., side. Letters Patent of the High Courts at Calcutta, Madras and Bombay, speaks of **ordinary original civil jurisdiction**, (cl. 11), and of **extraordinary original civil jurisdiction** (cl. 20).

There is a distinction between the original jurisdiction of the High Court, and the ordinary civil jurisdiction of the High Court. All applications to the High Court are either civil or criminal. They are original civil when matters come for the first time to the High Court, and they are appellate civil when they come in the form of appeals. The granting of **probates or succession certificates** will come within the original civil jurisdiction, but it would not come under ordinary original civil jurisdiction, which by the Letters Patent, seems to be confined to suits and matters under cls. 12 to 21, which refer to the exercise by the High Court of the ordinary original civil jurisdiction.¹⁵

An appeal under S. 55 of the Indian Divorce Act, against a decree absolute, must be filed within twenty days from the date of the decree, that being the period prescribed for appeals from decrees made on the original side of the High Court under the law for the time being in force.¹⁶ Original jurisdiction includes insolvency and matrimonial jurisdiction.¹⁷

Original insolvency and matrimonial jurisdiction. "Ordinary original civil jurisdiction" is opposed to the "extraordinary" jurisdiction, which the High Court may assume, at its discretion, upon special occasions and by special orders, and it includes all such jurisdiction as is exercised by the High Court in the ordinary course of law without any step taken to assume it.¹⁸

The prerogative writ of certiorari or mandamus. The jurisdiction possessed by the High Courts of Fort William, Madras and Bombay, in the matter of **certiorari** is original and supervisory, corrective and on the English analogy extends over all inferior tribunals amenable to its authority. In India the Madras High Court's power to issue the **writs of certiorari** falls within its original jurisdiction as distinguished from its appellate or other jurisdiction and it is in this

15. *In the matter of G. A. Kuppitswami Nayagar*, 1930 Mad. 779 (780)=53 Mad. 237=59 M.L.J. 17=32 M.L.W. 4=126 I.C. 481.

16. *A v. B* (Matrimonial jurisdiction), (1898) 22 Bom. 612.

17. *Harriette A. King v. James S. King*, (1882) 6 Bom. 416; *In the matter of Candas Nanondas Navivahu*, (1889) 13 Bom. 520=16 I.A. 156 (P.C.).

18. *In the matter of Candas Nanondas Navivahu*, 13 Bom. 520=16 I.A. 156 (P.C.).

sense that the expression "original jurisdiction" is used in Government of India Act (1919), S. 110.¹⁹ The prerogative writ of mandamus is in form a command issued in the King's name from the King's Bench Division of High Court of Justice, and it is a writ issued not as an ordinary writ of strict right, but at the discretion of the sovereign acting through that Court in which the sovereign is supposed to be personally present. So far as this country is concerned, S. 45, Specific Relief Act, now empowers the High Courts of Calcutta, Madras, Bombay and Rangoon to make orders which secure the same result as the writ of mandamus issued by the King's Bench Division in England. High Courts of Calcutta, Madras and Bombay have no longer any power to issue the writ of mandamus apart from and except under conditions prescribed by S. 45, Specific Relief Act, 1877.²⁰ The Letters Patent of Patna and Allahabad and Lahore High Courts do not contain any reference to power of issuing prerogative writs similar to those possessed by the Calcutta High Court and the High Courts of Bombay and Madras.²¹ The power seems to be confined only to those High Courts which had been invested with the original civil

Original jurisdiction under S. 66, Income Tax Act.

jurisdiction.²² An order of a single Judge of the Lahore High Court dismissing an application made under S. 66 (3), Income-tax Act, is appealable under cl. 10, Letters Patent.²³ The High Court has the power to consider whether mandamus should or should not issue and its decision to the effect it should not issue is a final judgment so far as the High Court is concerned.²⁴ Such an order is made in the exercise of the Lahore High Court's original jurisdiction.²⁵ Similarly, the 39th clause of the Letters Patent of the High Court of Bombay, provides for an appeal to His Majesty in Council in any matter (not being of

19. *Venkataratnam v. Secretary of State*, (1930) 53 Mad. 979=128 I.C. 851=60 M.L.J. 25=32 M.L.W. 475=1930 Mad. 896.

20. *Surajmal Brijlal v. Commissioner of Income-tax, Behar and Orissa*, 1930 Pat. 538=10 Pat. 218 (231) (F.B.); also see *Krishna Ballav Sahay v. Governor of Bihar and Orissa*, 1926 Pat. 305=96 I.C. 791=5 Pat. 595 (F.B.)—Per Sir Jawala Prasad, J., and *R. v. Nataraja Iyer*, (1913) 36 Mad. 72=16 I.C. 755=13 Cr.L.J. 723; Relied on *Alcock Ashdown and Co. v. Chief Revenue Authority of Bombay*, 1923 P.C. 138=47 Bom. 742 (P.C.).

21. *Surajmal v. Commissioner of Income-tax*, 1930 Pat. 538 (543) =10 Pat. 218 (P.C.).

22. *Mrs. Annie Besant v. The Advocate-General of the Government of Madras*, 1919 P.C. 31=52 I.C. 209=43 Mad. 146=46 I.A. 176 (P.C.).

23. *Toralmal Uttam Chand v. Commissioner of Income-tax, Punjab and N.-W. F. Province*, 2 I.T. Cases 301.

24. *Ferozeshah v. Income-tax Commissioner, Punjab*, 132 I.C. 704=1931 Lah. 138=12 Lah. 166=32 P.L.R. 234 (F.B.).

25. *Ibid.*, 12 Lah. 166 (F.B.); Relied on 1923 P.C. 148 (P.C.).

criminal jurisdiction) from any judgment, decree or order made in the exercise of its original jurisdiction by the High Court from which an appeal does not lie to the High Court under the 15th clause. The appeal is competent if the decision and order of the High Court under S. 51 of the Income Tax Act are within cl. 39 of the Letters Patent. But the decision, judgment or order made by the Court under S. 51 of the Income Tax Act, upon a case stated for the "opinion" of the Court, is merely advisory and not in the proper and legal sense of the term final, and an appeal from it is incompetent.²⁶

Order 41, R. 20 of the Civil Procedure Code has been held not applicable to an appeal under cl. 15 of the Letters Patent from the original side of the High Court. In such cases cross-objections are not entertainable in respect of appeals.²⁷ But, it has been held by their Lordships of the Privy Council that provisions of O. 41, R. 10, Civil Procedure Code, apply equally to appeals under Letters Patent as to appeals under Civil Procedure Code: and, the Madras High Court has held subsequently that cross-objection lies on even in original side appeals.²⁸

2297. DATE OF THE DECREE.—The expression "date of decree" means the date the decree is directed to bear under O. 20, R. 7, Civil Procedure Code. This is the date when the judgment was delivered, and not the date when the decree was actually prepared and signed.²⁹ This rule does not apply to chartered High Courts, but, even in case of decrees passed on the original side of the High Court, the practice is to make the decree bear the same date as that of the judgment.³⁰ See Ch. XVI, R. 10 of the Rules and Orders of the Calcutta High Court.

26. *Tata Iron and Steel Company, Limited v. The Chief Revenue Authority of Bombay*, 1923 P.C. 148=50 I.A. 212=47 Bom. 724=74 I.C. 469=45 M.L.J. 295 (P.C.).

27. *Kausalia v. Gulab Kuar*, 21 All. 297=A.W.N. (1899) 72; Relied in *Brojendra Chandra Sarma v. Prosunna Kumar Dhar*, (1921) 59 I.C. 589 (591); also see *Bhimasena Rao v. Venugopal*, (1924) 48 Mad. 631=48 M.L.J. 384.

28. *Venkatesan v. Mothi Chand*, (1925) 49 Mad. 291=50 M.L.J. 190 (F.B.).

29. *Rakbaldass Mazumdar v. Jogendra Narain*, (1909) 10 C.L.J. 467; *Bhajan Behary v. Grish Chandra*, (1913) 17 C.W.N. 959; also see *Anandram v. Nityananda*, (1916) 32 I.C. 744 (Cal.); *Narain v. Ramdulare*, (1922) 66 I.C. 7 (Nag.) and *Mohammad Mehdi Ali Khan v. Lal Bahadur Singh*, (1925) 89 I.C. 479=1925 Oudh 600.

30. *Hajee Aboabuckor v. Official Assignee*, (1913) 21 I.C. 545=1913 M.W.N. 868=25 M.L.J. 560; also see "Letters Patent Appeal", S. 12—S. 444, p. 461, ante.

The **Allahabad High Court** has held that where decree is signed some time after the judgment was pronounced by the Court, the time spent between delivery of judgment and signing of decree can be excluded under S. 12 of Limitation Act, as "time requisite for obtaining a copy," which, however, does not begin until an application for copies has been made. If, therefore, after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed.³¹

The **Bombay High Court** takes the same view. A party is at liberty to apply for a copy of the decree, whether the decree has been signed or not. A party who delays to apply for such copy is not entitled to exclude the period of such delay. If he has applied, but the copy cannot be prepared because the decree has not been signed, then this time, and the time taken up in preparing the copy will be excluded, but so long as he has made no application, the non-signature of the decree can have no effect at all upon him.³² An extension of time for filing a memorandum of appeal against an original side decree of the High Court, cannot be claimed unless some application is made to the Court for a copy of the decree or judgment, indicating the intention of the aggrieved party to appeal, within twenty days provided by Art. 151, Limitation Act.³³

According to the practice of the **Calcutta High Court**, such period should be excluded as being part of the time requisite for obtaining the copy³⁴; and, this practice has been followed by the High Court of **Patna**.³⁵ However, the more recent view is that "the time requisite for obtaining a copy" counts from the date on which the application for a copy is made³⁶ and according to their Lordships of the Privy

31. *Bechi v. Ahsanullah Khan*, (1890) 12 All. 461; also see *Parbati v. Bhola*, (1889) 12 All. 79 (The intermediate period should be excluded, under Limitation Act, S. 12, if the delay in signing the decree has delayed the appellant in obtaining a copy of the decree, and not otherwise).

32. *Jamaji v. Autajji*, (1898) 23 Bom. 442.

33. *The New Piece Goods Bazaar Company, Limited v. Jivabhai Vadilal*, (1913) 20 I.C. 537=15 Bom.L.R. 681.

34. *Bani Madhub v. Matungini*, (1886) 13 Cal. 104 (107) (F.B.); Relied in *Golam Gaffar Mandal v. Goljan Bibi*, (1897) 25 Cal. 109; also see *Ramey v. Broughton*, (1884) 10 Cal. 652 (655, 660).

35. *Ram Asray v. Sheo Nandan*, (1916) 35 I.C. 868=1 P.L.J. 573=1 P.L.W. 35 (F.B.); *Imaman v. Sham Sagar*, (1919) 49 I.C. 663 (665) (Pat.) (F.B.).

36. *Nibaran Chandra Dat v. Martin and Company*, (1920) 58 I.C. 408=32 C.L.J. 127.

Council no period can be regarded as requisite under the Act which need not have elapsed, if the appellant had taken reasonable and proper steps to obtain an order. According to the Privy Council view, in explaining the Calcutta decision in *Bani Madhub v. Matangini*, there is no warrant for the proposition that in determining what period is to be deducted in any case the time actually consumed in obtaining the decree is to be regarded.³⁷ A person cannot, by merely filing a requisition for office copy and failing to take steps to get the decree drawn up, become entitled to exclude the time that has been wasted, in computing the period of limitation for filing an appeal. But where a requisition for drawing up a decree has been filed by the plaintiff, the defendant is not called upon to interfere in the process of the drawing up of the decree, and the time occupied by the plaintiff in getting the decree drawn up cannot be charged to the defendant.³⁸ The **Calcutta Full Bench**, has, therefore, held that the word "requisite" means properly required, and it throws upon the pleader or counsel for the appellant the necessity for showing that no part of the delay beyond the prescribed period is due to his default, and but for the time which is taken up by his opponent in drawing up a decree, or by the officials of the Court in preparing and issuing the two documents, he is not responsible. If the delay in obtaining a copy is due to the laches of the appellant, he is not entitled to the benefit of the provisions of S. 12 (2).³⁹ In the case of an appeal from the original side, time requisite for obtaining copy does not run until application for it has been made.⁴⁰ Whether S. 12 can be invoked when the application for a copy is made after the expiry of twenty days from the date of decree or order depends on the facts of each case.⁴¹

The **Rangoon High Court** has held that the words "*time requisite for obtaining a copy of the decree*" in S. 12 of the Limitation Act imply that it is essentially necessary to obtain copies and that some time must necessarily be spent in obtaining copies. Where, therefore, under the rules framed by a High Court a copy of the decree need not necessarily be filed with a memorandum of appeal from that decree, the appellant is not entitled to exclude the time which he has spent in obtaining a copy of the decree from the period prescribed for

37. *Pramathanath Roy v. William A. Lee*, 1922 P.C. 352=49 Cal. 999; Followed in *Kamruddin Hyder v. Mitter*, 1925 Cal. 735=52 Cal. 342.

38. *Sambunath Bandopadhyaya v. Gopilal Seal*, 121 I.C. 307=56 Cal. 709=1929 Cal. 734.

39. 59 Cal. 1215=1932 Cal. 331 (F.B.); Followed 1928 P.C. 103; O.R. 54 Cal. 481=1927 Cal. 623=103 I.C. 235.

40. *Ibid.*, 59 Cal. 1215 (F.B.); Relied on 13 Cal. 104 (F.B.) and 1922 P.C. 352.

41. *Ibid.*, 59 Cal. 1215 (F.B.).

preferring appeals.⁴² The words "decree or order" as used in Art. 151, Limitation Act, are wide enough to cover a "judgment", in the sense in which that word is used in cl. 13 of the Letters Patent of the Rangoon High Court. The period of limitation for an appeal under cl. 13 of the Letters Patent of the Rangoon High Court from a judgment of the High Court on its original side is, therefore, twenty days from the date of the judgment under Art. 151, Limitation Act.⁴³ In case of such appeals, the memorandum of appeal, must, under the rules, be accompanied by a certified copy of the judgment which is under appeal, unless the Court dispenses therewith.⁴⁴

The Madras High Court has held in *Narayanaswamy Tevan v. Krishnasami Pillai*,⁴⁵ that O. 20, R. 7 of the Code of Civil Procedure read with Art. 152, Limitation Act, makes the "*date of the decree*" for calculating time for appeal to be the date on which the judgment was pronounced. But, where some time is taken in getting the decree drafted because the extra Court-fee is not paid, and time is given for its payment, such time must be taken to be the time requisite for obtaining copies within the meaning of S. 12 (2) of the Limitation Act, provided that an application for copy was put in before the preparation of the decree. According to Oudh Court, the time which need not have elapsed if an appellant had taken reasonable and proper steps to obtain a copy of the decree cannot be regarded as time requisite for obtaining the copy within the meaning of S. 12 (2), Limitation Act. The date of a decree must be considered to be the date of the judgment under O. 20, R. 7, Civil Procedure Code, and an appellant is not entitled in computing the period of limitation for filing his appeal to deduct the time which elapses between the date of the judgment and the actual preparation of the decree.⁴⁶

Article.	Description of Suit.	Period of Limitation.	Time from which Period begins to run.
152.	Under the Code of Civil Procedure 1908, to the court of a District Judge.	Thirty days.	The date of the decree or order appealed from.

42. *Surty v. Chetyar Firm*, (1926) 98 I.C. 417=4 Rang. 265=1927 Rang. 20=5 Bur.L.J. 187; s.c. (1928) 55 I.A. 161=1928 P.C. 103.

43. *Ariff v. Perumal*, (1926) 98 I.C. 689=1926 Rang. 143=5 Bur. L.J. 175.

44. *Ibid.*

45. (1914) 25 I.C. 67 (Mad.); also see *Hajee Aboobuckor v. Official Assignee*, (1913) 21 I.C. 545=25 M.L.J. 560 and cf. *Muthiah Chetti v. Suppan Servai*, (1913) 38 Mad. 291 (Registration Act, S. 77—Appeal under).

46. (*Raja*) *Mohammad Mehdi Ali Khan v. Lal Bahadur Singh*, (1925) 89 I.C. 479=2 O.W.N. 420=12 O.L.J. 444=1925 Oudh 600.

SYNOPSIS.

- 2298. Corresponding provisions.
- 2299. Scope.
- 2300. Starting Point of Limitation.
- 2301. Date of the Decree.
- 2302. Judgment when pronounced.
- 2303. Amendment of the decree.
- 2304. Review application.

NOTES.

2298. CORRESPONDING PROVISIONS.—This article is same as Art. 152, Sch. II, Act XV of 1877, and it corresponds to Art. 151, Sch. II, Act IX of 1871, where the third column did not contain the words “or order”, introduced in later Acts.

2299. SCOPE.—This article only applies to appeals to the District Judge preferred under the present Code of Civil Procedure, 1908, from some decree or order under the Code.

2300. STARTING POINT OF LIMITATION.—This article must be read with O. 20, R. 7, Civil Procedure Code, which enacts that

“the decree shall bear the date on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree”.

This rule does not apply to chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction. *See* O. 49, R. 3, cl. 5, Civil Procedure Code. But similar provision has been made by the rules of the High Court executed under S. 122, Civil Procedure Code (*vide* notes under Art. 151, *supra*).

2301. DATE OF THE DECREE.—Under this rule, the period of limitation for an appeal from a judgment runs from a date on which it is pronounced, and not from the date on which it is written and signed.⁴⁷ But where a person is unable to obtain a copy of the decree from which an appeal is to be filed, by reason of the decree being unsigned, the **Calcutta High Court** takes the view that the time between the delivery of judgment and the signing of the decree must be excluded in computing the time taken in presenting the appeal.⁴⁸ The **Privy Council** have explained in *Promothonath Roy v. Lee*,⁴⁹ that this does not mean

Time requisite for obtaining a copy of decree.

47. *Anandram v. Nityananda*, (1916) 32 I.C. 744 (Cal.); *Hajee Aboobuckor v. Official Assignee*, (1913) 21 I.C. 545=1913 M.W.N. 868=25 M.L.J. 560; *Narain v. Ramdulare*, (1922) 66 I.C. 7 (Nag.) and *Mohammad Mehdi Ali Khan v. Lal Bahadur Singh*, (1925) 89 I.C. 479=1925 Oudh 600; also see *Narayanswamy v. Krishnasami*, 25 I.C. 67 Mad.

48. *Bani Madhub Mitter v. Matingini Dassi*, (1886) 13 Cal. 104 (P.C.).

49. 1922 P.C. 352=49 Cal. 999 (P.C.); also see and cf. *Raja Mohammad Mehdi Ali Khan v. Lal Bahadur Singh*, (1925) 89 I.C. 479=1925 Oudh 600.

that in every case the time actually consumed in obtaining the decree must be deducted in calculating limitation.

"No period can be regarded as *time requisite for obtaining copies* under S. 12 of the Limitation Act, which need not have elapsed, if the appellant had taken a reasonable and proper steps to obtain an order."

The Allahabad⁵⁰ and Bombay High Courts¹ place a narrower construction upon S. 12 of the Limitation Act. The "time requisite" for obtaining a copy does not begin until an application has been made. According to Nagpur Court, "date of decree" is date of judgment though signed later.²

Allahabad and Bombay.

Nagpur.

In computing the period of limitation for an appeal against a decree nothing can be excluded except "the time requisite for obtaining a copy of the decree," and the day on which the judgment was pronounced. There is no law which allows any other, and no Court can exclude any other period of time even on the highest principles of equity. The time between the pronouncing of judgment and the signing of the decree can be excluded only where it can properly be treated as time requisite for obtaining a copy of the decree.³ However, there can be no legal obligation on a litigant to apply for a copy of a decree which is non-existent; the existence of a decree is a necessary condition precedent to the accrual of even the right or obligation to apply for a copy. Where a decree is not drawn up within the period of limitation prescribed for preferring an appeal against the decree, the suit must be deemed to be pending up to the date on which the decree is actually drawn up, and limitation for preferring an appeal will commence to run only from that date.⁴ The Sind Judicial Commissioner's Court has held that a party is not entitled to an allowance for the interval between the delivery of judgment and the signing of the decree under that section, unless the delay in obtaining copies was due to decree not being prepared or signed.⁵

2302. The date on which judgment is pronounced within the meaning of O. XX, R. 7, Civil Procedure Code, is the day on which it is pronounced in open Court in accordance with O. XX,

Judgment when pronounced.

50. *Bechi v. Ahsanullah Khan, etc.*, (1890) 12 All. 461.

1. *Yamaji v. Antaji*, (1898) 23 Bom. 442.

2. *Narain v. Ramdulare*, (1922) 66 I.C. 7=1922 Nag. 113.

3. *Din Dayal v. Anopi*, (1926) 97 I.C. 307=1926 Nag. 349=22 N.L.R. 60.

4. *Pandu v. Rajeshwar*, (1924) 78 I.C. 996=1924 Nag. 271=20 N.L.R. 131.

5. *Khudadad v. Morio Khan*, (1916) 34 I.C. 867 (868); *Topandas v. Manager, Encumbered Estates*, 10 I.C. 210=5 S.L.R. 47; also see *Lakhoomal v. Joomtomal*, 1 S.L.R. 71.

R. 1 of the Code.⁶ Where a judgment is signed, but not pronounced till a later date, limitation begins to run from the date of the pronouncement of the judgment, as, in view of the provisions of O. XX, R. 7 of the Civil Procedure Code, whatever might be the date upon the face of the decree, it must be considered as dated on the date of the pronouncement of the judgment.⁷ Where a judgment is pronounced in the absence of the parties or their pleaders on a day of which they had no notice, the judgment cannot be said to have been pronounced in accordance with law and limitation for appeal begins to run not from the day on which it is announced but from the date on which the party or his pleader receives intimation of the decision of the case against him.⁸ Where a Court gives a judgment but refuses to give a decree till the successful party complies with a certain condition, the Court virtually postpones the decision of the suit. The effect of such an order is to pronounce a provisional judgment, which does not become operative until the decree is prepared. The latter date is the date of the judgment as well as of the decree from which the limitation runs.⁹ Where, therefore, a Court by its judgment directed that the decree was to be prepared only after a certain amount due as penalty was paid and the decree was actually signed three months after the judgment on the day when the penalty was paid: it was held that time commenced to run, for the purpose of appeal, from the date of the decree.¹⁰

2303. Under S. 152 of the Civil Procedure Code, there is a provision for amendment of judgments, decrees or orders,

Amendment of the decree.

“clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may at any time be corrected by Court either of its own motion or on the application of any of the parties”.

A judgment once signed, cannot be afterwards altered or added to, save as otherwise provided by S. 152, or on review (*See* O. 20, R. 3, Civil Procedure Code). Order 20, R. 6, provides that the decree shall be drawn up so as to agree with the judgment. Even though the decree is in conformity with the judgment, S. 152 allows for correction by the Court of a *clerical or arithmetical mistake or an error* arising from an accidental slip or omission. In the case of an amendment of the decree under S. 152, Civil Procedure Code, the period of limitation must be taken to run from the date of the decree

6. *Sagarmal Marwari v. Lachmisaran Misir*, (1923) 75 I.C. 879=1923 Pat. 129=1 Pat. 771 (773).

7. *Ibid.*

8. *Sewa Ram v. Hussu*, (1927) 100 I.C. 909=28 P.L.R. 132.

9. *Khudadad v. Moriokhan*, (1916) 34 I.C. 867 (Sind).

10. *Ibid.*, 34 I.C. 867 (868).

as originally drawn up, but time *may* be extended, by the application of S. 5 of the Limitation Act, till the date of amendment; whether there is sufficient cause for such extension must depend upon the circumstances of each case.¹¹ The **Allahabad High Court** has relied on the Calcutta view in 3 C.L.J. 188, for holding that where a decree has been amended and an appeal is filed against the amended decree which is *prima facie* barred by limitation, it is not in every case that the appellant can pray in aid the provisions of S. 5 of the Limitation Act. He cannot do so, for instance, if his appeal does not attack the *amended* decree, or raise some question connected with the amended decree.¹² But, the earlier Calcutta view expressed in these words in *Brojola's* case

"If the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal such appeal should not be admitted out of time"¹³

has not been accepted as sound by the **Calcutta High Court** in *Nandlal Ganguli v. Dassrathi Mukerjee*,¹⁴ where it is observed

"with this proposition I am afraid I cannot agree because it means to circumscribe and limit the discretion which S. 5, Limitation Act confers upon a Court by the terms in which the section is expressed".

The earlier Calcutta view, however, has been followed by the **Oudh Court**, in *Deep Singh v. Raghunath*,¹⁵ relying upon the Patna Full Bench case of *Golap v. Janki Koer*,¹⁶ where the rule laid down in 3 C.L.J. 188 was held to govern the case. According to **Madras High Court** it is open to appellant, relying on the second paragraph of S. 5 of the Limitation Act to appeal against the decree so amended, notwithstanding the expiration of 30 days from the date when the decree was passed.¹⁷ Similarly, it has been held, in a Calcutta case, that where an amendment in respect of the name of a party, and of the amount of the claim allowed was applied for after some days of the passing of the decree, and the amendment was made a month later, it was held that the period of limitation should be reckoned from the date of amendment as the date when the correct decree was prepared; and further, that under S. 5 of the Limitation Act there was sufficient cause for not presenting the appeal within 30 days from the date of the first decree.¹⁸ The **Punjab Chief Court**

11. *Brojola Roy Choudhry v. Tarapprasanna Bhattacharjee*, (1905) 3 C.L.J. 188; *Golab v. Janki Kuer*, (1920) 57 I.C. 236=1 P.L.T. 403=5 P.L.J. 472 (F.B.); *Deep Singh v. Raghunath Singh*, 1930 Oudh 463; cf. *Nandlal Ganguli v. Dasrathi Mukerjee*, 1932 Cal. 534=59 Cal. 1052=36 C.W.N. 218.

12. *Gajadhar Singh v. Basantlal*, (1920) 43 All. 380.

13. (1906) 3 C.L.J. 188.

14. 1932 Cal. 534=36 C.W.N. 218=138 I.C. 754=59 Cal. 1052.

15. 7 O.W.N. 882=1930 Oudh 463 (465).

16. 57 I.C. 236=5 P.L.J. 472 (478) (F.B.).

17. *Visvanathan Chetty v. Ramanathan Chetty*, (1901) 24 Mad. 646.

18. *Amar Chandro Kandu v. Asadali Khan*, (1905) 32 Cal. 908.

similarly takes the view that a defendant is not bound to appeal from the original decree at a time when the plaintiff has, within the prescribed period allowed for an appeal, already applied for amendment; and in any event he would be entitled to an extension of time under the provisions of S. 5 of the Limitation Act.¹⁹

2304. If a decree is modified in review to however slight an extent it may be, the modified decree is the final decree for the purposes of an appeal and the fact that no decree is drawn up or that a decree was drawn up to the extent of the modification does not affect the question.²⁰ Consequently, an appeal against a decree anterior to review filed pending the review, without any appeal from the amended decree, is not competent.²¹ The party aggrieved by the original decree is entitled (although the modification or alteration is made in his favour) to treat the order upon review of judgment as the final decree or order in the case and may appeal within 30 days from its date.²² The effect of granting an application for review is to supersede the decree which was the subject of such an application, and no appeal therefore can be maintained under the decree anterior to the review, but an appeal lies against the subsequent decree.²³ Following the above view, it has been held in *Soudamini Das v. Nabalak Mia*,²⁴ that if a decree is amended either by way of review, or under S. 152, Civil Procedure Code, the decree to be appealed against is the amended decree, and no appeal should therefore lie from the original decree. Further, that even on the basis that an appeal from the original decree would be the proper appeal, the case would be a fit one for extension of time under S. 5 of the Limitation Act.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
153.	Under the same Code to a High Court from an order of a subordinate Court refusing leave to appeal to His Majesty in Council.	Thirty days.	The date of the order.

19. *Harkishan Singh v. Lahore Bank*, 51 I.C. 712=64 P.R. 1919.

20. *Aditya Kumar Bhattacharjee v. Abinash Chandra Mukhopadhyaya*, 1931 Cal. 323=34 C.W.N. 1002; Relied on *Kanhaiyalal v. Baldeo Prasad*, 28 All. 240.

21. *Ibid.*, 1931 Cal. 323=34 C.W.N. 1002.

22. *Vadilal v. Fulchand*, (1905) 30 Bom. 56; *Nawazali v. Allu*, (1923) 4 Lah. 185; compare *Maung Kyaw v. Ma Gauk*, (1915) 27 I.C. 732 (L.B.) and *Nanke v. Mangatrai*, (1913) 20 I.C. 647 (All.) (Review granted: but original decree upheld).

23. *Joykishen Mookerjee v. Ataoor Rehman*, (1881) 6 Cal. 22=6 C.L.R. 525; *Shidramappa v. Gurushantappa*, 1929 Bom. 183=116 I.C. 227.

24. 1931 Cal. 578=35 C.W.N. 251=133 I.C. 571.

SYNOPSIS.

2305. Corresponding provisions.

2306. Scope.

NOTES.

2305. CORRESPONDING PROVISIONS.—This provision corresponds to Art. 153 of Act XV of 1877, which referred to S. 601, Civil Procedure Code (of Act X of 1877) in column 1 of the article. Column 3 mentioned the starting point as “the date of the order refusing the certificate”. Section 601, Civil Procedure Code, 1877 provided for an appeal to the High Court, *within 30 days from the date of the order* (refusing the certificate). The words “within thirty days from the date of the order” in the above S. 601 of Act X of 1877 were repealed by the Limitation Act, 1877. Act XIV of 1882 (Civil Procedure Code) in its S. 601, however, re-enacted S. 601 of Act X of 1877, with the words “within thirty days from the date of the order”—*see* now O. 45, R. 6, and O. 43, R. 1 (*v*) of the present Code of Civil Procedure Act V of 1908.

2306. SCOPE.—This article deals with an appeal under O. 43, R. 1 (*v*), Civil Procedure Code, to the High Court from an order made by a subordinate Court refusing to grant a certificate (under O. 45, R. 6) that the case is a fit one for appeal to the Privy Council. The change of the words in the first column is thus explained by the Select Committee. “We understand that an application for a certificate that a case is a fit one for appeal to H. M. in Council is in ordinary legal language spoken of as an application for leave to appeal. We have used the expression “leave to appeal” in this article and elsewhere to include this meaning”.

Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
154.	Under the Code of Criminal Procedure, 1898, to any court other than a High Court.	Thirty days.	The date of the sentence or order appealed from.

SYNOPSIS.

2307. Corresponding provision.

2308. Scope and application.

2309. Starting point of limitation.

NOTES.

2307. CORRESPONDING PROVISION.—This article is the same as Art. 54, Sch. II of Act XV of 1877, and corresponds to Art. 152 of Sch. 2 of Act IX of 1871. The year “1898” is added in the present article and “from” in 3rd column replaces “against”.

2308. SCOPE, AND APPLICATION.—This article applies to appeals preferred under the Code of Criminal Procedure “to

any Court other than a High Court". Appeals to District Judge, against an order under Ss. 476, and 476-A of the Criminal Procedure Code, would thus come under this article. Section 476, Criminal Procedure Code applies to Civil, Revenue or Criminal Courts, and provides a procedure in cases mentioned in S. 195, Criminal Procedure Code, in which action is proposed to be taken in, or in relation to, a proceeding in that Court. Section 476-A deals with the power of a Superior Court to complain where a Subordinate Court has omitted to do so. Appeals against an order under S. 476 or 476-A is now provided by S. 476-B of the Criminal Procedure Code, which section has been added by S. 128 of the Criminal Procedure Code Amendment Act XVIII of 1923. Under the old law, when an application was made to a Munsiff asking him to take action under S. 476, and the Munsiff refused to do so, it was held that *no appeal* lay to the District Judge against the order of the Munsiff.²⁵ **Section 476-B**, now applies giving a right of appeal to the Court to which the Court making the complaint is subordinate within the meaning of S. 195, Sub-S. (3), Criminal Procedure Code. An appeal under S. 476-B, from the order of a Subordinate Civil Court (Sub-Judge) to a Superior Civil Court (District Judge) must be dealt with as a miscellaneous *civil* appeal regulated by the procedure of O. 41, Civil Procedure Code.²⁶ According to **Lahore High Court**,²⁷ and the **Patna High Court**,²⁸ the appeals under this section are subject to all the provisions applicable to criminal appeals laid down in S. 419 and the following sections. For the purposes of limitation, an appeal under this section is an "*appeal under the Criminal Procedure Code*" within the meaning of Arts. 154 and 155, and not an "*appeal under the Civil Procedure Code*" under Arts. 152 or 156, Limitation Act.²⁹ The policy of the law, as laid down in S. 476-B is this, that, whenever there is a decision by a Court upon an application that a complaint shall be made, whether that decision be one way or another, there is one appeal from it, and no more than one appeal. It matters nothing

25. *Bhagirathi v. Surajmal*, 12 A.L.J. 684=15 Cr.L.J. 575 (Rendered obsolete by S. 476-B, Cr. P. Code).

26. *Hamid Ali v. Madhusudan*, 54 Cal. 355=31 C.W.N. 281=1927 Cal. 284 (Per Duval, J., Chotzner, J., *contra*); *Nasiruddin Khan v. Emperor*, 53 Cal. 827=28 Cr.L.J. 92 (93) and *Mahendra v. Emperor*, 49 C.L.J. 374=1929 Cr.C. 54.

27. *Dhanpatrai v. Balak Ram*, 13 Lah. 342=1931 Cr.C. 1065 (1066) (F.B.).

28. *Baidyanath Giri v. King-Emperor*, 12 P.L.T. 336=32 Cr.L.J. 735; also see *Mahomad Boyatalla v. Emperor*, 34 C.W.N. 923=32 Cr. L. J. 325.

29. *Chandra Kumar v. Mathuriya*, 52 Cal. 1009=29 C.W.N. 1035=26 Cr.L.J. 1569=90 I.C. 529=1925 Cal. 1228; *Raiani v. Bistoo*, 46 C.L.J. 40=28 Cr.L.J. 840 (841); *Sheo Prosad v. Sheo Bans*, 24 A.L.J. 368=1926 All. 211 (212).

whatever the result of appeal may be.³⁰ No further right of appeal is conceded therefrom.³¹ When a Court refuses to complain, under S. 476, Criminal Procedure Code, amounts to an order to the effect that it will not complain and is governed by Art. 154.³² **An appli-**

Applications under Ss. 517 and 520, Criminal Procedure Code.

cation under Ss. 517 and 520 of Criminal Procedure Code for the restoration of property is not an appeal within Art. 154, Limitation Act. There is no period of limitation prescribed for such an application.³³ **Application to a superior Court under Criminal Procedure Code (Act V of 1898),**

Application to set aside sanction.

S. 195, to set aside a sanction given by an inferior Court, is not an appeal within the Indian Limitation Act, Art. 154.³⁴ An

order refusing to revoke a sanction granted by a lower Court is one granting a sanction, from which an appeal lies to a superior Court under S. 195, cl. (6), Criminal Procedure Code.³⁵ This sub-section (6) of S. 195, Criminal Procedure Code, does not confer a right of appeal to the superior authority, but only invests the latter with powers by way of revision.³⁶ Where the question arises with reference to Art. 154 of the Limitation Act, it has merely to be stated that there is a doubt as to whether an appeal lies or not in such a case in order to give the applicant the benefit of the longer period. The High Court accordingly directed the Sessions Judge to hear an application, to revoke a sanction, made to him after the expiry of a month from its date.³⁷ Where an application for sanction to prosecute under S. 195, Criminal Procedure Code, was refused by the first Court, and an application under sub-clause (6) of the same section made to lower appellate Court was put in on the 32nd day and dismissed as time-barred, it was held that such applications may be akin to appeals, yet they are not appeals to which Art. 154 of the Limitation Act is applicable.³⁸

2309. STARTING POINT OF LIMITATION.—The period of limitation under Art. 154, Limitation Act for preferring

30. *Ahamdar Rahman v. Dwip Chand Choudhury*, 1928 Cal. 281=32 C.W.N. 164=29 Cr.L.J. 119=106 I.C. 711=55 Cal. 765.

31. *Moideen Rowthen v. Miyassa Pulawar*, (1927) 51 Mad. 777.

32. *Kandaswami Pillai v. Tiru Navukarasu*, 1931 M.W.N. 1064.

33. *Kanshi Ram v. The Crown*, (1922) 4 Lah. 49.

34. *Bapu v. Bapu*, (1911) 39 Mad. 750 (F.B.).

35. *Bapu v. Bapu*, (1911) 39 Mad. 750 (F.B.); (Relied on *Muthusami Mudali v. Veeri Chetti*, (1907) 30 Mad. 382 (F.B.).

36. *Pochai Meteh v. Emperor*, (1912) 40 Cal. 239.

37. *Ibid.*, 40 Cal. 239; Relied on *In re North*, (1895) 2 Q.B. 264 (270) and *Gopalla Sahai v. Bahorni*, (1911) 15 C.L.J. 120.

38. *Punnalal v. Jamitamal*, (1920) 1 Lah. 602=22 Cr.L.J. 177=60 I.C. 33.

an appeal from an order making a complaint begins to run only from the time that the complaint is actually made inasmuch as such an order is incomplete for the purposes of S. 476-B, Criminal Procedure Code, until it has been supplemented by an actual complaint.³⁹ Fawcett, J., observed that the fact that an appellant may not know that a complaint has been filed till after the thirty days prescribed by Art. 154 have expired is immaterial, as the appellate Court can excuse the delay under S. 5 of the Limitation Act.⁴⁰ The starting point of limitation for an appeal from an order making a complaint is the date on which the complaint is filed, and not the date on which it is signed.⁴¹ In case of a complaint under S. 476, limitation must be held to run from the date of the complaint, for the words of the section make it clear that it is only on the refusal to make a complaint or on a complaint being made that an appeal is possible.⁴²

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
155.	Under the same Code to a High Court, except in the cases provided for by Article 150 and Article 157.	Sixty days.	The date of the sentence or order appealed from.

SYNOPSIS.

- 2310. Corresponding provisions.
- 2311. Scope and application.
- 2312. Starting point of limitation.

NOTES.

2310. CORRESPONDING PROVISIONS.—This article corresponds to Art. 155 of Act XV of 1877: and Art. 153 of Sch. II, Act IX of 1871. Article 153 of Act IX of 1871, however, did not contain the words “except in the cases provided for by Art. 150 and Art. 157”.

2311. SCOPE AND APPLICATION.—This article, like Art. 154, is restricted to **appeals preferred under Criminal Procedure Code**. Where an appeal was preferred to the High Court under the Extradition Act, more than sixty days after the conviction, the Criminal Procedure Code had no application, and the

39. *Daga Devji Patil v. Emperor*, (1928) 108 I.C. 26=30 Bom.L.R. 76=1928 Bom. 64=52 Bom. 164=29 Cr.L.J. 315; Followed *Fitsholmes v. Emperor*, 98 I.C. 393=7 Lah. 77=1927 Lah. 54=28 P.L.R. 232=27 Cr.L.J. 1321.

40. *Ibid.*, 108 I.C. 26 (27)=1928 Bom. 64=52 Bom. 164; Referred in *Kandaswami Pillai v. Tirunavukarasu*, 1931 M.W.N. 1064.

41. *Labhamal v. Wasawamal*, (1927) 106 I.C. 584=29 Cr.L.J. 72=29 P.L.R. 128; Followed *Rashid Muhd. Khan v. Emperor*, 98 I.C. 393=7 Lah. 77=1927 Lah. 54.

42. *Ramjanali v. Moolji Seeka & Co.*, 1929 Cal. 521=33 C.W.N. 329=118 I.C. 889=56 Cal. 932=30 Cr.L.J. 974.

appeal was admitted.⁴³ This article applies to appeals only, and applications to revoke or grant sanction to prosecute under S. 195, cl. (6), Criminal Procedure Code, were held outside its scope, prior to amending Act of 1923.⁴⁴ Since the amending Act, Courts themselves are empowered to prefer complaints under S. 476 and S. 476-A, Criminal Procedure Code, and S. 476-B provides an appeal even where the Court prefers a complaint *suo motu*.⁴⁵ There is only one appeal, and no further appeal is provided.⁴⁶ No appeal lies against an order made by Court directing complaint to be lodged under S. 476-B.⁴⁷ Where a Court refuses to make a complaint under S. 476, but on appeal the appellate Court directs a complaint, the order of the appellate Court is not appealable to the High Court, but the appeal may be converted to revision, in exceptional cases.⁴⁸ Section 115 of the Civil Procedure Code, however, has no application to such a case, as the jurisdiction under S. 476 of the Criminal Procedure Code is conferred on a Civil Court by the latter Code, and the exercise of that jurisdiction must be governed by the machinery provided by the statute which confers the jurisdiction, that is to say, the Criminal Procedure Code.⁴⁹ An appeal under S. 476-B against an order refusing to file a complaint under S. 195 of the same Code is governed by Art. 155, and not Art. 156, Limitation Act.⁵⁰ It is an appeal under the Criminal Procedure Code, and not a civil appeal.¹ An appeal to the High Court, under S. 408 (b), Criminal Procedure Code, from a sentence exceeding four years passed by a Magistrate specially empowered is governed by Art. 155, Limitation Act.² Appeals from original criminal Sessions of the

43. *Hayes v. Christian*, (1892) 15 Mad. 414.

44. *Bapu v. Bapu*, (1912) 39 Mad. 750=22 M.L.J. 419=14 I.C. 305 (F.B.); *Pachai Meteh v. Emperor*, (1912) 40 Cal. 239; *Punnalal v. Jamita Mal*, (1920) 1 Lah. 602.

45. *Thiraj v. The Crown*, (1929) 11 Lah. 55=1929 Lah. 641; *Namberumal v. Nainiappa*, (1930) 59 M.L.J. 850=1931 Mad. 16.

46. *Moideen Rowthen v. Miyassa*, (1927) 51 Mad. 777; *Ahamdar v. Dwipchand*, 1928 Cal. 281=106 I.C. 711=55 Cal. 765; *Hikmatullah v. Sakini*, 1931 All. 305=129 I.C. 264=1931 A.L.J. 117.

47. *Mohun Chandra v. Emperor*, 1929 Cal. 172=33 C.W.N. 285=49 C.L.J. 342=116 I.C. 638=30 Cr.L.J. 658=56 Cal. 854.

48. *Ma On Khin v. N. K. M. Firm*, 1927 Rang. 313=5 Rang. 523; *Muhd. Joris v. The Crown*, 1925 Lah. 322 (2)=6 Lah. 56; also see *Sonabhai Vallabhai v. Aditbhai Parshottam*, 1924 Bom. 347=48 Bom. 401.

49. *Gerimal v. Shewaram*, (1926) 95 I.C. 316=1926 Sind 215=20 S.L.R. 90=27 Cr.L.J. 780.

50. *Sheo Prasad v. Sheo Bans Rai*, (1926) 93 I.C. 851=1926 All. 211.

1. *Rajanikanta Kayal v. Bistoomani Dassi*, (1927) 104 I.C. 456=1927 Cal. 718=46 C.L.J. 40=28 Cr.L.J. 840; Followed *Chandra Kumar v. Mathuriya*, 90 I.C. 529=1925 Cal. 1228=52 Cal. 1009.

2. *In re Abdulla*, 2 Rang. 386.

High Court, under S. 449, Criminal Procedure Code, read with S. 443 of the Code, are governed by this article. There is no reason whatsoever for thinking that Art. 155 of the Limitation Act is only limited to appeals to the High Court from the Sessions Courts in the mofussil, or from other Courts from which appeals to the High Court lie direct and has no application to appeals from original criminal side of the High Court.³ This article similarly governs applications for leave to appeal under Ss. 449 (1) and 415-A of the Criminal Procedure Code read together.⁴ Under cl. 15 of the Letters Patent appeals would ordinarily lie from the judgments of a single Judge exercising original civil jurisdiction to the High Court, as Court of appeal on the original side. Accordingly, it was held by the Bombay High Court that an appeal lay to a Bench of two Judges of the High Court from an order granting or refusing to grant sanction for prosecution for giving false evidence though the order was passed by a single Judge of the same High Court exercising original jurisdiction.⁵ An order by a single Judge sitting on the original side of the High Court sanctioning prosecution under S. 195, Criminal Procedure Code, is a judgment within the meaning of cl. 15, and as such was held appealable by Madras High Court in *Muniswamy Mudaliar v. Raja Ratnam Pillai*.⁶ This view has been followed by the Calcutta High Court in *Ramjan Ali v. Moolji Seeka*.⁷

2312. STARTING POINT OF LIMITATION.—In cases of complaint under S. 476, limitation must be held to run from the date of the complaint, for the words of the section make it clear that it is only on the refusal to make a complaint or on a complaint being made that an appeal is possible.⁸ For the same reasons, the Lahore High Court has held in *Fitzholmes v. Emperor*,⁹ that time runs from the date of the making of the complaint. This was followed by the Bombay High Court in *Emperor v. Daga Devji Patil*,¹⁰ in which Fawcett, J., observed that until the order, being the finding under S. 476, is supplemented or completed by an actual complaint it is for the purpose of S. 476-B incomplete.

3. *Thomas v. Emperor*, 1926 Cal. 1203=53 Cal. 746=98 I.C. 248.

4. *Gallagher v. Emperor*, 1927 Cal. 307=54 Cal. 52=101 I.C. 657.

5. *Abdul Latif Usman v. Haji Tar Mahomed*, 1922 Bom. 455=47 Bom. 270=68 I.C. 33=24 Bom.L.R. 817=23 Cr.L.J. 497.

6. 1923 Mad. 136=45 Mad. 928=72 I.C. 340=44 M.L.J. 774 (F.B.); cf. 1922 Mad. 495=43 M.L.J. 375=71 I.C. 126.

7. 1929 Cal. 521=33 C.W.N. 329=118 I.C. 889=56 Cal. 932=30 Cr. L. J. 974.

8. *Ramjan Ali v. Moolji Seeka & Co.*, 1929 Cal. 521=33 C.W.N. 329=118 I.C. 889=56 Cal. 932=30 Cr. L. J. 974.

9. 1927 Lah. 54=7 Lah. 77=27 Cr. L. J. 1321.

10. 1928 Bom. 64=52 Bom. 164.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
156.	Under the Code of Civil Procedure, 1908, to a High Court except in cases provided for by Article 151 and Article 153.	Ninety days.	The date of the decree or order appealed from.

SYNOPSIS.

2313. Corresponding provisions.

2314. Scope and application.

2315. Starting point of limitation.

NOTES.

2313. CORRESPONDING PROVISIONS.—This article is the same as Art. 156 of the Act XV of 1877, and corresponds with Art. 154, Sch. II of Act IX of 1871.

2314. SCOPE AND APPLICATION.—This article refers to appeals under the Civil Procedure Code, 1908, and not under other Acts. An appeal from the Court of the Recorder of Rangoon to the High Court is an appeal under the Civil Procedure Code, and must be made within the time prescribed by Art. 156, Limitation Act.¹¹ Reference was made in this connection to the Burma Courts Act XVII of 1875, Ch. IV, Ss. 49 and 97, read with Ss. 3 and 4 of Civil Procedure Code: also S. 540, Civil Procedure Code, 1882. It was observed that “the Limitation Act, Art. 156, when it speaks of the Civil Procedure Code is, on the face of it, speaking of a Code which relates to procedure, and does not ordinarily deal with substantive rights: and the natural meaning of *an appeal under the Civil Procedure Code* appears to us to be an appeal governed by the Code of Civil Procedure so far as procedure is concerned.”¹² The decision in *Mahomed Hossein v. Inodeen*,¹³ was distinguished on the ground that to apply Art. 156, to proceedings under S. 27 or S. 34 of the Burma Courts Act, would be to use it, not to restrict any rights given to the parties, but to curtail a discretion given to the Court. Article 156 of the Limitation Act applies to appeals filed under S. 54 of the Land Acquisition Act (I of 1894).¹⁴ The words “appeals under the Civil Procedure Code” do not indicate that the right of appeal must be one given by that Code; they mean only appeals governed by the provisions of that Code *so far as procedure is concerned*.¹⁵

11. *Aga Mahomed Hamadani v. Cohen*, (1886) 13 Cal. 221.
 12. *Aga Mahomed Hamadani v. Cohen*, (1886) 13 Cal. 221.
 13. 10 Cal. 946 (Second appeal under S. 27 of the Burma Courts Act not governed by Art. 156).
 14. *Ramasami Pillai v. Deputy Collector of Madura*, (1919) 43 Mad. 51.
 15. *Reld. on Aga Mahomed Hamadani v. Cohen*, 13 Cal. 221.

"There seems to be no good reason for saying that an appeal under the Civil Procedure Code means only an appeal the right to prefer which is conferred by the Code itself. On the other hand it would not be straining the language of the article too much to hold that an appeal, the procedure with respect to which, from its inception to its disposal, is governed by the Civil Procedure Code, may rightly be spoken of as an appeal under the Code; this interpretation seems to us to be strengthened by the reference in Art. 156 itself to Art. 151 of the same schedule. Art. 151 provides for appeals from a decree or order of the High Court in the exercise of its original jurisdiction. Now though the right to appeal from such decrees or orders is not given by the Code of Civil Procedure but by the Letters Patent appeal yet Art. 156 speaks of such appeals as appeals under the Civil Procedure Code. That also tends to show that what is meant by the Legislature is **appeals, the hearing and disposal of which is governed by the rules of procedure laid down in the Civil Procedure Code.**"¹⁶

An award under the Land Acquisition Act is not a decree passed in the ordinary jurisdiction of a Civil Court, but as pointed out by their Lordships of the Privy Council in *Rangoon Botatoung Co., Ltd. v. The Collector, Rangoon*,¹⁷ appeals

Appeals from awards under land acquisition.

from awards as provided for in S. 54 of the Land Acquisition Act are governed as to their procedure from the date of the filing of the appeal to its disposal by the rules provided for in the Civil Procedure Code: and in the Letters Patent appeal in Madras High Court in *Manavikrama Tirumalpad v. The Collector of the Nilgiris*,¹⁸ it has been held that S. 98 of the Civil Procedure Code applies. It has been pointed out that the provisions of the Civil Procedure Code regarding procedure to be followed in appeals from original decrees are incorporated in the Land Acquisition Act by virtue of S. 54. If the first column of Art. 156 includes, as held by the Madras High Court, there is really no difficulty created by the use of the words "*decree or order*" in the third column.¹⁹ The

Appeals under Succession Act or Probate and Administration Act, etc.

Allahabad High Court has observed in *Dropadi v. Hira Lal*,²⁰ that there are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act, which make the Code of Civil Procedure applicable to proceedings under the Act and give a right of appeal to the High Court, but do not prescribe any period of limitation for the appeal.

"It has always been assumed, probably rightly, that such appeals are under the Code of Civil Procedure governed by what is now Art. 156 of Sch. I

16. *Ramasami Pillai v. Deputy Collector of Madura*, 43 Mad. 51 (55) = 37 M.L.J. 110 = 26 M.L.T. 136 = 10 L.W. 226 = 53 I.C. 405 = 1919 M.W. N. 565.

17. (1913) 40 Cal. 21.

18. (1918) 41 Mad. 943.

19. *Ramasami Pillai v. Deputy Collector of Madura*, (1919) 43 Mad. 51 (56) = 37 M.L.J. 10.

20. (1912) 34 All. 496 (500).

to the Limitation Act, and by the general provisions of the Act also."²¹

In *Naubat Ram v. Harnamdas*,²² it was held that an appeal under

Letters Patent appeals.

S. 10, Letters Patent must be filed within the period of ninety days required by the rules of the Allahabad High Court. The rule was not *ultra vires* of the Court, and appears to have followed the practice of the Calcutta High Court. Vide *Harrak Singh v. Tulsi Ram Sahu*²³ and *Fazal Muhammad v. Phul Kuar*.²⁴

2315. STARTING POINT OF LIMITATION.—*See*

Date of decree.

notes under Art. 152, *ante*. The period of limitation for an appeal or application against a decree runs from the date of the decree and not from the date when the decree is signed.²⁵ In the Central Provinces a judgment cannot be said to have not been "pronounced" within O. 20, R. 1, Civil Procedure Code, simply because it is not read out entirely by the Court.²⁶ Where a judgment is pronounced in the absence of the parties or their pleaders on a day of which they had no notice, the judgment cannot be said to have been pronounced in accordance with law and limitation for appeal begins to run not from the day on which it is announced but from the date on which the party or his pleader receives intimation of the decision of the case against him.²⁷

Where a preliminary decree on a mortgage is passed *ex parte* and on an application made by the defendant to set it aside, the Court sets it aside, and the plaintiff thereupon appeals to the High Court as a result of which the decree is restored, the time of filing an appeal, which is governed by Art. 156, runs not from the date of the original decree but from the date of the order of restoration of that decree by the High Court.²⁸ Time for filing an appeal from a preliminary decree runs from date of the preliminary decree and not from that of the final decree.²⁹

21. *Ramasami Pillai v. Deputy Collector of Madura*, 43 Mad. 51 (56); also see *Mt. Pana Bibi v. Mahla*, 1928 Lah. 488=110 I.C. 374.

22. (1886) 9 All. 115 (F.B.).

23. 5 B.L.R. 47=11 W.R. 107.

24. 2 All. 192 (F.B.).

25. *Kutubuddin v. Gulam Rabbani*, (1926) 94 I.C. 121 (Nag.); Expld. *Pandu v. Rajeshwar*, 78 I.C. 996=20 N.L.R. 131=1924 Nag. 271 (The headnote is incorrect and misleading).

26. *Ibid.*, (1926) 94 I.C. 121 (Nag.).

27. *Sewaram v. Hassu*, 100 I.C. 909=28 P.L.R. 132; Folld. *Lalli v. Sain Ditta*, 51 I.C. 239=27 P.R. 1919 and *Sagarmal Manvari v. Lachmi-saran Misir*, 75 I.C. 879=1 Pat. 771=1923 Pat. 129.

28. 1931 Mad. 149=54 Mad. 455=130 I.C. 738.

29. *Benodini Chaudhurani v. Jagabandhu*, 1933 Cal. 796=37 C.W.N. 179=146 I.C. 359.

An appeal would be deemed as barred by time unless it has been properly presented within limitation. But where there is an accidental omission of the name of the pleader in the power-of-attorney, but there was no doubt as the authorisation of the counsel and as to the party who authorised him to act on his behalf, where the power-of-attorney was signed both by the counsel and the party for whom he appeared and the defect was remedied subsequently, it was held that the appeal must be deemed to have been properly filed on its first presentation.³⁰

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
157.	Under the Code of Criminal Procedure, 1898, from an order of acquittal.	Six months.	The date of the order appealed from.

NOTES.

2316. CORRESPONDING PROVISION.—There was no corresponding provision under the Act of 1871. This article corresponds with Art. 157 of Sch. II, Act XV of 1877, with a slight verbal alteration. The figure “1898” is now put after the word “Procedure” in the first column, and the word “from” has been used in the third column in place of the previous word “against”

2317. SCOPE.—Under the old law (S. 272, Criminal Procedure Code, 1872), as amended by S. 23 of Act XI of 1874, it was enacted that no appeal from a judgment of acquittal shall be presented after six months from the date of the judgment complained of.³¹

Section 417 of the present Code of Criminal Procedure enacts that

“the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court”.

Under S. 449 (2), notwithstanding anything contained in the Letters Patent of any High Court, the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in sub-S. (1) of S. 449, Criminal Procedure Code. Only Government can appeal under S. 417, Criminal

30. *Mangal Singh v. Babu Singh*, (1931) 134 I.C. 114=33 P.L.R. 74=1932 Lah. 124.

31. *Empress v. Jyadulla*, (1877) 2 Cal. 436 (F.B.); also see *Government of Bengal v. Gokoolchunder Chowdhry*, (1875) 24 W.R. 41 (Appellate judgment of acquittal, included all judgments of an appellate Court by which a conviction was set aside).

Procedure Code, and it cannot direct any person other than a public Prosecutor to do so. The legal remembrancer is a Public Prosecutor within the meaning of S. 417, Criminal Procedure Code.³² A private prosecutor can neither present an appeal under S. 417, Criminal Procedure Code, nor apply in revision.³³ An appeal against a judgment of acquittal lies only to the High Court.³⁴ The right of appeal against an order of acquittal is created by Ss. 417 and 449; in its application to appeals against acquittals it merely has the effect of enlarging the scope of such appeals in certain classes of cases.³⁵

An appeal lies to the High Court (Division Bench) from an order passed by a Judge presiding at the Criminal Sessions of the High Court under cl. (c) of S. 449, Criminal Procedure Code, but it would be governed by Art. 155 of the Limitation Act, and if that appeal is barred, an application for leave to appeal is also barred.³⁶

Section 5 of the Limitation Act applies to extend the period of limitation under this article, if sufficient cause is shown by the Government to the satisfaction of the High Court.³⁷

THIRD DIVISION: APPLICATIONS.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
158.	Under the Code of Civil Procedure, 1908, to set aside an award.	Ten days.	When the award is filed in court and notice of the filing has been given to the parties.

SYNOPSIS.

2318. Corresponding provision.

2319. Article explained.

(i) "Under the Code of Civil Procedure".

2320. (ii) Application to set aside an award.

2321. Starting point of limitation.

32. *Tularam*, 23 C.W.N. 96=46 Cal. 544; *Gaya Prasad*, 41 Cal. 425.

33. *Thandavan v. Perianna*, 14 Mad. 363 and *In re Poona Churn*, 7 Cal. 447.

34. *Rangasami v. Crown*, 7 Mad. 213; *Sami Ayya v. Crown*, 26 Mad. 478; *Baijnath v. Gouri Kanti*, (1893) 20 Cal. 633; *Girish v. Dwarkadas*, (1897) 24 Cal. 528.

35. *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bagirath Mahto*, 151 I.C. 662=35 Cr. L. J. 1367=1934 Cal. 610=59 Cal. L. J. 482.

36. *Thomas v. Crown*, 53 Cal. 746=27 Cr. L. J. 1304 (1305); *Gallagher v. Crown*, 54 Cal. 52=28 Cr. L. J. 81.

37. *Government Pleader, Appellant*, 1 Weir 791; *Anonymous*, 2 Weir 462.

2322. Time cannot be extended or curtailed.

2323. Revision.

NOTES.

2318. CORRESPONDING PROVISION.—This article corresponds with Art. 155, Sch. II, Act IX of 1871: and with Art. 158, Sch. II, Act XV of 1877. In the Act of 1871, the Art. 155 was worded thus:—

“When the award is submitted to the Court, and notice of the submission has been given to the persons and in manner prescribed by the High Court.”

The third column of Art. 158, in Sch. II of Act XV of 1877, was “when the award is submitted to the Court”.

Section 324 of Act VIII of 1859 (Civil Procedure Code), enacted that an application to set aside an award should be made within ten days after the same was submitted to the Court.

2319. ARTICLE EXPLAINED.—See notes under Art. 156, as to the meaning of the words “under the

(i) Under the Code of Civil Procedure. Code of Civil Procedure”. This article applies to applications under the Code of Civil Procedure to set aside an award, but not under any other Act. It would cover an application governed by the Code of Civil Procedure so far as procedure is concerned.³⁸

2320. The application to set aside an award may be made upon any one or more of the grounds specified in para. 15 (1), Sch. II, Civil Procedure Code, 1908. The application to set aside award need not be in any prescribed form.³⁹ To say that no application could be said to have been made within the meaning of Art. 158 until either a notice of motion had been given or a rule *nisi* had been obtained, is taking too technical a view of what is required by Sch. II, R. 15, Civil Procedure Code. It is sufficient, if some notice is given to the proper office (*e.g.*, Prothonotary’s office), that the party objects to the award.⁴⁰ Art. 158, Limitation Act, applies to applications referred to in Sch. II, para. 15 (1), Civil Procedure Code (old S. 522, Civil Procedure Code, 1882), but this article will not apply if the grounds of objection are outside this paragraph 15, Sch. II, Civil Procedure Code.⁴¹

38. *Aga Mahomed Hamdani v. Cohen*, (1886) 13 Cal. 221; also see *Ramaswami Pillai v. The Tahsildar*, (1919) 43 Mad. 51=37 M.L.J. 110.

39. *Gopalji Kallianji v. Chhaganlal Vithalji*, 1921 Bom. 419=45 Bom. 1071=23 Bom.L.R. 614=63 I.C. 929.

40. *Ibid.*, 1921 Bom. 419=45 Bom. 1071.

41. *Muhammad Abid v. Muhammad Asghar*, (1895) 8 All. 64; also see *Hyder Sahib v. Garia Chettiar*, 19 I.C. 496=24 M.L.J. 483=1913 M.W.N. 338=13 M.L.T. 349 (The Court is bound to correct any obvious mistakes or slips in an award in the same manner in which mistakes in decrees are corrected).

The view so held under Act XIV of 1882 is, however, no longer good law under the present Code, where an award may be set aside if invalid for any reason. Also, this article will not apply to proceedings under para. 12 (to modify or correct an award); nor to proceedings under para. 14 (for remitting of an award) of Sch. II, Civil Procedure Code. No specific provision is made in the Limitation Act for applications to correct an award. There is, therefore, no limitation provided for making an application to remit an award by reconsideration of the arbitrators owing to some illegality being apparent on the face of it.⁴² Awards void *ab initio*, where the illegality should be judicially noticed by the Court need not be objected to within ten days provided for objections to award on behalf of the parties. Art. 158 of the Limitation Act does not apply where the award is, on the face of it void, for as held in *Raja Har Narain Singh v. Bhagwant Kuar*,⁴³ the Court ought to take judicial notice of its patent invalidity, notwithstanding the fact that neither party has taken any objection thereto.⁴⁴ In *Ram Narain Roy v. Baijnath Malal*,⁴⁵ an application to set aside an award on the ground that three out of five arbitrators were not present at the time the award was made and did not sign the award, although it purported to have been signed by all of them, was held to be governed by Art. 158 of the Limitation Act. This article has no application to a statement in answer to an application for having the award made a rule of the Court.⁴⁶

2321. STARTING POINT OF LIMITATION.—It has been noticed above, that the change in the language of column 3 was made by the Amending Act XVIII of 1919, which substitutes the present words, for words which made the period of ten days run when the award was submitted to the Court. The last nineteen words of the third column in Art. 155 of Limitation Act, IX of 1871, evidently referred to a special rule of one or more of the High Courts.⁴⁷ The words in third column of Art. 158, Sch. II, Limitation Act, XV of 1877 were “when the award is submitted to the Court”. The words to “file an award”, “to cause an award to be filed,” “to submit an award to the Court”, and “to present an

42. (*Mamidi*) *Apayya v. (Yedan) Venkataswami*, (1918) 47 I.C. 597=1918 M.W.N. 477=24 M.L.T. 102=8 L.W. 171; Relied on *Hyder Sahib v. Giria Chettiar*, 19 I.C. 496=24 M.L.J. 483=1913 M.W.N. 338=13 M.L.T. 349; also see *Kiroti v. Behari*, 1933 A.L.J. 519=146 I.C. 596=1933 All. 648 (Art. 158 not applicable to applications within S. 12 or S. 14 of Second Schedule, Civil Procedure Code).

43. 13 All. 300=18 I.A. 355 (P.C.).

44. *Lala v. Abdus Samed*, (1912) 17 I.C. 320=16 O.C. 94.

45. (1901) 29 Cal. 36 (41) [Explaining *Muhd. Ahid v. Muhd. Asghur*, 8 All. 64 (67)].

46. *Manghooram v. Girdharilal*, 1935 Lah. 951=162 I.C. 124.

47. *Akbar Rahman v. Ismail Ebrahim*, (1915) 27 I.C. 371 (373)=8 S. L.R. 190.

award to the Court", are all synonymous terms. In the Arbitration Act, the word "file" is used indifferently to mean either the Act of the arbitrator or party or the act of the Court staff.⁴⁸ This clearly

Filing of the award. declared the intention of the Legislature that the period of limitation under Art. 158, Act XV of 1877, was to run from the date of submission of the award to the Court, and not from the date of service of the notice.⁴⁹ This view had been taken in reported cases like *Ram Narain Roy v. Baijnath Malla*,⁵⁰ *Ghulam Khan v. Mahomed Hassan*¹ and *Sm. Nobin Kally Dabee v. Ambica Churn Banerjee*.² In this last case, it was held that an application to set aside an award must be made within ten days from the time the award arrives at the Registrar's office for the purpose of being filed, and not from the time when it was filed. The presenting of an award, without the knowledge of the parties, before the day fixed by Court for its filing, was not held *submission of the award to the Court* within the meaning of Art. 158, Limitation Act.³ The submission will be deemed to have been made only on the date fixed by the Court for its filing, and the ten days' time for filing objections should be counted from that date.⁴ However, in *Sitaram v. Rupram*,⁵ it was held that Art. 158 of the Limitation Act must be read with paragraph 10 of the Second Schedule of the Civil Procedure Code, and the period of ten days is to be computed from the day on which the parties receive notice that the award has been submitted, and not from the day on which it is actually received by the Court. It seems settled law that a Court has no power to enlarge the time within which an application to set aside an award must be filed.⁶ Paragraph 10 lays down that

"notice of the filing of the award shall be given to the parties".⁷

48. *Akbar Rahman v. Ismail Ebrahim*, (1915) 27 I.C. 371 (373) Sind; also see *Mansoor v. Min Sahebodin*, (1912) 13 I.C. 234=5 S.L.R. 125.

49. *Ibid.*

50. (1901) 29 Cal. 36.

1. (1901) 29 Cal. 167 (P.C.) (Ten days are to be computed exclusive of the time requisite for copies).

2. 5 C.W.N. 813 (Decided before the present Civil Procedure Code came into force); cf. *Soza Chand Bhurtoria v. Hurry Bux Dora*, 46 Cal. 721 (728) (Diss. from 5 C.W.N. 813, Where time was held to run not from the time award is filed in Court, but from the time it arrives at the Registrar's Office).

3. *Jawahir Singh v. Mehvir Singh*, (1916) 34 I.C. 250=14 P.W.R. 1916; cf. *Sahib Rai v. Chait Ram*, 28 I.C. 427=30 P.W.R. 1916=96 P.L.R. 1915—the date of giving notice held to be starting point.

4. *Ibid.*

5. (1917) 42 I.C. 266.

6. *Edalji Shapurji v. Tulsidas Sundardas*, 2 B.H.C.R. 270; and *Surya Narain Jha v. Banwari Jha*, 17 I.C. 7=18 C.L.J. 35=18 C.W.N. 626.

7. *Sitaram v. Rupram*, (1917) 42 I.C. 266 (Nag.); also see *Sheo Prakash Rai v. Sri Ram Mahadeo*, 1921 All. 63=63 I.C. 399=19 A.L.J. 404 (Para. 10, Sch. 2, Civil Procedure Code makes it compulsory for the Court to give notice of the filing to the parties).

It was held in some cases, therefore, that the Court is bound to give notice of the filing of the award to the parties.⁸ This agreed with the English view in *Brooke v. Mitchell*,⁹ that time runs after the award has been made and published to the parties.

The Legislature has accordingly made an amendment (which came into force from 17th September, 1919),¹⁰ and now under the amended Art. 158, time runs from the time when the award is filed

in Court, and notice of the filing has been given to the parties,¹¹ which term includes their authorised pleaders.¹² The authority of cases decided prior to 1919 amendment must be accepted with caution.¹³ The amendment by the Repealing and Amending Act XVIII of 1919, was made to remove the discrepancy between the existing entry in Art. 158 and para. 10 of the Second Schedule to the Civil Procedure Code of 1908.¹⁴ Of the compulsory duty of the Court under S. 10, Sch. II, Civil Procedure Code, 1908, Art. 158 of the Limitation Act, as it originally stood, apparently took no notice and the time was made to run from the date when the award was filed and not from the date when the notice had been given.¹⁵

The direction to issue a notice is not equivalent either to the issue of the notice or of giving of the notice to the parties concerned.¹⁶ In *Mohammad Tahsin Khan v. Basant Rai*,¹⁷ no opinion was pronounced on the point whether the word "given" in col. 3, Limitation Act, Art. 158, is to be interpreted as actually received by the party for whom the notice was intended or is to be treated merely as the issue of the notice. But see *Sheikh Abdulla v. M. V. R. S. Firm & Sons*,¹⁸ where the date when the applicant was given or received notice of the filing of award, was held to be the starting

8. *Rangasami v. Muthusami*, (1887) 11 Mad. 144; *Chaturbhujdas v. Ganesh Ram*, (1898) 20 All. 474; *Muhammad Hussain v. Laltu*, (1912) 17 I.C. 340.

9. (1840) 6 M. and W. 473.

10. *Sheo Baksh Rai v. Sri Ram Mahadeo*, (1921) 19 A.L.J. 404=63 I.C. 399=1921 All. 63; also see *Sitaram v. Rupram*, 42 I.C. 266=13 N.L.R. 172 and *Sahibrai v. Chaitram*, 28 I.C. 427=96 P.L.R. 1915.

11. *Ibid.*

12. *Gayan Singh v. Haribilas*, 1930 All. 711=1930 A.L.J. 995=128 I.C. 769.

13. Banerji's Law of Arbitration, p. 326.

14. *Sheopraakashrai Ganpatrai v. Sriram Mahadeo*, 1921 All. 63=63 I.C. 399.

15. *Ibid.*, 1921 All. 63=19 A.L.J. 404=63 I.C. 399.

16. *Mohammed Tahsin Khan v. Basant Rai*, (1930) 126 I.C. 14=1930 A.L.J. 1166=1930 All. 477.

17. 1930 All. 477 (478).

18. 1924 Rang. 153=2 Bur.L.J. 229=77 I.C. 866; also see *Sahib Ram v. Chait Ram*, (1915) 28 I.C. 427 (Punj.) (Ten days computed from the day on which the parties receive notice that the award has been submitted to Court).

point of limitation under Art. 158, Limitation Act. Also see *Tima-setti Sanjivappa v. Pinnu Venkatanarappa*,¹⁹ where the period of ten days was computed from the date when the award was filed in Court and notice of the filing had been given to the parties. In *Gopalji Kallianji v. Chhaganlal Vithalji*,²⁰ it was held that it is sufficient under Art. 158 if some notice is given to the proper officer that the party objects to the award. Art. 158 allows a period of ten days for an application to set aside the award from the date of its submission by the arbitrator to the Court. But, a Court has discretion to allow a ground of objection to be added beyond time by way of amendment of the objections filed within time, or to entertain objections of its own motion if they would render the award invalid.²¹

2322. The object of the Legislature in allowing so short a period as ten days for the preferring of objections to awards is to discourage and prevent the discreditable attempts of parties to resile from their agreement and to set aside the award the moment the arbitrators decide against them.²² The ten days' time allowed for filing objections, or an application to set aside an award, cannot be extended or curtailed. Under S. 5 of the Limitation Act, the Court has no authority to receive an application to set aside an award after the time prescribed by Art. 158 of the Limitation Act.²³ Time under this article cannot be enlarged under S. 6 for the applicant's disability.²⁴ An objection even on the ground of fraud cannot be entertained after the period of ten days under this article. However, time has been extended on the ground of fraud inducing plaintiff not to make application within time prescribed.²⁵ The time required for obtaining a copy of the award shall be excluded by S. 12 (4), although it is not necessary to file a copy of the award with the application to set aside the award.²⁶ It is not competent to the Court, on one hand, to extend the time prescribed by Art. 158; and, on the other hand, there is authority for saying that a decree passed on an award within the

19. (1927) 100 I.C. 634=52 M.L.J. 357=1927 Mad. 436.

20. 1921 Bom. 419=45 Bom. 1071=63 I.C. 929=23 Bom.L.R. 614.

21. *Bhagwan Din Singh v. Fakir Singh*, (1913) 20 I.C. 773 (Oudh).

22. *Rain Narain v. Baij Nath*, 29 Cal. 36 (54).

23. *Suryanarain Jha v. Banwari Jha*, (1912) 17 I.C. 7 (Cal.); *Mandhar Lal v. Kalyandas*, (1908) 5 A.L.J. 36; also see *Devi Ditta v. Babu Ram*, 8 Lah. 274=100 I.C. 955=1927 Lah. 273.

24. *Suryanarain Jha v. Banwari Jha*, (1912) 17 I.C. 7=18 C.W.N. 626=18 C.L.J. 35.

25. *Mehta Kashiram v. Dadabhoy*, 124 P.R. 1880; cf. *Kalianbarttu v. Rocharbai*, 27 I.C. 371 (373).

26. *Siva Chand v. Hurry Bux*, 46 Cal. 721 (727); *Das v. Dayalal and Sons*, 1933 Rang. 38=142 I.C. 835; *Ghulam Khan v. Muhd. Hassan*, 29 Cal. 167 (183) (P.C.); *Wazid Ali v. Nazam Kishore*, 17 All. 211 (215).

ten days allowed by the Limitation Act is bad.²⁷ This is supported by a Division Bench of the Madras High Court in *Sooraparaju v. Narayanaraju*,²⁸ where it was held that such a procedure was without jurisdiction or with material irregularity such as to call for revision. A judgment ordering a decree in terms of an award on a reference through Court under the Civil Procedure Code, on receipt of the award, and before the expiry of the time allowed by law, for making an application to set aside the award, is illegal, notwithstanding that application may have been made and set aside or that parties may have stated that they have objection to urge.²⁹ The Oudh Court also takes the view that a Court has no power to cut short the period of limitation provided by statute for filing the objections against an award. Where on an award being filed in Court the plaintiff stated that he agreed to the award; however, within ten days, he filed objections to the award, it was held that there was no rule of law or procedure whereby the plaintiff was estopped from filing objections to the award within the time prescribed by law for that purpose.³⁰

Where an arbitrator states a special case, the award is completed when Court expresses its opinion and period of limitation begins only thence. **Special case stated.** It is not open to the Court to pass a decree in terms of the award on the very day on which the opinion is expressed on the case.³¹

2323. Where time was not given by the trial Court, the High Court in revision allowed time, though ten days had expired.³² Where a District Munsiff declined to hear certain objections to an award filed by the petitioner on the ground that they had been filed out of time, while as a matter of fact they had been filed in time, it was held

27. *Rungiah Chetty v. Govindasami*, 1922 Mad. 179=45 Mad. 466=15 L.W. 160=71 I.C. 266=1921 M.W.N. 793; *Achaber Pande v. Kuldip Singh*, (1923) 76 I.C. 307 (Rang.); *Velu Pillai v. Appasami Pandaram*, 9 M.L.T. 301=1911 M.W.N. 142=21 M.L.J. 450=9 I.C. 168; Followed in *Mani Ram v. Ramasray*, (1921) 64 I.C. 90=1921 Oudh 148=24 O.C. 234; *Srikishen v. Relumal*, 9 S.L.R. 183=34 I.C. 845 (848).

28. 1912 M.W.N. 1232=12 M.L.T. 608=17 I.C. 431; also see *Subbarao v. Ramalingayya*, 152 I.C. 157=1934 Mad. 619=67 M.L.J. 377.

29. *Sri Krishan Rochumal v. Relumal Pariomal*, (1916) 34 I.C. 845 (848)=9 S.L.R. 183; cf. *Ghulam Mustafa v. Halmiabibi*, (1913) 21 I.C. 298=176 P.W.R. 1913=310 P.L.R. 1913 (Ten days' period not allowed for filing objections under para. 16 where the parties accepted award at the time it was filed or did so before the expiry of that period).

30. *Kamta Prasad v. Uman Prasad*, (1923) 76 I.C. 33=9 O. & A.L.R. 703.

31. *Lakshman Baburao v. Ram Chandra Rajaram*, 1925 Bom. 22=48 Bom. 663=84 I.C. 378=26 Bom.L.R. 836.

32. *Surapparaju v. Narain*, 17 I.C. 431; cf. *Chaturbhuj v. Raghaveer*, 36 All. 354=23 I.C. 758.

that the decision amounted to a declination of a jurisdiction by the lower Court, and that the same could be revised under S. 115, Civil Procedure Code.³³ An erroneous rejection of objections filed in time as barred may amount to a failure to exercise jurisdiction. Where therefore a Court having jurisdiction to entertain an application refused to look upon it upon an erroneous assumption which was not warranted by facts, a revision was held to lie.³⁴ The omission of a Court in deciding a point of limitation to have advertance to an amendment of the article concerned, is not a mere error in the decision of a question of law and affords a good ground for interfering in revision under S. 115, Civil Procedure Code.³⁵ However, it has been held recently, that where there is no question of jurisdiction involved, the only grievance against the order of the District Judge being that he decided the points of law involved in the case erroneously against the petitioner and it was possible to take a different view of the points of law involved in the case, that in view of the clear exposition of S. 115, the High Court was precluded from interfering in revision with the order of the District Judge.³⁶ Where the appropriate plea was not put forward by the defendant, the Court was not bound *suo motu* to make inquiry.³⁷

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
159.	For leave to appear and defend a suit under the summary procedure referred to in section 128 (2) (f) or under order XXXVII of the same Code :	Ten days.	When the summons is served.

SYNOPSIS.

2324. Corresponding provision.
 2325. Summary procedure.
 2326. Starting point.

NOTES.

2324. CORRESPONDING PROVISION.—This article corresponds with Art. 159, Sch. II, Act XV of 1877, but there was no corresponding article under Act IX of 1871. The only change

33. *Ratnam v. Kolandai Ramasamy Chetty*, (1915) 31 I.C. 536 (Mad.).

34. *Mohammad Tahsin Khan v. Seth Basant Rai*, 1930 All. 477=1930 A.L.J. 1166=126 I.C. 14; also see *Sahib Rai v. Chait Ram*, (1915) 28 I.C. 427=96 P.L.R. 1915.

35. *Tinasetti Sanjivappa v. Pinnu Venkata Narappa*, (1927) 100 I.C. 634=1927 Mad. 436=52 M.L.J. 357.

36. *Manghoo Ram v. Girdharilal Ramchand*, (1936) 162 I.C. 124=1935 Lah. 951.

37. *Chendrayya v. Appalamma*, 1932 Mad. 588=140 I.C. 11 (2).

noticeable is the addition of the words "or under O. 37," by the Amending Act XXX of 1925. See Art. 5, for a similar amendment.

2325. SUMMARY PROCEDURE:

2326. **STARTING POINT.**—In cases of summary procedure the only possible date to which the Court can refer is the date of the service of summons as shown in the sheriff's return. The proper time to determine question of limitation relative to *ex parte* application is when the application is made, and it is not open to the defendant afterwards to escape the law of limitation by showing a state of things different from that appearing on the face of the original petition.³⁸ The question as to what took place upon the occasion of the service of summons by the sheriff is one which may properly be taken into consideration on an application under S. 534 to set aside the decree, if made (*See* O. 37, Civil Procedure Code.)³⁹ The important point to notice is that the defendant in a summary suit cannot be allowed to appear while the hearing is proceeding, and there is another way open to the defendant, who has not obtained leave to appear and defend in a summary suit. He may, under O. 37, R. 4, Civil Procedure Code, ask the Court to grant him any of the reliefs mentioned therein.⁴⁰ The Court may extend the time of service of the summons, but the Court has no power to extend the time after the time fixed by the summons for obtaining leave to appear and defend has expired.⁴¹

Under the rules of the Madras High Court all suits on a negotiable instrument *must* be by way of summary procedure only.⁴² The advantage of a summary suit is that the defendant is not entitled as of right to defend the suit. The defendant has to take previous leave before appearing to defend. Such leave must be taken within 10 days of the service of summons on the defendant. But if the defendant is at such a distance as to make it impossible for him to appear in ten days it might be the Court will stay execution for a time long enough to enable him to apply under O. 37, R. 4 of the Code.⁴³ If the period of 10 days expires on a day when the Court is closed, the application may be made on the day the Court re-opens.⁴⁴ Irregular service of summons on some of the defendants

38. *Madhublal Durgur v. Woopendra Narain*, (1896) 23 Cal. 573 (575).

39. *Ibid.*

40. *Pestonji Shapurji Narelwalla v. Jamshedji Nowroji Gamadia*, 1926 Bom. 250=50 Bom. 262; cf. *Bejoy Gobind v. Muddun Ram Pal*, (1872) 18 W.R. 454 (Defendant allowed to appear and defend a suit after decree).

41. *Quazi Mahmudar v. Sarat*, (1900) 5 C.W.N. 259 (262).

42. *Venkataramayya v. Nurse*, (1925) 49 Mad. 815=51 M.L.J. 716 (F.B.).

43. *Chandra Kant Roy v. Rogose*, (1869) 3 Ben. L. R. (O.C.) 83; see also *Grob v. Palmer*, 1 Ind. Jur. (N.S.) 395.

44. *Tata Industrial Bank v. Abdul Hosein*, (1922) 25 Bom. L. R. 1296 (1298)=1924 Bom. 144=89 I.C. 529.

to an action brought on a joint promissory note may not give the defendant properly served any ground to question the decree passed against him.⁴⁵

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
160.	For an order under the same Code to restore to the file an application for review rejected in consequence of the failure of the applicant to appear when the application was called on for hearing.	Fifteen days.	When the application for review is rejected.

SYNOPSIS.

2327. Corresponding provision.

2328. Scope and application.

NOTES.

2327. CORRESPONDING PROVISION.—This article corresponds with Art. 160, Sch. II, Act XV of 1877; but there was no corresponding provision under Act IX of 1871.

2328. SCOPE, AND APPLICATION.—This article refers to an application under O. 47, R. 7 (2), Civil Procedure Code; and it applies when an application for review has been rejected "*in consequence of the failure of the applicant to appear when the application was called on for hearing*".

The illness of one of the petitioners for restoration of a petition for review is no ground for extending the period provided by Art. 160 of Sch. I of the Limitation Act, 1908, specially when the absence of the petitioner's counsel and of the other co-petitioner is not explained.⁴⁶

Article.	Description of Suit.	Period of Limitation.	Time from which period begins run.
161.	For a review of judgment by a Provincial Court of Small Causes or by a Court invested with the jurisdiction of a Provincial Court of Small Causes when exercising that jurisdiction.	Fifteen days.	When the application for review is rejected.

45. *Ewing & Co. v. Gossaindas Ghose*, (1869) 3 Beng. L. R. App. 7.

46. *Kalu v. Sowaria*, (1915) 27 I.C. 703 (Punj.).

SYNOPSIS.

2329. Corresponding provision.
 2330. Review of judgment—Conflict of views.
 2331. Provincial Small Cause Courts Act, S. 17—a directory provision.
 2332. *Ibid.*—a mandatory view.
 2333. Deposit or security.

NOTES.

2329. CORRESPONDING PROVISION.—There was no corresponding provision in Act IX of 1871, or in the original Act XV of 1877. But, a corresponding Art. 160-A, Sch. II of Act XV of 1877 was inserted by S. 36 of Act IX of 1887.

2330. REVIEW OF JUDGMENT.—The Provincial Small Cause Courts Act, by its S. 17 lays down that the procedure prescribed in the chapters and sections of the Code of Civil Procedure, shall, so far as those chapters and sections are *applicable*, be the procedure followed in a Court of Small Causes, etc. An application for a review of judgment under **S. 17, Provincial Small Cause Courts Act**, shall be accompanied by a deposit in the Court of the amount due from the applicant under the decree or in pursuance of the judgment or security should be given by the applicant to the satisfaction of the Court for the performance of the decree or compliance with the judgment as the Court may direct.⁴⁷

There has been some conflict of opinion on the question whether the wording of S. 17, Provincial Small Cause Courts Act makes it imperative that a party seeking to set aside an *ex parte* decree should deposit the decree amount in Court or give security at the time of presenting his application. In *Ramasami v. Kurisu*,⁴⁸ the provisions of the section were held to be merely directory, not mandatory. In a later case, it was observed by the Madras High Court, that a deposit made *after the hearing* of the petition was too late and the application was liable to be dismissed as barred by limitation.⁴⁹ But, in *Assam*

Mohamed Sahib v. Rahim Sahib,⁵⁰ a Full Bench of the Madras High Court held, (Seshagiri Ayyar, J., dissenting), that the provisions of S. 17 (1) of Provincial Small Cause Courts Act, are mandatory. However, the view taken was that the deposit of the decretal amount may be made or the security given, within the period prescribed by the law of limitation for applications under the section, namely, thirty days from the date of the *ex parte* decree, although it did not accom-

47. *Jugal Kishore Girdharilal v. Achal Singh Takhat Singh*, (1923) 45 All. 569=1923 All. 605 (2).

48. 13 Mad. 178 (F.B.).

49. *Suryanarayana v. Ramamma*, (1910) 34 Mad. 88.

50. (1920) 43 Mad. 579=38 M.L.J. 539=1920 M.W.N. 375=28 M.L.T. 17=11 L.W. 543=27 M.L.T. 273=55 I.C. 977 (F.B.); Followed *Jeun Muchi v. Budhiram*, (1905) 32 Cal. 339.

pany the application itself. In *Jeun Muchi v. Budhiram Muchi*,¹ where the application was made without making a deposit or giving security, it was held by Brett and Mookerjee, JJ., that, if the requirements of the section were complied with within the period prescribed for such applications in the Limitation Act, it might be treated as sufficient, as no objection could have been taken if a fresh application had been presented when security was deposited. In *Akula Achiah v. Lakshminarasimham*,² Sesharigi, J., held, that S. 17, Provincial Small Cause Courts Act was directory, and he adhered to this view as a dissenting Judge in the Full Bench case. The

Allahabad High Court has held that the words of the section are mandatory.³ The earlier Madras Full Bench in *Ramasami v. Kurisu*,⁴ has not been accepted as sound by the **Calcutta**,⁵ and **Bombay High Courts**,⁶ which hold the view that the provisions of S. 17, Provincial Small Cause Courts Act are mandatory. But the later Madras Full Bench

follows the Calcutta view in *Jeun Muchi v. Budhiram Muchi*,⁷ as noticed already.

A recent **Allahabad decision** takes the same view as to mandatory character of the provision.⁸ Also see *Narain v. Pudan*,⁹ a decision by the Oudh Court in line with the above.

2331. PROVINCIAL SMALL CAUSE COURTS ACT,

S. 17—A DIRECTORY PROVISION.—

Lahore Full Bench. A Full Bench of the **Lahore High Court**,¹⁰ has followed the dissenting judgment of Seshagiri, J., in 43 Mad. 579 (F.B.), holding that the provisions of S. 17, Provincial Small Cause Courts Act are directory, and not mandatory, and that it is open to the Court in appropriate cases to extend the time within which the deposit is to be made or security furnished. The conflict of view has been noticed by Tek Chand, J., who divides the cases into three groups.

1. (1905) 32 Cal. 339.

2. (1919) 37 M.L.J. 333; also see *Suryanarayana v. Sowidararaja*, (1919) 55 I.C. 618 (Mad.) and *Mukandilal v. Parasram*, (1919) 50 I.C. 917.

3. *Jagannath v. Chetram*, (1906) 28 All. 470; *Chhotey Lal v. Lakhu Chand*, (1916) 38 All. 425; also see *Sri Bhagwant v. Balkaran*, (1922) 65 I.C. 956.

4. (1890) 13 Mad. 178 (F.B.).

5. *Jogi Abins v. Bishen Dayal*, (1890) 18 Cal. 83.

6. *Somabhai Hirachand v. Wadilal Premchand*, (1907) 9 Bom. L. R. 883.

7. (1904) 32 Cal. 339; Folld. in *Assan Mahamed v. Rahim Saheb*, (1920) 43 Mad. 579=38 M.L.J. 539=55 I.C. 977 (F.B.).

8. *Suraj Prasad v. Baldeo*, (1927) 50 All. 254 (256).

9. (1929) 6 O.W.N. 1014.

10. *Gedimal Dharam Das v. Huna Mal Shedu Ram*, 1931 Lah. 332=131 I.C. 635=32 P.L.R. 504=12 Lah. 359 (F.B.).

"(1) Those in which it has been held that the words 'at the time of presenting the application' in the proviso to S. 17 are directory, and the Court has the discretion to extend the time in appropriate cases."

"(2) Those which decide that the words are mandatory, and that it is a condition precedent to the making of an application for setting aside the decree that the applicant should, at the time of presenting his application, deposit in Court the decretal amount or tender security for payment of the same;" and

"(3) those which lay down that the words are directory to this extent that the deposit or security need not be made or tendered with the application, but that this can be done within the period of limitation but not beyond it."¹¹

The learned Judge observes that

"the first view has held the field in the Punjab Courts from 1894 and has been accepted as correct by the Chief Court, and by the High Court, the leading case being *Mohammad Fazal Ali v. Karim Khan*,¹² where the question is discussed at length by Plowden, S.J., in his referring order, and by Stagdon and Chatterji, J.J., in the judgment. This decision was followed by Reid, C.J., in *Raghu Nath Das v. Panna Lal*¹³ and Shadilal, J., in *Mukandilal v. Pars Ram*."¹⁴ "The second view was first enunciated by the Calcutta High Court in *Jogir Ahir v. Bishen Dayal Singh*¹⁵ and was adopted by the Allahabad High Court.¹⁶ It was also followed by the Bombay Court, in *Somabhai Hirachand v. Wadilal Premchand*,¹⁷ the Patna Court in *Ram Charitar Ram v. Hashim Khan*,¹⁸ *Kawleshwar Lal v. Satya Brata Banarji*¹⁹ and other cases, the Chief Court of Oudh in *Dunia Din v. Farzand Husain*²⁰ and *Edu v. Hiralal*²¹ and the Judicial Commissioner of Nagpur in *Chandulal v. Motilal Bansilal*.²²"

"The Calcutta High Court, however, modified its opinion a few years later and accepted the third view in *Jeun Muchi v. Budhiram Muchi*,²³ which has been followed in all subsequent rulings of that Court." This interpretation was also adopted by a majority of the Full Bench of the Madras High Court in *Assan Mohammad Sahib v. Rahim Sahib*,²⁴ the third learned Judge Seshagiri Ayyar, J., dissenting and agreeing with the reasoning and conclusion of the Punjab Chief Court in *Mohammad Fazil Ali v. Karim Khan*.²⁵ This view seems to have now found favour with

11. 1931 Lah. 332=131 I.C. 635=12 Lah. 359 (F.B.).

12. 108 P.R. 1894.

13. 54 P.R. 1910=6 I.C. 945.

14. (1919) 50 I.C. 917.

15. (1891) 18 Cal. 83.

16. *Jagannath v. Chet Ram*, (1906) 28 All. 470=3 A.L.J. 318=1906 A.W.N. 93; *Chhotey Lal v. Laxmi Chand*, (1916) 38 All. 425=34 I.C. 113; *Sri Bhagawat v. Balkaran*, 1922 All. 29=65 I.C. 596; *Mool Chand v. Niranjana Singh*, 1922 All. 265.

17. (1907) 9 Bom. L. R. 883.

18. (1920) 56 I.C. 810.

19. 1927 Pat. 90=7 P.L.T. 138=90 I.C. 194.

20. 1926 Oudh 544=3 O.W.N. 621=13 O.L.J. 592=97 I.C. 581.

21. 1928 Oudh 488=5 O.W.N. 886=114 I.C. 502.

22. 1930 Nag. 137=116 I.C. 641=26 N.L.R. 63.

23. (1905) 32 Cal. 339=1 C.L.J. 143.

24. (1920) 43 Mad. 579=55 I.C. 977 (F.B.).

25. 108 P.R. 1894.

the **Allahabad High Court** also.²⁶ At **Patna** and **Lucknow** too, rulings can be found in which later **Calcutta** view enunciated in *Jeun Muchi v. Budhiram Muchi*,²⁷ has been adopted.²⁸

The learned Judge concludes

"It will thus be seen that while the **Punjab** stands alone in upholding the first view, the stricter and more literal interpretation in (2) has been definitely abandoned at **Calcutta** and **Madras** in favour of (3) and in the other Courts also opinion is gradually veering round towards the third view."

The prevailing view (No. 3) in other High Courts recognises that the correct legal position is not to put a strict and literal interpretation on the words "at the time of presenting the application". This view strikes a middle course, holding on the one hand that the words are not mandatory, and at the same time laying down that the words are directory in a limited sense inasmuch as the deposit must be made or security furnished within the period prescribed by Art. 164, Limitation Act. The Lahore High Court does not accept it.²⁹

2332. THE MANDATORY VIEW.—The **Allahabad** decisions are almost uniform. In *Jagannath v. Chetram*,³⁰ it was held that S. 17 of the

Allahabad. Provincial Small Cause Courts Act, 1887, requires that at the time of presenting his application the applicant must either deposit in Court the amount of the decree or give security as provided for by the section; so that the deposit of the decretal amount or the furnishing security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. This view gives the option to the applicant at the time of presenting his application but not at any subsequent stage, and holds that if he elects to give security, it must be to the satisfaction of the Court and subject to the Court's directions. The provision in S. 17, is held mandatory and not directory. It agrees with the **Calcutta** view in *Jogi Ahir v. Bishen Dayal Singh*,³¹ but dissents from the **Punjab** Chief Court decision in *Muhammad Fazl Ali v. Karim Khan*.³² It was again held, in *Jagannath v. Chetram*,³³ followed by *Chhoteylal v. Lakhmichand Maganlal*,³⁴ that the provisions of S. 17

26. *Suraj Prasad v. Baldeo*, 1928 All. 111=108 I.C. 464=56 All. 254 [Where the majority decision in *Assan Mohammad v. Rahim Sahib*, (1920) 43 Mad. 579=55 I.C. 977 (F.B.) was referred to with approval] (The Court does not acquire jurisdiction till cash is deposited or security is given).

27. (1920) 32 Cal. 339=1 C.L.J. 143.

28. *Khantar Potdar v. Punni Naddaf*, (1920) 54 I.C. 971; *Ram Charitar Ram v. Hashim Khan*, (1920) 56 I.C. 810 and *Edu v. Hiralal*, 1928 Oudh 488=5 O.W.N. 886=114 I.C. 502.

29. 1931 Lah. 332=131 I.C. 635=12 Lah. 359 (F.B.).

30. (1906) 28 All. 470=3 A.L.J. 318=1906 A.W.N. 93.

31. (1890) 18 Cal. 83.

32. P.R. 1894 at p. 410.

33. (1915) 37 All. 450=13 A.L.J. 639=29 I.C. 996.

34. (1916) 38 All. 425=14 A.L.J. 548=34 I.C. 113.

of the Provincial Small Cause Courts Act, were mandatory, and that unless the amount of the decree were deposited or security furnished, the application could not be entertained. This makes it incumbent on the defendant, who applies to have the *ex parte* decree set aside, to deposit with his application the amount of the decree or to furnish security in respect of that amount.³⁵ A defendant in applying for a re-hearing sufficiently complies with the terms of the proviso to Cl. (1) of S. 17 of the Provincial Small Cause Courts Act, 1887, when he deposits in Court the sum which is in fact named in the decree.³⁶ But, it is not a sufficient compliance where the applicant does not deposit the decretal amount with the application for restoration, but prays for time to deposit it.³⁷ It is also not a sufficient compliance with the requirements of the law if the applicant files with his application for restoration an unregistered, and, therefore, invalid security bond, purporting to hypothecate immoveable property, and the next day on being directed by the Court deposits the amount in cash.³⁸ However, it was held to be a sufficient compliance, where the Court ordered that the security tendered should be verified, but the applicant paid in cash into Court the full decretal amount as security,³⁹ or, where an application to set aside an *ex parte* decree was presented on the last day of limitation at about 3 p.m. accompanied by a tender of the amount payable under S. 17 of the Provincial Small Cause Courts Act, which could not be deposited in the treasury that day after 12 noon.⁴⁰ The tender of the decretal amount with the application for setting aside the decree, is a good tender in view of Rule No. 12 of Ch. II of the General Rules framed by the High Court, although the amount is actually put into treasury when it re-opens after a public holiday.⁴¹ The provisions of S. 17 of the Provincial Small Cause Courts Act are imperative and the requirement to give security at the time of presenting the application is mandatory. But, if security is deposited

35. *Chhoteylal v. Lakhmi Chand*, (1916) 38 All. 425 (429); also see *Suraj Prasad v. Baldeo*, 108 I.C. 464=1928 All. 111=25 A.L.J. 1032=50 All. 254 (The Court does not acquire jurisdiction to set aside an *ex parte* decree in a small cause suit until cash is deposited or security is given) and *Kiran Koomar Banerji v. Baij Nath*, (1928) 111 I.C. 719=51 All. 402=1928 All. 607=1929 A.L.J. 96.

36. *Basdeo Ram Sarup v. Mul Chand*, (1921) 43 All. 438=1921 All. 144.

37. *Sri Bhagwat v. Balkaran*, 1922 All. 29.

38. *Budhu Singh v. Panthu Singh*, (1923) 71 I.C. 474=1923 All. 270=21 A.L.J. 173; Folld. in *Suraj Prasad v. Baldeo*, 108 I.C. 464=1928 All. 111=25 A.L.J. 1032; Reld. on *Assan Mohammad Sahib v. Rahiman Sahib*, 55 I.C. 977=43 Mad. 579=38 M.L.J. 539 (F.B.).

39. *Azmatullah Khan v. Ahmad Ali*, (1925) 88 I.C. 581=47 All. 728=1925 All. 379=23 A.L.J. 435.

40. *Gangadhar Baijnath v. B. B. & C. I. Ry., Co.*, (1926) 92 I.C. 522=48 All. 342=1926 All. 602=24 A.L.J. 328.

41. *Ram Saroop v. Khaderam*, (1927) 102 I.C. 523=1927 All. 608.

in Court within limitation an application for setting aside the *ex parte* decree may be entertained even later.⁴² This follows the Calcutta decision in *Jeun Muchi v. Budhiram*.⁴³ A mere deposit of fixed deposit receipt or applicant's statement that attached property should be treated as security is not adequate security in compliance of the mandatory provisions of S. 17, Provincial Small Cause Courts Act.⁴⁴ However, where no objection was raised to the Court accepting as sufficient security the Fixed Deposit Receipt of a bank which was not transferable, it was held that it could not be said that the applicant had failed to furnish the security "to the satisfaction of the Court", under the circumstances.⁴⁵ A Court cannot look at the application of a petitioner to set aside the decree, where the application is not accompanied by either a security bond or cash. But where two days after the presentation of the application, the Court directed security to be furnished, and the security was furnished within the time allowed by law for applying for setting aside an *ex parte* decree, it was held that the application must be deemed to have been a proper application and to have presented on the date the proper deposit had been made.⁴⁶ Where on application within 15 days of passing of an *ex parte* decree, the Judge passed the following order: "The security bond produced is not satisfactory. I can allow the application on condition of the applicant depositing the entire decretal amount in Court within two weeks", it was held that the security bond was not accepted by the Small Cause Court as sufficient: therefore, the application was not in accordance with law and the Court below had no jurisdiction to extend the time and grant the application. The subsequent restoration of the case after the putting in of the decretal amount was also without jurisdiction.⁴⁷ In *Jhaboo Misir v. Havaladar Tewari*,⁴⁸ it was held that the applicant has the option either to deposit the amount of the decree in cash or give security. But if he elects to adopt the latter course, the security must be to the satisfaction of the Court and subject to the Court's directions, which must be obtained at the time of presenting the application. The evidence as to the security being satisfactory may be taken on a subsequent date.^{48-a} The

Madras.

Madras High Court has held that the setting aside of an *ex parte* decree in the

42. *Kiran Koomar Banerji v. Baij Nath*, (1928) 111 I.C. 719=1928 All. 607 (2).

43. 32 Cal. 339=1 C.L.J. 43.

44. *Kiran Koomar Banerji v. Baij Nath*, 1928 All. 607 (2)=111 I.C. 719.

45. *Ibid.*

46. *Motilal Ramchander v. Durga Prasad*, 1930 All. 830=128 I.C. 765=1931 A.L.J. 7.

47. *Mool Chand v. Niranjana Singh*, 1922 All. 265=20 A.L.J. 657.

48. 1929 All. 840=1929 A.L.J. 1273=27 A.L.J. 1273.

48-a. *Ibid.*

absence of the deposit or the security being given is *ultra vires*.⁴⁹ And this seems to agree with the Allahabad view in *Suraj Prasad v. Baldeo*,⁵⁰ and the Lahore decision in *Maheshmal Dyaldas v.*

Mahomed Jamil.¹ The Nagpur Judicial

Nagpur.

Commissioner's Court has held with reference to the above that the proviso to S. 17 of the Provincial Small Cause Courts Act as to a deposit or security being made at the time of presenting an application is merely directory and not mandatory, and if security is given at the time of presenting the application even though it is accepted only subsequently, the requirements of the proviso are satisfied.² It would not hesitate to apply the provisions of S. 5 of the Limitation Act even if it is held that the provisions of the section are mandatory.³ The Nagpur Court now takes the view that the provisions of S. 17, Provincial Small Cause Courts Act, are mandatory, and it is a condition precedent to the granting of a new trial that the applicant should, when presenting the application for setting aside an *ex parte* decree of the Court of Small Causes, either deposit the decretal amount or give security.⁴ The same view is taken by the

Oudh.

Oudh Chief Court in *Edu v. Hirral*,⁵ following the decision in *Sitaba v. Mata Din*,⁶ where it was held that an application for setting aside an *ex parte* decree is not maintainable where the security has not been filed before the time prescribed for the making of such an application. In *Dunia Din v. Farzand Husain*,⁷ it was held that the deposit of the decretal amount or the furnishing of the security is a condition precedent to the maintaining of an application to set aside an *ex parte* decree. The Oudh Chief Court follows the Calcutta⁸ and Madras view⁹ in

49. *Venkatakrishnamma v. Venkataratnam*, (1922) 16 L.W. 606; also see *Venkatapathi v. Changa Reddi*, (1922) 17 L.W. 579.

50. (1927) 50 All. 254=1928 All. 111=108 I.C. 464=25 A.L.J. 1032.

1. (1927) 106 I.C. 830=1929 Lah. 374; cf. 1931 Lah. 332=131 I.C. 635=12 Lah. 359 (F.B.).

2. *Vithu Mhali v. Virthu Mahadji*, (1927) 99 I.C. 779=1927 Nag. 164; cf. *Umrao Jiwan Patel v. Munnumian Musalman*, 2 N.L.R. 23 (The question of the application of S. 5 was not discussed).

3. *Vithu Mhali v. Virthu Mahadji*, (1927) 99 I.C. 779=1927 Nag. 164; Reld. on *Koipilai Somban v. Sappari Muthu*, 72 I.C. 220=44 M.L.J. 247=1923 Mad. 354 (S. 5 used to extend time, excusing delay in depositing the amount); also see *Sudalai Muthu Kudumban v. Andi Reddiar*, 66 I.C. 104=45 Mad. 628=42 M.L.J. 484=1922 Mad. 186.

4. *Chandulal v. Motilal Bansilal*, 116 I.C. 641=26 N.L.R. 63=1930 Nag. 137; Folld. *Umrao Jivan v. Mannumian*, 2 N.L.R. 23.

5. 1928 Oudh 488=114 I.C. 502=5 O.W.N. 884.

6. 1925 Oudh 446=89 I.C. 482=2 O.W.N. 440.

7. 1926 Oudh 544=97 I.C. 581=3 O.W.N. 621; Folld. *Jagannath v. Chetram*, (1906) 28 All. 470.

8. (1906) 32 Cal. 339=1 C.L.J. 43.

9. (1920) 43 Mad. 579=38 M.L.J. 539=55 I.C. 977 (F.B.).

holding that the provisions of S. 17 are mandatory, but if an application under S. 17 is filed without security and is subsequently completed within the time prescribed by the law of limitation for making the application by the deposit of the decretal amount or filing of security, the applicant has a right to have his application heard on merits.¹⁰ The presentation of a tender within time is substantial compliance with the provisions of S. 17, provided the applicant has done everything that was possible for him to deposit the money at the time of presenting the application.¹¹

The **Patna High Court** has held in *Kamleshwarlal v. Satyabrata Banerji*,¹² that where an application is made with draft security which is rejected, it is to be deemed incompetent where there is no subsequent application made within the period of limitation with proper observance of the provisions of that section. Under S. 17, it is a condition precedent to the granting of a new trial that the applicant should at the time of presenting his application, deposit in Court the decretal amount or tender security for payment of the same.¹³ This is the prevailing view in most of the High Courts.

2333. DEPOSIT OR SECURITY.—We have seen that there is a considerable difference of opinion between the various High Courts, on the question of the directory or mandatory character of the provision as to deposit or security in S. 17, Provincial Small Cause Courts Act. Similar considerations would be held to govern an application for review of judgment.

Where an application for review of judgment of a Small Cause Court was made on the last day of limitation but without deposit of amount of costs, and on the following day Court allowed applicant time for making deposit and application for review was granted, it was held that applicant had failed to comply and was barred under Art. 161, Limitation Act. It was doubtful whether S. 5 applied at all as application was made within time.¹⁴ However, it has been held in a Madras case that payment, required to be made along with the application to set aside an *ex parte* decree in a small cause suit under the proviso to S. 17 (1) of the Provincial Small Cause Courts Act, is an element required in order to the completeness of the petition, and the delay in making the payment can be excused under S. 5 of the Limitation Act, as delay in filing

10. *Narain v. Pudan*, 1930 Oudh 1=6 O.W.N. 1014.

11. *Mendilal v. Udmī Chand*, 1927 Oudh 263=2 Luck. 594=105 I.C. 169.

12. 1927 Pat. 90=7 P.L.T. 138=90 I.C. 194.

13. *Khantar Potdar v. Punni Naddaff*, (1920) 54 I.C. 971 (Pat.); *Folld*, 18 Cal. 83; *Ram Charitar Ram v. Hashim Khan*, (1920) 56 I.C. 810 (Pat.).

14. *Abdul Sheikh v. Muhammad Ayub*, (1920) 31 C.L.J. 197=24 C.W.N. 380=56 I.C. 551.

the completed petition.¹⁵ When time is granted by a Court for the performance of any act till a certain date, it includes that date.¹⁶

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
162.	For a review of judgment by any of the following courts, namely, the High Courts of Judicature at Fort William, Madras, Bombay, Lahore and Rangoon, and the Chief Court of Sind in the exercise of its original jurisdiction.	Twenty days.	The date of the decree or order.

SYNOPSIS.

2334. Corresponding provision.

2335. Review of judgment.

NOTES.

2334. CORRESPONDING PROVISION.—This article corresponds to Art. 162 of Act XV of 1877. There was no corresponding provision in Act IX of 1871. The Civil Procedure Code of 1859, Act VIII of 1859, in its S. 377, provided that an application for review of judgment shall be made within ninety days.

2335. REVIEW OF JUDGMENT.—Art. 162, Limitation Act, speaks of applications for a review of judgment by certain High Courts in the exercise of their original jurisdiction. An application for *review of judgment* by the High Court in exercise of their original jurisdiction can only be made under the Civil Procedure Code. (*Vide* O. 47, R. 1, Civil Procedure Code.)¹⁷ This article does not apply to proceedings under cl. 26 of the Letters Patent in a criminal case.¹⁸ The judgment of a High Court in its matrimonial jurisdiction is a judgment of the High Court in its original jurisdiction. A motion by the respondent, which may be regarded in the light of an application for a review of judgment would be too late if

15. *Sudalaimuthu Kudumban v. Andi Reddiar*, (1922) 45 Mad. 628 =42 M.L.J. 484.

16. *Perumal Nadan v. Sivanamji Nadachi*, (1915) 39 Mad. 583.

17. *Padam Prasad v. King-Emperor*, (1929) 50 C.L.J. 106=33 C.W.N. 1121=1929 Cal. 617 (S.B.) and *In the matter of L. W. Nasse, Esq.*, (1929) 7 Rang. 201=1929 Rang. 229=118 I.C. 615.

18. *Padam Prasad v. King-Emperor*, (1929) 33 C.W.N. 1121=50 C.L.J. 106 (S.B.).

not made within twenty days, under Art. 162, Limitation Act.¹⁹ The judgment of the High Court passed in its insolvency jurisdiction may be a judgment in exercise of Court's ordinary original jurisdiction.²⁰ But, an application for review under S. 8 of the Presidency Towns Insolvency Act is not limited by O. 47, Civil Procedure Code, and is not governed by Art. 162 or Art. 173 of this Act.²¹

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
163.	By a plaintiff, for an order to set aside a dismissal for default of appearance or for failure to pay costs of service of process or to furnish security for costs.	Thirty days.	The date of the dismissal.

SYNOPSIS.

- 2336. Corresponding provision.
- 2337. Scope and application.
- 2338. Default of appearance.
Non-appearance by reason of death.
- 2339. Starting point of limitation.
- 2340. Enlargement of time.
- 2341. Notice of motion.
- 2342. Second application.
- 2343. Exclusion of time.

NOTES.

2336. CORRESPONDING PROVISION.—The Civil Procedure Code, Act VIII of 1859, made a provision in S. 119, enacting that

“in all cases of judgment against a plaintiff by default, he may apply, within thirty days from the date of the judgment, for an order to set it aside.”

Similar provision was made in Art. 156 of Act IX of 1871. The corresponding Art. 163 of Act XV of 1877 provided only for applications “by a plaintiff, for an order to set aside a dismissal for default”. The additional words

“of appearance or for failure to pay costs of service of process or to furnish security for costs,”

were introduced by Act IX of 1908.

2337. SCOPE AND APPLICATION.—This article prescribes a period of limitation for applications made under O. 9,

19. *Harriette A. King v. James S. King and A. F. Turner*, (1882) 6 Bom. 416.

20. *In re Candas Narondas*, 13 Bom. 530 (533).

21. *L. W. Nasse, In re*, 7 Rang. 201=118 I.C. 615.

Rr. 4 and 9, as well as under O. 25, R. 2, Civil Procedure Code. This rule operates as to orders of dismissal of default by the Chartered High Courts. (*See* O. 49, and 50, Civil Procedure Code.) This article would also cover the case of a dismissal under the Presidency Small Cause Courts Act. A plaintiff whose suit has been dismissed for default has two remedies under different enactments.²²

2338. Where, on the day fixed for hearing, a party is present in person merely for the purpose of applying for an adjournment which is refused, he must be taken to have "appeared" within the meaning of Ch. VII of the Civil Procedure Code. The party has appeared in person. The purpose for which he appeared, or the action which he took on appearance, are immaterial. But, where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at an end when the adjournment is refused, in that case the property has not appeared within the meaning of the chapter.²³ Similarly, if the recognised agent although able to do so does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an "*appearance*" in the suit. An appearance may be made by a pleader or a recognised agent: but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.²⁴ The Allahabad High Court takes a similar view. Where a party defendant retained a pleader to defend the suit against him, and the pleader filed a *vakalatnamah* and did certain acts for the defendant; however, when the suit came on for hearing the pleader came into Court and stated that he had no instructions and could not go on with the case, practically, that he had retired from the case; and the Court proceeded with the suit and made a decree in favour of the plaintiff, it was held that the decree was *ex parte* within the meaning of S. 108 of the Code of Civil Procedure, 1882.²⁵

22. *Soonderlal and Goor Pershad v. Soonderlal*, (1898) 23 Bom. 414.

23. *Soonderlal and Goor Pershad v. Soonderlal*, (1898) 23 Bom. 414; also see and cf. *Esmail Ebrahim v. Haji Jan Mohammad*, (1908) 33 Bom. 475 (Ss. 102 and 103 of C. P. Code, 1882, did not apply when plaintiff was present in Court).

24. *Ibid.*, (1898) 23 Bom. 414; also see and cf. *Motilal Ratanchand v. Nandram Dalpatram*, (1924) 82 I.C. 124=25 Bom. L. R. 1222=1924 Bom. 139 (Decree passed in absence of defendant, but presence of his pleader, not instructed, held *ex parte*).

25. *Shankar Dat Dube v. Radhakrishna*, (1897) 20 All. 195: s.c. on appeal (1900) 23 All. 220 (P.C.); also see *Bhagwan Dai v. Hira*, 19 All. 355 and *Krishna Das v. Ram Ugrah Singh*, (1923) 74 I.C. 845=1923 All. 549.

The **Allahabad Full Bench** has held that it is not an "appearance" within the meaning of Civil Procedure Code when the plaintiff is represented only by a pleader who is without instructions enabling him to proceed with the case, and who is merely instructed to apply for an adjournment.²⁶ If the plaintiff is not personally present, and the pleader has no instructions to conduct the case, the plaintiff must be deemed not to have appeared on the date of the hearing, and the only order which the Court can make is an order of dismissal for default under O. 9, R. 8, Civil Procedure Code, read with O. 17, R. 2, Civil Procedure Code. The Court cannot pass a judgment on the merits under cover of the words "make such *other order* as it thinks fit"; the *other order* referred to in O. 17, R. 2 can only mean an order for further adjournment.²⁷ The **Calcutta**

Calcutta.
Madras.

High Court takes the same view in several cases.²⁸ The **Madras High Court** relies on the Bombay and Calcutta view in hold-

ing that if a pleader, who appears in Court says he has no instructions, he should be held not to have appeared.²⁹ A **Full Bench of the Madras High Court** has held that when a pleader reports no instruction, whether after he has asked for an adjournment, and been refused or not, the party for whom the pleader was appearing has not appeared. No formality is necessary about the leave of Court to withdrawal of counsel from the case, and the Court in assenting to the conduct of the *vakil*, and in raising no question about his withdrawal must be taken to have given its consent.³⁰

Patna.

The **Patna High Court** also takes the same view that where a pleader has no instructions but to ask for time, his sitting in the Court room is not an appearance.³¹ A party may appear in two ways, either by person or by pleader. If he is not appearing in person, the mere fact that he is standing in Court does not amount to an appearance

26. *Lalta Prasad v. Nand Kishore*, (1899) 22 All. 66 (F.B.); Approved 20 All. 195 and 23 Bom. 414.

27. *Rukam v. Tara Chand*, (1922) 65 I.C. 775=20 A.L.J. 123; *Phul Kuar v. Hashmatullah*, (1915) 37 All. 460; *Ramcharanlal v. Raghubir Singh*, (1923) 45 All. 618.

28. *Janardhan v. Ram Dhone*, 23 Cal. 738; *Hinga Bibee v. Munna Bibee*, (1903) 31 Cal. 150; also see *Satish Chandra v. Ahara Parshad*, 34 Cal. 403 (F.B.) and *G. P. Cooke v. The Equitable Coal Co.*, (1904) 8 C.W.N. 621 (As to the appearance of the defendant).

29. *Arunachella Goundan v. Kattia Goundan*, 1924 Mad. 842=47 M. L.J. 514=82 I.C. 107=20 L.W. 795=1924 M.W.N. 835; Reld. on *Gopala Row v. Maria*, (1906) 30 Mad. 274=17 M.L.J. 225; *Soonderlal v. Gour Pershad*, (1898) 23 Bom. 414 and *Satish Chandra v. Ahara Pershad*, 34 Cal. 403 (F.B.).

30. *Manickam Pillai v. Mohudum Bathummal*, 47 Mad. 819=1925 Mad. 21=82 I.C. 1027 (F.B.).

31. *Ram Kishen Lal v. Jatadhari Lal*, (1918) 46 I.C. 488=3 P.L.J. 481.

within the real meaning of the word.³² The mere presence of a party in Court unless he is there for the purpose of conducting his case, is not an appearance within the meaning of the Civil Procedure Code: nor does the presence of his pleader who has been instructed to represent him **on previous** occasions constitute an appearance, unless he is instructed to represent him on the occasion in question and attends for that purpose.³³

Their Lordships of the Privy Council have held in *Debi Baksh Singh v. Habib Shah*,³⁴ that the **Non-appearance by reason of death.** rules or orders of the Civil Procedure Code, 1908, dealing with the case of the non-appearance of a suitor do not apply to the situation which arises when a suitor is dead. An order under O. 9, R. 8, Civil Procedure Code, dismissing a suit for default of prosecution on a date when the plaintiff was dead, in ignorance of such death, is a nullity.³⁵

2339. STARTING POINT OF LIMITATION.—The starting point of limitation under Art. 163 **Date of dismissal.** is the date of the order dismissing the suit in default, and it is not permissible for the plaintiff to obtain an extension of the period prescribed by urging that the fact of dismissal was not discovered for some time. He cannot obtain the benefit which the law only allows to a defendant under Art. 164, Limitation Act.³⁶ The starting point of the period of limitation for an application to set aside a dismissal for default of appearance of plaintiff is **date of dismissal and not date of knowledge** as in Art. 164, Limitation Act.³⁷ Time runs under this article from the date of dismissal, and not when the formal order is drawn up.³⁸

2340. The provisions of Art. 163 are intended to be strictly followed, and the Court has no discretion **Enlargement of time.** to enlarge the period of thirty days prescribed by this article.³⁹ The application under S. 103 (old Code),

32. *Lalji Sahu v. Lachmi Narain Singh*, (1918) 47 I.C. 27=3 P.L.J. 355; also see *Shaikh Muhammad v. Chulhai Mahto*, (1919) 4 P.L.J. 712.

33. *Mahant Damodar Das v. Raj Kumar Das*, 1922 Pat. 485=1 Pat. 188=69 I.C. 837.

34. (1913) 19 I.C. 526=17 C.W.N. 829=11 A.L.J. 625=18 C.L.J. 9=15 Bom. L. R. 640=25 M.L.J. 148=35 All. 331=16 O.C. 194 (P.C.); overruling 14 I.C. 221 and 14 I.C. 711.

35. *Trilochan Prasad Singh v. Bhagwati*, (1923) 73 I.C. 230=9 O. & A. L. R. 70.

36. *Bisa Mal v. Keshar Singh*, 1 Lah. 363=53 I.C. 789.

37. *De Cruze v. Pitts*, 1933 Pat. 557=147 I.C. 179.

38. *Lakshi Ram v. Sanatan*, (1910) 15 C.L.J. 160.

39. *Bano Mal v. Bano Mal*, (1920) 55 I.C. 55=27 P.W.R. 1920=116 P.L.R. 1920; *Folld. Makund Ram v. Ramraj*, 35 I.C. 292=14 A.L.J. 310; also see *Sahibditta v. Roda*, 83 P.R. 1902.

or, O. 9, R. 9, Civil Procedure Code, 1908, is not for a review of judgment.⁴⁰ A plaintiff whose suit has been dismissed for want of appearance under O. 9, R. 8, Civil Procedure Code, has no remedy by review⁴¹; and the mandatory provisions of this article cannot be eluded by ostensibly filing an application as one for review of judgment. The only course open is to make an application for restoration under O. 9, R. 9, within thirty days of the order of dismissal.⁴² Similarly, when a definite period of limitation is prescribed by law within which action must be taken, a Court is not entitled to extend it by purporting to act under S. 151, Civil Procedure Code.⁴³ If an application to set aside a dismissal for default under O. 9, R. 9 is made when the period for it has expired, Court has no inherent jurisdiction to set aside the dismissal. Section 151, Civil Procedure Code, cannot be invoked to help a party who has a remedy provided by law, and who has failed to take advantage of that remedy within the period of limitation prescribed.⁴⁴ The period prescribed by this article cannot be extended under S. 5 of the Limitation Act. This section provides for an appeal, or an application for a review of judgment being admitted after the expiration of the period of limitation, if good cause be shown for the delay. But throughout the Act there is no similar provision in respect of the admission of an application for the re-admission of an appeal struck off for default, and where such an application is plainly barred by time, the only proper course for the Court is to reject the same.⁴⁵ Section 5, Limitation Act, has not been made applicable by any enactment or rule to an application under O. 9, R. 9, and, therefore, the Court has no jurisdiction to admit the application on the ground that the opponent had

40. *Nur Muhammad v. Dina*, 15 P.R. 1897.

41. *Mahadeo Govind Wadkar v. Lakshminarayan*, 1925 Bom. 521=27 Bom. L. R. 1150=90 I.C. 610=44 Bom. 839; *Chajju Ram v. Neki*, 1922 P.C. 112=3 Lah. 127=49 I.A. 144 (P.C.); cf. *Virupakshi*, 50 I.C. 327 (Mad.).

42. *Koilash Mandal v. Nabadwipchandra*, 2 C.W.N. 318; *Deo Dip v. Gopal Singh*, (1916) 1 P.L.J. 547; *Sheoraj Nandan v. Girijanand*, (1920) 58 I.C. 191 (Pat.); also see and cf. *Abdul Rasak v. Muhammad Sharif*, (1925) 86 I.C. 616=1925 Lah. 517 and *Bepin v. Abdul*, (1916) 24 C.L.J. 446.

43. *Saba v. Dayaram*, (1928) 107 I.C. 193=23 N.L.R. 183=1928 Nag. 91; *Ajudhya Mahton v. Phul Kuer*, 65 I.C. 341=1 Pat. 277=1922 Pat. 479; *Dunichand Gokalchand v. Pritamdas*, (1925) 86 I.C. 256=7 Lah. L. J. 13=1925 Lah. 321; also see *Mt. Karam Bhari v. Jagannath*, (1936) 163 I.C. 274=1936 Lah. 495.

44. *Dunichand Gokalchand v. Pritamdas*, (1925) 86 I.C. 256=7 Lah. L. J. 13=1925 Lah. 321; also see *Madharam Gaonbura v. Mt. Tupoo Rukhani*, 1931 Cal. 319=52 C.L.J. 23=129 I.C. 778.

45. *Mahi v. Jiwan*, 141 P.R. 1879; also see *Ma Naw Naw v. Soma-sundaram*, (1925) 85 I.C. 324=2 Rang. 655=1925 Rang. 187 and *Koganti Veerayya v. Narra Sree Silam*, 110 I.C. 47=1928 Mad. 556=1928 M.W.N. 239.

sufficient cause for not preferring his application within the time prescribed.⁴⁶ The section does not empower a Court to extend the period fixed for an application, under S. 103 (old Civil Procedure Code), or O. 9, R. 9, Civil Procedure Code, 1908, the Court having no alternative to dismissing the application barred by Art. 163 of the Limitation Act, but this does not affect the appeal from an order dismissing the suit, such order having the force of a decree.⁴⁷

The **Lahore High Court** has held that the time spent in obtaining a copy of the order of dismissal of a suit in default cannot be excluded in applying for restoration to file of the suit dismissed for default.⁴⁸

2341. The Court must be actually moved within thirty days, and mere giving *notice* of motion is not sufficient.⁴⁹ An application to the Registrar of the original side to issue a notice of motion under Ss. 154, 155 of the original side rules is an application within the meaning of Art. 163, Limitation Act.⁵⁰ Where on the date fixed for the suit, the plaintiff being absent, the suit is dismissed under O. 9, R. 8, Civil Procedure Code, the limitation for filing the restoration application is governed by Art. 163, Limitation Act, and this cannot be avoided by recourse to S. 151, Civil Procedure Code.¹

2342. If an application is made within the 30 days, but is dismissed for default, a second application preferred beyond 30 days from the *first* dismissal would be barred.² Where a suit was dismissed for default, both parties being absent, and the application for restoration of the suit was also dismissed for default of both parties, an application for setting aside the order of dismissal of the application for restora-

46. *Mahadev Govind v. Lakshminarayan*, 1925 Bom. 521=49 Bom. 839=90 I.C. 610; also see *Samson v. Silvaran*, (1924) 82 I.C. 418=3 Bur. L. J. 47=1924 Rang. 274 and *Saba v. Dayaram*, 107 I.C. 193=1928 Nag. 91; cf. *Kalyanasundarappa v. Chinnagani*, 72 I.C. 13 (Mad.).

47. *Sahibditta v. Roda*, 83 P.R. 1902; Relied upon in 116 P.L.R. 1920=27 P.W.R. 1920=55 I.C. 55.

48. *Mohanlal v. Sher Muhd. Khan*, (1926) 93 I.C. 1023 (Lah.); cf. *Lakshiram v. Sanatun*, 15 C.L.J. 160=7 I.C. 775 (Period taken in getting certified copy of judgment, may be deemed "prosecuting another civil proceeding" within the meaning of S. 14 (2), Limitation Act).

49. *Khetter Mohun Singh v. Kassy Nath Sett*, (1893) 20 Cal. 899; *Hingabibee v. Munna Bibee*, (1903) 31 Cal. 150.

50. *Kuttayan v. Ellappa*, (1907) 17 M.L.J. 215.

1. *Mt. Karm Bhari v. Jagannath*, (1936) 163 I.C. 274=1936 Lah. 495.

2. *Nallu Subba Rao v. Ganti Venkataratnam*, (1913) 22 I.C. 689 (This case wrongly assumed that the 30 days could be enlarged for sufficient cause, under S. 5, Limitation Act).

tion was rejected.³ In *Bipin Behari Shaha v. Abdul Barik*,⁴ where a small cause suit was dismissed for the plaintiff's default in the presence of the defendant, and an application made under O. 9, Rr. 4 and 9 for the restoration of that suit was also dismissed for the plaintiff's default in the presence of the defendant's pleader, and where again an application was made under O. 9, R. 9, Civil Procedure Code for the re-hearing of the case and another application for treating it as an application for review, it was held that an application under O. 9, R. 9, lay. The **Punjab Chief Court**, (Broadway, J.) has held in *Kirpa Singh v. Mula Singh*,⁵ that where an application under O. 9, R. 4, Civil Procedure Code, to restore a suit dismissed for default is itself dismissed for default, a fresh application to restore such application is maintainable. Reliance

Nagpur.

was placed on *Manakai v. Surajmal*,⁶ for the above view. This was also approved and followed by Petman, J., in *Abdul Rahman v. Shahana*,⁷ where

Lahore.

plaintiff's suit was dismissed in default, under O. 9, R. 8 by a Sub-Judge, and an application for restoration explaining the absence of the client and his counsel was made the same day, but dismissed in default later, and subsequently another application for restoration of the suit was made describing it as a review of the previous order, it was held that this was not an application for review, but was to be treated as one under O. 9, R. 9, read with Ss. 141 and 151 of Civil Procedure Code. Where an application for restoration of a suit dismissed in default is in turn dismissed in default, an application is maintainable for restoration of the application so dismissed and the second application should not be rejected summarily without giving an opportunity to the plaintiff.⁸ This was relied on by

Oudh.

Oudh Judicial Commissioner's Court in *Mt. Jamna v. Mt. Ramraji*,⁹ and a similar view has been taken by the **Allahabad High Court** in *Ganesh Prasad v. Bhagelu Ram*,¹⁰ where it was held

Allahabad.

that a Court has jurisdiction on good cause shown to restore an application for setting aside a dismissal for

3. *Faridbi v. Mohamed Amin*, (1913) 19 I.C. 97 (Nag.).

4. (1916) 44 Cal. 950=24 C.L.J. 446 (O. 47, R. 1, applied to all orders of the Court which may be reviewed under certain circumstances).

5. (1919) 50 I.C. 401=1 P.L.R. 1919=10 P.W.R. 1919.

6. 10 I.C. 705=7 N.L.R. 32.

7. 1 Lah. 339=58 I.C. 748=1 L.L.J. 188=82 P.W.R. 1920; Followed in *Pearclal Mohanlal v. Haider*, 99 I.C. 1055=27 P.L.R. 561=1927 Lah. 71.

8. *Pearclal Mohanlal v. Haider*, 99 I.C. 1055=27 P.L.R. 561=1927 Lah. 71; Relied on *Ramsarandas v. Nathwa*, 52 I.C. 926=69 P.L.R. 1919=38 P.W.R. 1919 (Held, that an application to restore an appeal dismissed for default cannot be rejected summarily).

9. (1923) 74 I.C. 380=1923 Oudh 146=9 O.L.J. 627.

10. 89 I.C. 350=23 A.L.J. 817=47 All. 878=1925 All. 773; Relied upon *Jamna v. Ramraji*, 74 I.C. 380=9 O.L.J. 627=1923 Oudh 146; *Bepin*

default or an *ex parte* decree, which application has itself been dismissed for default. Such jurisdiction can be exercised either by virtue of the provision contained in R. 9 of O. 9 of the Civil Procedure Code read with S. 141 of the Code or by virtue of the inherent powers of the Court conferred upon it by S. 151 of the

Madras.

The **Madras High Court** has followed the above view in *Venkata Narasimha Rao v. Hemadu Suryanarayana*,¹¹ where it was observed that proceedings under O. 9, Civil Procedure Code relate to questions independent of the suit, to be determined on evidence as to matters quite irrelevant to the suit, and are, therefore, covered by S. 141, Civil Procedure Code. Order 9, Civil Procedure Code, therefore, applies to applications made under O. 9 itself, so that where an application to restore a suit is dismissed for default, a petition lies under O. 9, to set aside the dismissal. This view has been taken by

Calcutta.

Bombay.

the **Calcutta High Court** in *Bepin Behari Shaha v. Abdul Barik*,¹² and by the **Bombay High Court** in *Lallubhai Vajeram v. Bai Magangavri*.¹³ But, a later Bombay case

of *Manke v. Walvekar*,¹⁴ holds that there is no rule in the Code of Civil Procedure that, enables the Court to restore an application made under O. 9, R. 9, Civil Procedure Code, which has been dismissed for want of prosecution. Nor can the Court make such an order in the exercise of its inherent jurisdiction under S. 151 of

Cf. Patna.

the Code. But, there is an authority to the contrary of the **Patna High Court**,¹⁵ which purports to be based on the decision of the Privy Council in *Thakur Prasad v. Fakirullah*.¹⁶ In a *Mysore case*,^{16-a} it is observed that

Behari Saha v. Abdul Barik, 35 I.C. 613=44 Cal. 950=24 C.L.J. 446=21 C.W.N. 30 and *Abdul Rahman v. Shahdha*, 58 I.C. 748=1 Lah. 339=82 P.W.R. 1920=1 L.L.J. 188; also see *Pitambar Lal v. Dodi Singh*, (1924) 46 All. 319 (320); cf. *Chandra Sahai v. Durga Prasad*, (1924) 46 All. 538 (540).

11. (1926) 92 I.C. 802=50 M.L.J. 75=23 L.W. 409=1926 Mad. 325; cf. *Thakur Prasad v. Fakir Ullah*, 17 All. 106=22 I.A. 44 (P.C.) (S. 647, Civil Procedure Code, 1882, held to include original matters in the nature of *suits* such as proceedings in probates, guardianships and so forth, and did not include executions).

12. 35 I.C. 613=44 Cal. 950=21 C.W.N. 30=24 C.L.J. 446 (F. N. 4, *supra*).

13. 18 Bom. 59.

14. (1924) 80 I.C. 182=1923 Bom. 386.

15. *Ramgulam Singh v. Sheo Deonarain Singh*, 51 I.C. 152=4 P.L.J. 287; Followed *Bhubaneshwar Prasad v. Tilakdhari*, 49 I.C. 617=4 P.L.J. 135.

16. 17 All. 106=22 I.A. 44=5 M.L.J. 3 (P.C.); Considered in *Venkata Narasimha v. Hemadu Suryanarayana*, 92 I.C. 802=1926 Mad. 325, *supra*).

16-a. (1925) 3 Mys. L. J. 218.

"the rigid rule adopted in 22 I.C. 689, that the second application also should be filed within the 30 days prescribed in Art. 163 does not commend itself to us, because it will practically render futile the second application, unless the second default also occurs within 30 days after the first default, which will rarely happen. In our opinion the second application must be filed within 30 days *from* the date of the order dismissing the first application for default".¹⁷

The rule deducible from the authorities appears to be that a second application for restoration of the *original* dismissal for default is not competent if made more than 30 days therefrom: but, that a subsequent application for restoration of the first application dismissed for default, is maintainable within 30 days of the dismissal of the first application.

2343. EXCLUSION OF TIME.—Section 4 of the Limita-

S. 4, Limitation Act. tion Act applies where the period of limitation expires on a day when the Court is closed.¹⁸ The period of the pendency of infructuous proceedings for the same relief may be excluded, where

S. 14, Limitation Act. the requirements of S. 14 are otherwise satisfied.¹⁹ In *Sheoji Ram v. Sheo Chand Rai*,²⁰ where a suit was dismissed for default under S. 102, Civil Procedure Code, 1882 (O. 9, R. 8), and a subsequent suit was filed but it was eventually dismissed as not maintainable, and the plaintiff then made an application for restoration of the original suit alleging that, under S. 14 of the Limitation Act, he was entitled to have the time occupied in the prosecution of the second suit deducted, it was held that Cl. (3), S. 14, Limitation Act does not provide for the deduction of the time during which the plaintiff had been bringing a suit which the Court is not legally empowered to entertain, and the previous clauses did not apply as the definition of a suit in S. 3 of the Act XV of 1877 excluded applications.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
164.	By a defendant, for an order to set aside a decree passed <i>ex parte</i> .	Thirty days.	The date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree.

17. Rustomji's Limitation, p. 903.

18. *Kalyansundrappa v. Chinnaasami*, (1923) 72 I.C. 13=1923 Mad. 489 =17 L.W. 413=1923 M.W.N. 211.

19. *Mohanlal v. Sher Muhd. Khan*, (1926) 93 I.C. 1023 (1).

20. 63 P.R. 1886.

SYNOPSIS.

- 2344. Corresponding provisions.
- 2345. Change in law.
- 2346. **Scope, and application.**
- 2347. "Decree passed *ex parte*."
- 2348. *Ex parte* decree of Small Cause Court.
- 2349. "Defendant."
- 2350. Application by legal representative.
- 2351. Right to apply.
- 2352. Non-appearance of defendant.
- 2353. **Starting point of limitation.**
Old law.
- 2354. Present law.
- 2355-2356. **Service of summons.**
- 2357. Due service.
- 2358. (i) What is due service: *Illustrative cases.*
- 2359. (ii) Service by affixture.
- 2360. (iii) Substituted service.
- 2361. (iv) Service by registered post.
- 2362. (v) Service in sufficient time.
- 2363. **Knowledge of the decree.**
- 2364. Burden of proof.
- 2365. **Period of limitation.**
(1) Review of judgment.
(2) Enlargement of time.

NOTES.

2344. CORRESPONDING PROVISIONS.—This article corresponds to Art. 164 of Act XV of 1877, which was a re-enactment of Art. 157 of Act IX of 1871. Under Act VIII of 1859, the corresponding provision was enacted by its S. 119, which ran as follows:

"In all suits in which a judgment may be passed *ex parte* against a defendant, he may apply, within a reasonable time not exceeding 30 days after any process for enforcing the judgment has been executed, to the Court by which the judgment was passed, for an order to set it aside."²¹

The service of such a process was considered by the legislature to be tantamount to an actual and personal notice to the debtor of the existence of the decree.²²

2345. The wording of Art. 164 of Act XV of 1877 referred to a "*judgment*" *ex parte* in column 1 of the article which is now altered to "*decree ex parte*": In column 3, the old article ran as follows:—

"The date of executing any process for enforcing the judgment."

The present article makes the application in time, if filed within thirty days of the time when the applicant had knowledge of the decree.²³ A right of party to make the application lost under the

21. *Har Prasad v. Jafar Ali*, (1885) 7 All. 345 ("Any process for enforcing the judgment", were held to refer to "process executed against the person or property of the judgment-debtor"); also see *Shib Chunder v. Luckee Debia*, (1866) 6 W.R. Mis. 1.

22. *Radhabinode v. Jugut*, (1866) 6 W.R. 300.

23. *Bapurao v. Sadhu Bhiva*, (1922) 47 Bom. 485=1923 Bom. 193=72 I.C. 130.

provisions of Art. 164 of Limitation Act of 1877, prior to passing of Act IX of 1908, was not revived by the later Act. See General Clauses Act, S. 6.²⁴ The Law of Limitation to be applied is the law existing at the time when the application is made.²⁵ The "right" to make an application to set aside the *ex parte* decree, if any, is acquired not under the Limitation Act, which merely regulates the period within which the remedy must be sought, but under the Code of Civil Procedure.²⁶ Section 6 of the General Clauses Act (X of 1897) had not the effect of making the new Act inapplicable to a decree passed *ex parte* in 1894, but which was sought to be set aside by the minor defendant on attaining his majority after the passing of Act IX of 1908.²⁷ The New Act was passed in August, 1908, and came into force nearly five months later on the 1st of January, 1909, giving ample notice to all who would be seriously affected by the change in the law to seek their remedy under the old law, before the new Act came into operation.²⁸

2346. SCOPE AND APPLICATION.—This article applies only to applications to set aside a decree *ex parte*. A suit to set aside an execution sale on the ground that the decree was obtained by fraud is governed by Art. 95 of the Limitation Act.²⁹ An unstamped objection statement cannot be treated as an application to set aside an *ex parte* decree, within this article.³⁰

2347. Article 164, deals with applications for setting aside a decree passed *ex parte*, viz., to applications under the Civil Procedure Code, O. 9, R. 13, and applies to the case of a defendant only. Therefore, it does not apply to the case of an application for revocation of the probate of a will, by a person who was not cited in the probate proceeding because he was not a defendant in the proceeding.³¹ The Madras High Court held that Art. 164 of the Limitation Act is not intended to apply only to decrees strictly so called. It also applies to orders in execution which come under the defini-

24. *Nepal Chandra Roy v. Niroda Sundari Ghose*, 39 Cal. 507 (509).

25. *The Hope Mills, Ltd. v. Vithaldas*, (1910) 12 Bom.L.R. 730; Followed in *Jia Bibi v. Ilahi Baksh*, (1915) 37 All. 597; *Mt. Zaibunissa v. Mt. Ghulam Fatima*, 70 P.L.R. 1911=10 I.C. 823; also see *Kumud Nath v. Jotindranath*, (1911) 38 Cal. 394.

26. *Mandharlal v. Mt. Saddika Begam*, 101 P.R. 1916=37 I.C. 292=202 P.W.R. 1916.

27. *Chidambaram v. Raman*, (1910) 35 Mad. 678; Followed *Kali Amma v. Palappakkarra Manakal*, (1910) 20 M.L.J. 347.

28. *Ibid.*, (1910) 35 Mad. 678.

29. *Motilal Chakrbutty v. Russick Chandra*, (1896) 26 Cal. 326.

30. *Subbiah Naicker v. Ramanathan*, 37 Mad. 462.

31. *Abhoy Charan Basak v. Saroja Soondari*, (1914) 24 I.C. 27 (Cal.).

tion of decree in Civil Procedure Code.³² The word "decree" is defined in S. 2 (2), Civil Procedure Code, and in order to come within this article, the order or decision must be a *decree* as defined in Civil Procedure Code.³³ *Ex parte* determination of any question under S. 47, Civil Procedure Code will be a "*decree passed ex parte*", within the meaning of this article, as held in the Madras case, 37 Mad. 462, but a Full Bench decision has held recently that O. 9, Civil Procedure Code does not apply at all to execution proceedings even if they have the force of a decree under S. 2 (2), and S. 47, Civil Procedure Code.³⁴ The **Sind Judicial Commissioner's Court** has held that Art. 164, Limitation Act is not restricted to applications to set aside *ex parte* decrees passed in suits. It also applies to similar applications made in proceedings other than suits, *e.g.*, a petition to file an award under the Arbitration Act.³⁵ A **Full Bench** has held recently that though S. 141, Civil Procedure Code has no application to execution proceedings, and therefore, O. 9 has likewise no application to *ex parte* order passed in such proceedings, the Court is competent to entertain application to set aside such *ex parte* orders under its inherent jurisdiction, and to afford opportunity to judgment-debtor of satisfying the Court that he had sufficient

Application to set aside orders. cause for non-appearance and that there had been an adjustment as alleged.³⁶ A decision given under S. 152, Civil Procedure Code, granting an application for amendment is an order and not

32. *Subbiah Naicker v. Ramanathan*, (1914) 22 I.C. 899=37 Mad. 462; Followed in *Periakaruppan v. Chidambara*, (1916) 33 I.C. 443 (Mad.); (O. R. in *Arunachellam v. Veerappa*, 61 M.L.J. 538, F.B.) (As to applicability of O. 9, Civil Procedure Code to proceedings in execution in general, see *Hajrat v. Waliulnissa*, 18 Bom. 429; *Narayana v. Muthu*, (1926) 50 Mad. 67; *Bholu v. Ramlal*, (1921) 2 Lah. 66; *Bharat v. Ashghar*, (1922) 45 All. 148; *Sarat v. Bisheshwar*, (1926) 54 Cal. 405; *Basratullah v. Riazuddin*, (1926) 53 Cal. 679; *Thakur Prasad v. Kakirullah*, (1894) 22 I.A. 44 (P.C.).

33. *Hindustan Bank, Ltd. v. Mehraj Din*, (1920) 1 Lah. 187=55 I.C. 820=2 L.L.J. 291; *Kanji v. Vasanji*, (1928) 53 Bom. 839=1929 Bom. 386=31 Bom.L.R. 995=120 I.C. 833 (Order granting leave to execute a decree under O. 21, R. 50 (2) (3) is not a decree).

34. *Arunachellam v. Veerappa Chettiar*, 61 M.L.J. 538 (F.B.) (O.R. 37 Mad. 462); cf. *Swaminatha v. Thiagarajasamy*, (1926) 92 I.C. 846=23 L.W. 26=1926 M.W.N. 140 (*Ex parte* order passed in execution proceedings cannot be set aside by application made more than 30 days after the judgment-debtors became aware of such order against him).

35. *Messrs. Flaming, Shaw and Company v. Mangal Chand Dwarkadas*, (1923) 75 I.C. 1035=1924 Sind 56; also see *Umar Din v. Raghunath*, 1932 Lah. 522=13 I.C. 377=33 P.L.R. 698 (Art. 164 applied to an order of adjudication of an insolvent passed *ex parte*) and *Roshanlal v. Lachhmi Narayan*, 17 Bom. 507 (509) (Art. 164, applied to an application to set aside *ex parte* decree passed by a Presidency Court of Small Causes).

36. *Denmal Rachandmal v. Firm Lalchand*, 1931 Sind 97=133 I.C. 65=25 S.L.R. 475 (F.B.).

a decree. Consequently an application to set aside the order is governed for purposes of limitation by Art. 181, and not by Art. 164, Limitation Act.³⁷ Applications to set aside **miscellaneous ex parte orders** which have not the force of a decree are not governed by Art. 164.³⁸ The term "re-hearing" in S. 169, Companies Act means the re-hearing in the nature of an appeal, and the section does not apply to an application to set aside an *ex parte* order which

Applications under
O. 9, R. 13, C. P.
Code.

is not strictly speaking an application for a re-hearing though it may result in it.³⁹ This article has not in terms been restricted to applications preferred under the Civil Procedure Code, but it is generally taken that it contemplates applications under O. 9, R. 13, Civil Procedure Code.⁴⁰ Article 164, Limitation Act applies to any **application which involves setting aside the original decree**, that is to say, to any application under O. 9, R. 13, Civil Procedure Code (Old S. 108, Civil Procedure Code, 1882), whether made to the original Court or to the Court of appeal after an appeal has been filed.⁴¹ An application to the Appellate Court by a defendant who was not duly served by summons in the Lower Court, and who has not appealed to set aside the original decree under O. 9, R. 13 (old S. 108, Civil Procedure Code, 1882), is, for purposes of limitation, governed by Art. 164, and not Art. 169, Limitation Act, which latter article applies only to applications for re-hearing of an appeal *ex parte* in the absence of the respondent.⁴² The view now taken by several High Courts is that all such applications should be made only to the original Court, even though an appeal has been filed from the *ex parte* decree.⁴³ But, where the appellate Court confirms, or otherwise disposes of the appeal, the

37. *Lawrence v. Dewan Singh*, (1933) 145 I.C. 823=1933 Rang. 264=6 R. R. 59 (1).

38. *Sodevi v. Sobharam*, (1906) 10 C.W.N. 306; also see *Hindustan Bank v. Mehrajdin*, (1920) 1 Lah. 187=55 I.C. 820=2 L.L.J. 291 (*Ex parte* order under S. 150, Companies Act).

39. *Parvathi Shankar v. Ishwardas Jagjivandas*, 19 Bom. 208.

40. *Abboy Charan Basak v. Saroja Sundari*, (1914) 24 I.C. 27 (Cal.); s.c., 41 Cal. 819; Referred *Bai Manekbai v. Manekji Karakji*, 7 Bom. 213; *Tiluck Singh v. Parsotem Proshad*, 22 Cal. 924; *Rahmat Karim v. Abdul Karim*, 34 Cal. 672=6 C.L.J. 19=11 C.W.N. 674 [Cases bearing on Art. 181 (Old Art. 178)].

41. *Sankara Bhatta v. Subrayya Bhatta*, (1907) 30 Mad. 535 (536).

42. *Ibid.*, 30 Mad. 535 (536).

43. *Kalimuddin v. Esahakuddin*, (1924) 51 Cal. 715 (732, 733); *Shyam v. Satinath*, (1916) 44 Cal. 954; *Kumudnath v. Jotindra*, (1911) 38 Cal. 394; *Damodar v. Saratchandra*, (1909) 13 C.W.N. 846; also *Mirza Abdulla v. Ramzankhan*, (1923) 79 I.C. 381 (All.); *Hummi v. Asisuddin*, (1916) 39 All. 143; *Gajraj Mati v. Swaminath*, (1916) 39 All. 13; *Mathura Prasad v. Ramcharan*, (1915) 37 All. 208; *Ribdaqat v. Bibi*, (1917) 39 All. 393 and *Palaniappa v. Subramania*, (1921) 44 Mad. 731=41 M.L.J. 90; also *Seth Khunda v. Ghulam Kadir*, 1924 Lah. 224.

original decree is merged in the appellate decree, and the Court which passed the original decree has no longer any power over the application, even though it was made before the appeal was filed.⁴⁴ The observation that Art. 164 would apply to cases of applications under the Code of Civil Procedure seems to have been accepted in the **Calcutta** case of *Haji Ramjan v. Hafiz Abdul*.⁴⁵ The decision in *S. N. Banerjee v. Suhrawardy*,⁴⁶ is not opposed to this view inasmuch as this case merely decides that under the rules of the original side of the **Calcutta High Court** no decree is passed *ex parte* within the meaning of O. 9, R. 13, Civil Procedure Code.

2348. We have seen *ante* in notes under Art. 161, that there

Ex parte decree of a
Small Cause Court.

has been a considerable conflict of view as to the mandatory or directory nature of the provision in Provincial Small Cause Courts Act, S. 17. A Full Bench of the Lahore High Court holds that the provision is directory and not mandatory, and it is open to the Court in appropriate cases to extend the time within which the deposit is to be made.⁴⁷ Another view is that this provision is mandatory and that it is a condition precedent to the making of an application for setting aside the decree, that the applicant should, at the time of presenting his application deposit in Court the decretal amount or tender security for payment of the same.⁴⁸ A duly executed security bond, though unregistered,⁴⁹ or not verified by two sureties,⁵⁰ is sufficient offer of a security within the meaning of S. 17, Provincial Small Cause Courts Act. The mandatory view is now considerably modified, and the trend of opinion is that the deposit or security may be made at the option of the applicant, within the period of limitation prescribed by Art. 164, but not beyond it, when defendant is applying to set aside the *ex parte* decree of a Court of

44. *Dhonai v. Taraknath*, (1910) 12 C.L.J. 53; *Kahimuddin v. Eshakuddin*, (1924) 51 Cal. 715 (733); *Murtaza v. Jogendra*, (1925) 90 I.C. 724 (Cal.); also *Sankara v. Subrayya*, (1907) 30 Mad. 535; *Palaniappa v. Subramanya*, (1921) 44 Mad. 731 (732) and *Mathura Prasad v. Ram Charan*, (1915) 37 All. 208; compare *Subramania v. Varadarajalu*, (1927) 53 M.L.J. 110 and *Abdul Ohad v. Amdali*, (1920) 48 Cal. 153; also see and cf. *Mt. Ayodhya Kuar v. Durga Prasad*, (1922) 1923 Pat. 331; *Palaniappa v. Subramaniya*, 44 Mad. 731=42 M.L.J. 12.

45. (1927) 32 C.W.N. 411=116 I.C. 633=1928 Cal. 864.

46. (1927) 32 C.W.N. 10=1928 Cal. 772=55 Cal. 473=106 I.C. 91.

47. *Gedimal Dharamdas v. Himamal Sheduram*, 1931 Lah. 322=131 I.C. 635=12 Lah. 359 (F.B.).

48. *Suraj v. Baldeo*, 50 All. 254=1928 All. 111=108 I.C. 464; *Ram Charitar v. Hashim*, 1 P.L.T. 323=56 I.C. 810; *Bishun v. Sheotakal*, 62 I.C. 108 (109) (Pat.); *Pandlik v. Ganpat*, (1933) 144 I.C. 394; Relied on 116 I.C. 641=26 N.L.R. 63.

49. *Rajeswari Prasad v. Brahmanand*, (1933) 145 I.C. 314=1933 Pat. 279=12 Pat. 745.

50. *Ahmadyar v. Kheyali*, 1933 All. 933.

Small Causes.¹ The reason for this view is that the previously made application may be taken as made on the date on which the security was furnished, as the period of limitation has not yet expired, and it would be a mere formality (which may be safely dispensed with) to direct the applicant to file a fresh application on the day when he furnishes the security.²

2349. See definition of the "defendant" in S. 2 (4) of the Act. (S. 51, p. 51, *ante*). This article is "Defendant." restricted to the case of an application by a defendant. Article 164 does not apply to the case of one who is not a defendant in a probate proceeding. Merely, citing a person in a probate application does not make him a defendant. Under S. 83 of Probate and Administration Act the case must be contentious and the person cited must appear to oppose the grant before he becomes a defendant. The limitation laid down in Art. 164, Limitation Act applies to the case of a defendant as understood by S. 83 of the Probate and Administration Act.³

Application by legal representative.

2350. Section 146, Civil Procedure Code deals with proceedings by or against representatives. It enacts that

"save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him".

Under the Civil Procedure Code of 1882, there was no such specific provision, and it was very doubtful where an application under O. 9, R. 8, Civil Procedure Code, to set aside an *ex parte* decree against the defendant, could be made by the legal representative of the deceased. The **Allahabad High Court** took the view in *Janki Prosad v. Sukhram*,⁴ that S. 108, Civil Procedure Code (O. 9, R. 8, Civil Procedure Code) only refers to the defendant, against whom the decree is passed, and he alone can apply to set it aside. The **Calcutta High Court** dissented from this view in *Ganoda Prasad Roy v. Shib Narain Mukerjee*.⁵ The **Madras High Court** held to same effect as the Allahabad High Court, that S. 108, Civil Procedure Code, under which the application was made to set aside a decree *ex parte* only authorised applications by the defendant against

1. *Jenumuchi v. Budhiram*, (1905) 32 Cal. 339=1 C.L.J. 143; *Aosan Mohd. v. Rahim Saheb*, 43 Mad. 579=55 I.C. 977 (F.B.); *Jhaboo v. Havildar*, 1929 All. 840; *Narain v. Pudam*, 1930 Oudh 1.

2. *Ram Bharose v. Ganga Singh*, 1931 All. 727 (730) (F.B.); *Motilal Ramchander v. Durga Prasad*, 1930 All. 830.

3. *Saroja Sundari Basak v. Abboy Charan Basak*, (1914) 41 Cal. 819 (823)=24 I.C. 27.

4. (1899) 21 All. 274.

5. (1901) 29 Cal. 33; Followed *Jogodanund Singh v. Amritlal Sircar*, (1895) 22 Cal. 767.

whom an *ex parte* decree had been made.⁶ Where, therefore, a defendant died after a decree *ex parte* had been passed against him, his representative could not apply to set aside the *ex parte* decree unless the plaintiff had brought them on record as representatives under the Civil Procedure Code.⁷ The Madras High Court now follows the Calcutta view. In *Venkata Subbaiyer v. Krishnamurthy*,⁸ it was held that on the true construction of Art. 164 of the Limitation Act read with S. 146, Civil Procedure Code, the word "defendant" in Art. 164, Limitation Act is wide enough to include the executor of the original defendant, though the executor may not have been brought on the record when the application was made. The Allahabad High Court has also held under the new Civil Procedure Code that heirs of a defendant against whom an *ex parte* decree is passed before his death, have a right to apply to set aside the *ex parte* decree.⁹ Section 146, Civil Procedure Code, however, refers only to taking proceedings or making an application and not to continuing a proceeding or an application already started.¹⁰ Where proceedings under S. 108, Civil Procedure Code, 1882 (O. 9, R. 8 of the present Code) had been initiated by the defendant, the legal representative of the defendant was held entitled to continue such proceedings.¹¹

2351. A Court has no jurisdiction to set aside an *ex parte* decree, and order the whole case to be re-opened at the instance of a person not in any way interested in the decision of the case, and who has been expressly exempted from the decree.¹² In order to attract the provisions of O. 9, R. 13, Civil Procedure Code, relating to the setting aside of *ex parte* decrees, the person seeking the aid of the Court must be a **party to the suit**. It is of the essence of the rule that the complaint must come from one **whose rights could validly be dealt with by the trial Court**.¹³ Accordingly, where a minor is not properly represented on the record, he cannot be regarded as a party to the proceedings, and the result of such proceedings, therefore, cannot bind him; consequently, there can be no question of his having been prevented by sufficient cause from conducting them. If in such a case an *ex parte* decree is passed against a minor, he

6. *Sambasiva Chetti v. Veera Perumal Mudali*, (1904) 28 Mad. 361.

7. *Ibid.*, (1904) 28 Mad. 361 (362).

8. (1913) 38 Mad. 442=1913 M.W.N. 899=21 I.C. 568=14 M.L.T. 396.

9. *Mt. Banoo v. Hardwarilal*, 1923 All. 30.

10. *Doraiswami Ayyar v. Balasundaram*, 1927 Mad. 507=52 M.L.J. 477=38 M.L.T. 275=102 I.C. 243.

11. *Beti Jeo v. Sham Biharlal*, (1907) 29 All. 574; Dist. 21 All. 274.

12. *Ajodhya Prasad v. Mt. Katori*, (1921) 61 I.C. 484 (All.).

13. *Eda Punayya v. Jangalakama Kotayya*, (1919) 53 I.C. 184=37 M.L.J. 399=26 M.L.T. 327=10 L.W. 471=1920 M.W.N. 1.

cannot apply to set it aside under O. 9, R. 13, Civil Procedure Code.¹⁴ If a minor is not properly represented before a Court, a decree passed against him is a nullity, and the Court cannot set aside the *ex parte* order and re-open the suit under O. 9, R. 13, Civil Procedure Code.¹⁵ A minor not represented by a competent guardian is not a party defendant to the suit, and cannot maintain such an application.¹⁶ But, a different view has been taken in *Pearelal v. Ashraf Khan*,¹⁷ where it was held by Daniels, J., that if an *ex parte* decree is passed against a non-represented minor, there is sufficient cause for his non-appearance and restoration of the suit; and if the Judges refuse to restore it he fails to exercise a jurisdiction vested in him by law which he was bound to exercise. When a suit is brought against a firm and an *ex parte* decree is passed against the firm, an application by the firm to set aside the decree would be barred after thirty days from the date of the decree. It can never be said that a decree against the firm is *ex parte* against one of the partners because he has not appeared.¹⁸

2352. Art. 164 applies equally to an application to set aside an *ex parte* decree, whether passed against the defendant by reason of his non-appearance at the first hearing, or at an adjourned hearing.¹⁹ Order 17, R. 2, Civil Procedure Code provides that

"where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. 9 or make such other order as it thinks fit".

The provisions of O. 9 by themselves do not apply to a case in which the plaintiff or defendant has already appeared, but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in O. 17 which deals with adjournments.²⁰ The effect of O. 17, R. 2, Civil Procedure Code is to make O. 9

14. *Eda Punayya v. Jangalakama Kotayya*, 53 I.C. 184 (186); Relied on *Rashidunnissa v. Muhammad Ismail*, 3 I.C. 864=31 All. 572=36 I. A. 168=19 M. L. J. 631; cf. *Bhagwan Dayal v. Paransukhdas*, 36 I.C. 366=39 All. 8=14 A.L.J. 818; also see and cf. 27 I.C. 623=37 All. 179=13 A.L.J. 179 (The point had not directly come up for decision).

15. *Arumuga Gounden v. Periaravanjiappa*, (1924) 78 I.C. 76=46 M.L. J. 348; Reld. on *Eda Punayya v. Jangala*, 58 I.C. 184.

16. *Permanand v. Lakhmichand*, (1922) 18 N.L.R. 138=66 I.C. 460 (Nag.); Folld. *Rashidunnissa v. Muhammad Ismail*, 31 All. 572 (P.C.).

17. (1923) 71 I.C. 456=21 A.L.J. 185=1923 All. 213.

18. *Adiveppa Shidlingappa v. Pragji Mohanji*, (1924) 80 I.C. 773=26 Bom. L. R. 388=1924 Bom. 366.

19. *Jonardhan Dobey v. Ramdhone Singh*, (1896) 23 Cal. 738 (F.B.); O.R. *Sital v. Heera*, 21 Cal. 269; *Muniappan v. Balayan*, 31 Mad. 505 (506) and *Hildreth v. Sayaji*, 20 Bom. 380.

20. *Enatulla v. Jiban*, (1914) 41 Cal. 956=23 I.C. 769.

apply where there is default in appearance at an *adjourned* hearing, and to assimilate the procedure with that in cases where there is such default at the *first* hearing.²¹ Thus, if a defendant fails to appear at an adjourned hearing the Court may pass an *ex parte* decree under this rule, and O. 9, R. 13, for an order to set it aside.²² Where there is default of appearance *before* hearing in a case of general adjournment, as distinguished from an adjournment granted under O. 17, R. 3 to enable a party to perform any act necessary to the further progress of the suit, R. 2 would empower the Court to proceed under O. 9, and if the defendant does not appear, it may pass an *ex parte* decree under O. 9, R. 6, Civil Procedure Code.²³ A defendant against whom a decree is passed *ex parte* for default of appearance is entitled to apply to set aside the decree though he may have filed his written statement.²⁴ When on the day of hearing the defendant appears in person, but only for the purpose of applying for adjournment, and the application being refused, a decree follows, such decree passed in presence of the defendant is not an *ex parte* decree.²⁵ But, if the defendant who is absent is represented by a pleader who has no instructions but to apply for an adjournment, the defendant cannot be said to have been present at the hearing, and if the application for adjournment is refused, and the Court passes a decree, it would be a decree passed *ex parte* within the meaning of Art. 164, Limitation Act.²⁶ Their Lordships of the Privy Council have held in *Radha Kishan v. The Collector of Jaunpur*,²⁷ that where a defendant, not present in person at the hearing on evidence, had appointed a pleader who had acted in the suit until that occasion, when he stated to the Court that he was not instructed for the defence, and the Court proceeded without him to a decree for the plaintiff, the High Court's order on appeal

21. *Rukam v. Tara Chand*, (1922) 65 I.C. 775=1922 All. 68=20 A. L.J. 123; *Mariannissa v. Ramkalpa*, (1907) 34 Cal. 235; *Nagendra Kumar v. Nabin Mandal*, (1909) 36 Cal. 189=1 I.C. 741; also see *Ryall v. Sherman*, (1877) 1 Mad. 287; *Ramayya v. Rangayya*, (1884) 7 Mad. 41.

22. *Bhagwan v. Hira*, (1897) 19 All. 355; *Hildreth v. Sayaji*, (1896) 20 Bom. 380; *Jonardhan v. Ram Dhone*, (1896) 23 Cal. 738 (F.B.); *Folld. in Enatulla v. Jibun*, (1914) 41 Cal. 956=23 I.C. 769.

23. *Krista v. Pancharam*, (1928) 47 C.L.J. 467=111 I.C. 430=1928 Cal. 341; *Ratanbai v. Shankar*, (1922) 46 Bom. 1026=68 I.C. 514=1923 Bom. 27; *Mahant Damodar v. Raj Kumar*, (1922) 1 Pat. 188=69 I.C. 837=1922 Pat. 485.

24. *Muniappan v. Balayan*, (1908) 31 Mad. 505.

25. *Soonderlal v. Goor Pershad*, 23 Bom. 414 (421); also see *Shankar Dat v. Radhakrishna*, (1897) 20 All. 195.

26. *Cooke v. Equitable Coal Co., Ltd.*, 8 C.W.N. 621 (624); *Ram Tahal v. Rameshar*, 8 All. 140; *Shankar v. Radha*, 20 All. 195 and *Ramanuja v. Rangaswamy*, 18 M.L.J. 51; also see *Satish Chandra v. Ahara Prasad*, (1907) 34 Cal. 403 (417) (F.B.); *Manikam v. Mahudum Bathummal*, (1924) 47 Mad. 819=47 M.L.J. 398 (F.B.) and *Arunachella v. Katha Goundan*, (1924) 47 M.L.J. 514=1924 Mad. 842=82 I.C. 107.

27. (1900) 23 All. 220=5 C.W.N. 153 (156) (P.C.).

holding that the decree was an *ex parte* one and remanding the case to be disposed of on the merits, was not intended to set aside the decree against the defendant, but in effect it directed an inquiry under S. 108 (Civil Procedure Code, 1882), as to the cause of the defendant's absence, the decree having been *ex parte*.

2353. STARTING POINT OF LIMITATION.—We have

Old law.

noticed above that the corresponding provision in Art. 164 of Act XV of 1877 provided in column 3, the starting point of limitation as "*the date of executing any process for enforcing the judgment*". A notice to show cause why decree should not be executed under S. 248, Civil Procedure Code, was held not a "process for enforcing the judgment".²⁸ A legal process of attachment or arrest must be formally executed before time began to run against the applicant.²⁹ "Any process" in Art. 164, meant the *first* process³⁰ and it set time running whether the applicant was aware of it or not.³¹ The service of a precept or injunction on the defendant,³² or an attachment order,³³ was sufficient to start limitation, if the property belonged to the judgment-debtor, though it may not have been in his possession.³⁴ Application for setting aside a decree passed *ex parte* could lie under S. 108, Civil Procedure Code, on the ground of the summons not having been duly served, or the defendant having sufficient cause for non-appearance on the day fixed for the hearing.³⁵ The starting point now is the date of decree in case the defendant had been duly served, but otherwise limitation begins to run against him only when he had knowledge of the decree. The present Limitation Act has made a noticeable change of law in this respect. A judgment-debtor is not in such a favourable position as he used to be when he had thirty days from the time when execution was levied against him.³⁶

2354. Under the present Art. 164, third column gives the starting point as the date of the decree.

Present law.

This assumes that the summons was duly served. The alternative date is "where the summons was not duly

28. *Gouranditta v. Ziada*, (1905) 110 P.L.R. 1905.

29. *Pooroo Chunder v. Prosanno Coomar*, (1876) 2 Cal. 123.

30. *Har Prasad v. Jafar Ali*, (1885) 7 All. 345; Reld. on *Pachu v. Jai Kishen*, 4 A.W.N. 322.

31. *Bhoobunessury v. Judobendra*, (1882) 9 Cal. 869.

32. *Suraj Kiran v. Ambika Prosad*, (1883) 6 All. 144.

33. *Har Prasad v. Jafar Ali*, (1885) 7 All. 345.

34. *Kalee Prosad v. Digamber*, 25 W.R. 72 (Property not in possession of the judgment-debtor); cf. *Sookhmoyee v. Nurmooda*, (1871) 15 W.R. 210 (Property belonging to a third person).

35. *Fakhruddin v. Ghafuruddin*, (1900) 23 All. 99; *Bhura Mal v. Har Kishen*, (1902) 24 All. 383.

36. *Bapurao Sakharam v. Sadhu Bhirba Gholap*, 1923 Bom. 193=25 Bom. L. R. 74=72 I.C. 130=47 Bom. 485.

served," "when the applicant has knowledge of the decree".³⁷ The two periods defined by the article indicate that where the defendant has knowledge of proceedings which he knows must end in the decree, he is bound by the shorter period of limitation, *i.e.*, thirty days from the date of the decree. But where he has no such knowledge, then limitation runs only from the time when the decree was brought to his notice.³⁸

2355. SERVICE OF SUMMONS.—As to issue and service of summons, the provisions of the **Civil Procedure Code, O. 5**, will govern. The words "*when the summons was not duly served*", in Art. 164, Limitation Act, refer to summons given for the *first* hearing of the suit, and where there has been due service of such summons, the mere fact that the defendant has not received notice of an adjourned hearing will not cause limitation to run from the date on which the defendant becomes aware of the decree having been passed.³⁹

Art. 164 is not intended to help a defendant who is duly served with a summons, and has due notice of the suit but who intentionally neglects to ascertain the date of the suit after it has been transferred to another Court with a view to come at a late stage and get the decree set aside if it were passed *ex parte*. No proceedings can therefore be taken on an application by such defendant, to set aside an *ex parte* decree presented after the period of limitation.⁴⁰⁻⁴² The **Peshawar Judicial Commissioner's Court** has held, following the Lahore view, that the summons referred to in Art. 164 is the summons for the *first* hearing of the case, and there is no essential difference between the case where a suit is adjourned owing to the absence of the presiding officer or for some other cause and a case in which a suit is remanded for re-trial by the appellate Court.⁴³ It was observed that

"the suit is the same in the trial Court and the defendants have been served with a summons. I presume that the underlying principle in such cases is

37. *Mir Ahmad v. Pir Baksh*, 1930 Lah. 397 (398)=129 I.C. 689; *Rajeshwari Prasad v. Brahmanand*, 12 Pat. 745=145 I.C. 314=1933 Pat. 279 (Application is to be filed within thirty days from knowledge of *decree* and not of *suit*).

38. *Kesarchand Keshowji v. Lakhamshi Raisi*, (1917) 42 I.C. 611=11 S.L.R. 71.

39. *Mt. Lal Devi v. Amar Nath*, (1920) 57 I.C. 15 (Lah.); Folld. in *Surjit Singh v. Toree*, (1923) 76 I.C. 14=1924 Lah. 666; *Sham Sundar Khushi Ram v. Deviditta Mal*, 1932 Lah. 539=139 I.C. 354=33 P. L. R. 838 and *Tarachand v. Ram Chand*, (1935) 154 I.C. 429=1935 Pesh. 7; also see *Panjab v. Bali*, (1922) 69 I.C. 549 (Nag.); *Raghubir v. Daulat*, (1916) 39 I.C. 32 (Punj.).

40-42. *Sham Sundar-Khushi Ram v. Deviditta Mal*, 1932 Lah. 539=139 I.C. 354=33 P.L.R. 838.

43. *Tara Chand v. Ram Chand*, (1935) 154 I.C. 429; Reld. on 57 I.C. 15=1920 Lah. 261; 76 I.C. 14=1924 Lah. 666 and 139 I.C. 354=1932 Lah. 539=33 P.L.R. 838.

that where the existence of the suit has been brought to the notice of the defendants by due service of a summons on them, it is their duty thereafter to inform themselves of what is being done in the case."⁴⁴

2356. SERVICE OF SUMMONS.—

2357. Order 5, R. 16 of the Code of Civil Procedure contemplates three distinct classes of service,
Due service. (1) on the party in person, (2) on that party's duly appointed agent, (3) upon any other person on behalf of that party. The third class of service is contemplated by the law only when the party cannot himself be found. Service effected on a party in person is defective if the mark or signature of the party is not taken upon the paper.⁴⁵ The words "*duly served*" in the third column of Art. 164, do not mean personal service, as a matter of necessity.⁴⁶ The expression is **not equivalent to personally served.**⁴⁷ But, the expression must receive a strict interpretation, meaning in literal conformity with the requirements of the Civil Procedure Code.⁴⁸ It must mean "*legally served*", in one or more of the ways permitted by the Code under O. 5 of the Code, and in strict conformity with the requirements thereof. It means something more than served in a manner which is technically and formally correct as a basis for proceeding *ex parte*.⁴⁹ All the rules in the Code relating to service of defendants and respondents are intended to carry out the cardinal principle of administration of civil justice that no decree shall be made against a party behind his back.⁵⁰ The phrase "*duly served*" in Art. 164 of the Limitation Act is used in the same sense as in O. 5, R. 19, Civil Procedure Code. In both places it means served in such a manner as to give the defendant information of the proceedings taken against

44. *Tara Chand v. Ram Chand*, 154 I.C. 429 (430)=1935 Pesh. 7 (Per Almond, J.C.).

45. *Abdool Hossein v. Esmailji*, (1910) 6 I.C. 901=12 Bom. L. R. 462.

46. *Currimbhoy v. Moqs*, 1929 Bom. 250; also *Doraiswami v. Balasundaram*, (1926) 52 M.L.J. 477; *Venkatachellam v. Subbayya*, 1928 Mad. 655 (657)=108 I.C. 889=54 M.L.J. 448 (Service on agent or servant is due service).

47. *Doraiswami v. Balasundaram*, (1926) 52 M.L.J. 477=1927 Mad. 507=102 I.C. 243=38 M.L.T. 275; also *Vitta Venkatachellam v. Sivapuram Subbayya*, (1927) 54 M.L.J. 448=1928 Mad. 655=108 I.C. 889.

48. *Pandlick v. Vasantrao*, (1909) 11 Bom. L. R. 1296; *Abdool Hossein v. Esmail Abdool Hossein*, (1910) 12 Bom. L. R. 462; *Kumudnath v. Jotindranath*, (1911) 38 Cal. 394; also *Gopaldas v. Ishu*, (1916) 46 I.C. 277 (Nag.); *Diwan Chand v. Parbati*, (1918) 48 I.C. 28 (Punj.); *Barkatullah v. Fazl-i-mazla*, (1920) 55 I.C. 824 and *Ram Kishan v. Mula*, (1922) 69 I.C. 467 (Lah.).

49. *Gayanammal v. Abdul Hossein*, (1931) 34 L.W. 496=1931 Mad. 813=61 M.L.J. 920=134 I.C. 1202.

50. 1931 Mad. 813 (814).

him.¹ A summons cannot be said to be duly served which is a misleading document having no relevance to the real proceeding which is contemplated, and having no reference to the order ultimately passed.² Even if there is a record that the defendant has been personally served, it is open to him to show that the summons in the suit was not really served upon him but upon somebody else, or that what was served upon him was not the summons in the suit, or that it was not accompanied by a copy of the plaint in the suit concerned so that although in a sense he was personally served, he was not provided with the knowledge of the claim against him, which is the object of the service.³ The general rule as regards the service of summons on a defendant is R. 9 of O. 5, Civil Procedure Code; and R. 27 invests the Court with a discretion to effect **service of summons on a public servant** in the manner provided by that rule.⁴ A personal and direct service of summons on the defendant may be more convenient and proper in the circumstances of the case, and if he refused to accept service so ordered by the Court, the service was due service all the same and time ran from the date of the decree.⁵ A declaration required by R. 19 is implicit in the circumstances attending the service of the summons on its return to the Court which had issued it.⁶ Where there is a verification by the affidavit of the serving officer the examination of the serving officer is a matter of discretion with the Court.⁷ Where the summons is duly served, the starting point of limitation, under column 3 of Art. 164, is the **date of the decree**.⁸ The object of the service of summons, in whatever way it may be effected, (other than substituted service to which other considerations apply), is that the defendant may be informed of the institution of the suit in due time before the date fixed for the hearing.⁹ A preliminary decree in a suit for rendition of accounts does not conclude the proceedings and those intervening between the passing of the preliminary decree, and the final decree are not fresh proceedings, but continuation of the same suit. An order directing that proceedings should be *ex parte* against defendant

1. *Kesarchand Keshowji v. Lakhamshi Raisi*, (1917) 42 I.C. 411=11 S.L.R. 71; 8 S.L.R. 153=27 I.C. 351.

2. *Pandit Balgobind v. Sheo Kumar*, 1924 All. 818 (2)=82 I.C. 184=46 All. 864.

3. *Gyanammal v. Abdul Hossein*, 1931 Mad. 813 (815).

4. *Har Charan Seth v. Muhammad Azizullah*, 1932 Oudh 326=9 O.W. N. 896=141 I.C. 759; cf. *Wazir Khan v. Naqui Yawar*, (1909) 1 I.C. 168.

5. *Ibid.*, 1932 Oudh 326.

6. *Ibid.*, 1932 Oudh 326 (327)=141 I.C. 759.

7. *Ibid.*

8. *Ibid.*

9. *Bhom Shetti v. Umabai*, (1895) 21 Bom. 223 (225); also see *Kesar Chand v. Lakhamshi*, 42 I.C. 411, *supra*.

remains in force till final decree, and no fresh notice is necessary before a final decree is made. The time would begin to run against the defendant under Art. 164 from the **date of the final decree**, and the date of knowledge could not be insisted on as a starting point on the plea that the summons had not been duly served.¹⁰

2358. ILLUSTRATIVE CASES.—(1) The following

illustrative cases may be noticed to see
 (i) What is due what is or what is not due service according to the authorities: **O. 5, R. 15**, should be strictly complied with. The enquiry as to the defendant's whereabouts should not be confined to his son or relation. An attempt should be made to find out the defendant by an enquiry from his neighbours or other persons.¹¹ Where a defendant was not living in his ancestral family house since some years, and there was no one present upon whom a summons could be served, a substituted service by affixing a copy of the summons at the outer door of the family house was held not justified under the law.¹² **Service of summons upon *pardanashin* ladies** may be effected under the provisions of **R. 17 of O. 5**, Civil Procedure Code, by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which a lady ordinarily resides.¹³ It is open to the Court, even where there has been a technical compliance with the provisions of R. 17 to order service in another mode, if the Court thinks fit to do so in the interests of justice. The Court may, in a case of this description, direct the issue of summons to *pardanashin* ladies by means of notice sent by registered post, so that the cover may, in due course, reach the lady herself.¹⁴ An application by a defendant who was duly served with the summons, by receiving notice through registered post, to set aside an *ex parte* decree must be made within 30 days of the date of the decree.¹⁵ Where suit is brought against a firm, it will be taken that a **summons served on any one of the partners of the Firm** is due service, and time runs from the date of the decree.¹⁶

10. *Baldev Singh v. Krishen*, 1931 Lah. 268=135 I.C. 42.

11. *Dharam Chand Jain v. Kanak Sarkar*, 1921 Cal. 638=26 C.W.N. 359.

12. *Kumudnath Roy v. Jotindranath*, (1911) 38 Cal. 394.

13. *Khirod Sundari Dasi v. Nobin Chandra*, (1915) 30 I.C. 64=19 C.W.N. 1231.

14. *Ibid.*

15. *Ghanshiram Baburam v. Misrilal Chunilal*, (1925) 89 I.C. 223=1925 Bom. 444=27 Bom. L. R. 690.

16. *Adiveppa v. Paragji*, 26 Bom. L. R. 388=1924 Bom. 366=80 I.C. 773.

2359. (2) Service by affixture is resorted to where the defendant is absent from home, or refuses to sign the acknowledgment, although he has received a copy of the summons.¹⁷ Where a defendant cannot be found, the affidavit of service must show— (1) that proper efforts were made to find him; and (2) that the

(ii) Service by affixture. **copy of the summons was affixed on the door of the house in which the defendant**

ordinarily resided at the time of service: whether or not these conditions are established to the satisfaction of the Court must in each case depend on its own particular circumstances.¹⁸ When a return has been made as to service by affixture under O. 5, R. 17, it is insufficient until confirmed under O. 5, R. 19.¹⁹ For substituted service of summons to be effective, it is essential that the requirements of the rules of the Code should be strictly observed. Knowledge of the institution of the suit, derived by the defendant aliunde is not sufficient in the absence of proper service of the summons.²⁰ All available steps to effect personal service must be made before resort is had to the provisions of O. 5, R. 17.²¹ The serving peon before he can take advantage of these provisions must attend at the right place and he must attend at a time when he may reasonably expect that the defendant will be present, and if he fails to find the defendant he must take reasonable steps to discover where the defendant may happen to be.²² Where the notice was sent for service at the place mentioned, in the plaint as the plaintiff's residence but the peon on arriving there did not find the plaintiffs or any *male* member of the family, but found there a servant of the plaintiffs and was told that the plaintiffs were at that time living at their own *bari*

17. *Diwan Chand v. Parbati*, (1918) 48 I.C. 28 (Punj.); *Maruti v. Vithu*, (1891) 16 Bom. 117; *Nageswar v. Bisheshwar*, (1923) 3 Pat. 236.

18. *Rajendronath Sanyal v. Jan Meah*, (1898) 26 Cal. 101; also see *Sankaralinga v. Ratnasabapati*, (1897) 21 Mad. 324; *Baldeo Das v. Sukhramdas*, (1924) 52 Cal. 179, *Dinanath v. Upendra*, (1924) 40 C.L.J. 154; *Sakaram v. Padmakar*, (1906) 30 Bom. 623.

19. *Nur Mahomed v. Kazbai*, (1886) 10 Bom. 202.

20. *Kasim Ebrahim Saleji v. Johurmul Khemka*, (1915) 43 Cal. 447 = 34 I.C. 799; *Folld. Cohen v. Narsing Dass Auddy*, (1892) 19 Cal. 201; also see *Dittu Ram v. Nawab*, (1925) 7 Lah. L. J. 448; *Narasimha v. Balakrishna*, (1926) 52 M.L.J. 512 = 1927 Mad. 487; *Shariba v. Abdul Salaam*, (1927) 51 Mad. 860 = 55 M.L.J. 565.

21. *Bhubaneshwar Trigunait*, In the goods of, 1925 Cal. 627 (2) = 52 Cal. 179 = 88 I.C. 508; also see *Dinanath Pati v. Upendra Narain Das*, 1924 Cal. 1004 = 40 C.L.J. 154 = 82 I.C. 703 (Personal service should not be dispensed with unless it is unavoidable to do so); and *Abraham Pillai v. Donald Smith*, (1906) 29 Mad. 324 (Whenever it is practicable, the service of summons must be in person); *Chintaman Pawar v. Pannalal*, (1931) 134 I.C. 279 = 27 N.L.R. 53 = 1931 Nag. 119.

22. *Ibid.*, 1925 Cal. 627 (2) = 52 Cal. 179 = 88 I.C. 508.

at a village some two or three miles distant: it was held that the affixing of the notice at the entrance of the plaintiff's house was not good service as the peon did not use due and reasonable diligence.²³ Where it appeared from the serving officer's return that, according to the information given to him, there was no prospect of his being able to serve the defendant personally within a reasonable time, that he was justified in affixing the summons to the door of the house.²⁴ Temporary absence by itself will not justify a resort to substituted service.²⁵ Where a serving officer finds a defendant to be away temporarily from home, and knows where he is, it is not good service if he thereupon does no more than fix the summons to the outer door of the house; but he must make further efforts to effect personal service.²⁶ The enquiry as to the whereabouts of the defendant must not be perfunctory.²⁷

2360. (3) A summons cannot be said to be duly served where substituted service has been ordered by the Court and effected upon a misrepresentation of facts²⁸; or upon allegations which were false,²⁹ and on insufficient and unsustainable materials.³⁰ But, ordinarily, substituted service is as effectual as personal service, and is hence "due service" within the meaning of Art. 164, Limitation Act.³¹ The advisability of effecting service by substituted process is a matter primarily for the trial Court and if it is satisfied on the matter set out in O. 5, R. 20, it should order substituted service which is as effectual as if ser-

23. *Dinanath Pati v. Upendranarain Das*, 1924 Cal. 1004; also see *Bhom Shetti v. Umabai*, (1895) 21 Bom. 223 (226) (The Code does not take into account the female members of a family).

24. *Sankaralinga v. Ratnasabapatki*, (1897) 21 Mad. 324; also see *Abraham Pillai v. Donald Smith*, (1906) 29 Mad. 324.

25. *Subramania Pillai v. Subramania Ayyar*, 21 Mad. 419; Folld. in 134 I.C. 279 (Nag.); also see *Bhom Shetti v. Umabai*, (1895) 21 Bom. 223; *Nihala v. Khazana*, (1923) 73 I.C. 34 (Lah.).

26. *Sakina v. Gauri Sahai*, (1902) 24 All. 302.

27. *Dharm Chand v. Kanak*, (1920) 68 I.C. 991.

28. *Pandit Balgobind v. Sheo Kumar*, (1924) 82 I.C. 184=46 All. 864=1924 All. 818 (2); *Kedarmal v. Hosifulnessa*, 1934 Cal. 745=38 C.W.N. 1066=60 C.L.J. 106.

29. *Ramkishan v. Mula*, 69 I.C. 467=1924 Lah. 191.

30. *Krishna Padayachi v. Srinayaka Swamiyar*, (1930) 122 I.C. 35=1930 Mad. 222.

31. *Doraiswamy Aiyar v. Balasundram*, 102 I.C. 243=1927 Mad. 507=52 M.L.J. 477=38 M.L.T. 275; *Narasimha v. Balakrishna*, 101 I.C. 651=1927 Mad. 487=52 M.L.J. 572=38 M.L.T. 359; *Shariba Bibby v. Abdul Salam*, 110 I.C. 490=1928 Mad. 815=51 Mad. 860=55 M.L.J. 565; *Vitta Venkatachellam v. Sivapuram Subbaiyah*, 108 I.C. 889=1928 Mad. 655=54 M.L.J. 448; cf. F.-n. (29) and (30) above; also see *Rajagopalachari v. Subramaniam*, (1932) 138 I.C. 146=1932 Mad. 472=1932 M.W.N. 133.

vice was made personally.³² A recent **Full Bench decision of the Allahabad High Court** has observed that

"the rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. But if, for no fault of the defendant, a defendant was never put in a position to know that a suit had been instituted against him whatever steps might have been taken for serving the summons on him, these steps can never be taken as amounting to 'due service'. It is, therefore, open to the defendant, when he appears to show that the method employed was not calculated to effect the purpose of informing the defendant of the institution of the suit, and in order to see whether there was due service or not, the Court must consider all the circumstances of the case, for example, the place where the defendant was when the summons was issued to him and where and how the summons was served."³³

The same view is taken by the **Madras High Court** in *Muhaidin Kader Saheb v. Lakshmanan Chettiar*,³⁴ that there may be circumstances under which there is no difficulty in treating substituted service as due service. Where defendants deliberately evade service of summons and substituted service is properly asked for, granted and effected, there is due service. If the defendants remain absent, and an *ex parte* decree is passed, they must apply for setting it aside within 30 days of the decree.³⁵ The extreme argument, however, is not correct that substituted service necessarily is due service which can never be contested by the judgment-debtor at a later date.³⁶ The **Peshawar Judicial Commissioner's Court** (Mir Ahmad, A.J.C.) has held

"that the fact that substituted service by order of Court has been effected by O. 5, R. 20, Civil Procedure Code to be as effectual as if it had been made on the defendant personally does not necessarily mean that the first part of Art. 164, Limitation Act covers the allegation to set aside decrees which follow such due service. The words '*or where the summons was not duly served*', in Art. 164 clearly connote an inquiry into the due service of the summons which can only be found out by giving a chance to the petitioner to prove that he has not been served accordingly to law".³⁷

As held in *Gyanammal v. Abdul Hussain Saheb*,³⁸ though the return is that summons has been served personally, yet defendant can get *ex parte* decree against him set aside on various allegations. He

32. *Hans Raj v. Narain Singh*, 1931 Lah. 118=131 I.C. 344; *Thakur Prasad v. Barati*, 1931 Oudh 369 (1).

33. *Ram Bharose v. Ganga Singh*, 1931 All. 727 (729)=1931 A.L.J. 1049 (F.B.).

34. 1931 Mad. 812=61 M.L.J. 931=1931 M.W.N. 1079=34 L.W. 633.

35. *Muhaidin Kader v. Lakshmanan*, 1931 Mad. 812=61 M.L.J. 931; cf. 1928 Mad. 655=54 M.L.J. 448=108 I.C. 889 F. N. (31) above.

36. *Ibid.*, 1931 Mad. 812; cf. 1928 Mad. 815=110 I.C. 490=51 Mad. 860.

37. 1935 Pesh. 137; Relied on *Ram Bharose v. Ganga Singh*, 1931 All. 727=136 I.C. 609=54 All. 154 (F.B.); *Gyanammal v. Abdul Hussain*, 1931 Mad. 813=134 I.C. 1202; *Kedarmal v. Wazifulnissa*, 1934 Cal. 745=152 I.C. 830.

38. 1931 Mad. 813=134 I.C. 1202=34 M.L.W. 496=1931 M.W.N. 1069=61 M.L.J. 920.

cannot be precluded from doing so. Similarly, the order of the Court on service of summons by affixture that it has been "duly served" which enables the suit to go on is an *ex parte* order, and it cannot be suggested that the defendant cannot in certain circumstances, come in and show that he never had knowledge of the claim against him.³⁹ Substituted service cannot be ordered unless the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way.⁴⁰

2361. Service by registered post, if resorted to, is due service. It is effected by prepaying and

(iv) Service by registered post.

posting by registered post a letter enclosing the summons, and if properly addressed it

shall be presumed to have reached its destination in proper course.⁴¹ Where a summons was sent by registered post addressed to the defendant in a Native State, and purported to be sent in accordance with the provisions of O. 5, R. 25, Civil Procedure Code, 1908, and the cover was returned with an endorsement of refusal by the postman, it was held by the **Bombay High Court** that that the Court was entitled to draw the inference indicated in S. 27 of the General Clauses Act and to hold that there was sufficient service.⁴² Rule 107 of the Bombay High Court Rules falls under S. 27 of the General Clauses Act (X of 1897). Therefore, if the summons in a registered cover be tendered to, and refused by the defendant, he refuses it at his own risk; where he disputes the actual delivery or tender of delivery, it is a mere question of fact, and the onus is on him.⁴³ Service by registered post, is at any time a poor substitute for personal service, which is directed by the Code. It is allowed to litigants as a matter of convenience: and the original side practice of the Bombay High Court is to allow a defendant a re-trial, if, after the decree had been passed against him on evidence that the summons was sent by registered post and returned refused, he appeared and denied that the packet had ever been delivered to him by the postal authorities.⁴⁴

39. *Gyanammal v. Abdul Hussain*, 1931 Mad. 813=134 I.C. 1202=34 M.L.W. 496=1931 M.W.N. 1069=61 M.L.J. 920.

40. *Panjaram v. Uttamchand*, 1928 Lah. 799; (Also see O. 5, R. 20, Civil Procedure Code).

41. See S. 27 of General Clauses Act, X of 1897.

42. *Baluram Ramkissen v. Bai Pamabai*, (1910) 35 Bom. 213; cf. *Jaganath v. Sassoon*, (1893) 18 Bom. 606 (Defendant residing in British territory, and decision was prior to last General Clauses Act); also see and cf. *Fakhruddin v. Ghafuruddin*, (1900) 23 All. 99 (A case under Civil Procedure Code, 1882, without reference to General Clauses Act).

43. *Roopchand Rangildas v. Haji Hossein Haji Mahomed*, (1911) 24 I.C. 437=16 Bom.L.R. 204.

44. *Sunder Spinner v. Makan Bhula*, 1922 Bom. 377 (1)=46 Bom. 130.

2362. It is not essential for due service that the summons should be served upon the defendant in time to make his defence, or to appear and answer. The phrase duly served is used

(v) Service in sufficient time.

in O. 5, R. 19, as meaning that the summons had been served upon the defendant in such a way that the defendant has knowledge of the suit or that the Court may presume that he has such knowledge.⁴⁵ However, Farran, C.J., observed in *Bhanshetti v. Umabai*,⁴⁶ that

"the object of the service of summons in whatever way it may be effected (other than substituted service to which other considerations apply) is that the defendant may be informed of the institution of the suit *in due time before the date fixed for the hearing*, and when from the return of the serving officer it appears that there is no likelihood that summons will come to the knowledge *in due time*, or a probability that it will not so come to his knowledge, it cannot be said that there has been due service".

There can be no doubt that in the case of substituted service a summons is duly served for the purpose of Art. 164 even though it does not in fact come to the defendant's knowledge.⁴⁷

2363. KNOWLEDGE OF THE DECREE.—See note as to "Present Law," *ante*. The starting point under Art. 164 is the date of decree, where there has been due service on the defendant, personally or by substituted service of a notice. The matter of the time at which a judgment-debtor seeking to set aside an *ex parte* decree first had knowledge of the decree only becomes relevant after he has proved that substituted service ought not to have been ordered or was not duly carried out.⁴⁸ The *terminus a quo*, where the summons was not duly served is the date on which the applicant has knowledge of the decree⁴⁹: and not within thirty days of the knowledge of the suit⁵⁰: nor of execution proceedings.¹ It is only when summons was not duly served that ignorance of decree saves limitation.² The period of limitation under Art. 164 runs

45. *Kesarchand Keshowji v. Lakhamsi Raisi*, (1917) 42 I.C. 611 (Sind); s.c., 27 I.C. 351.

46. (1895) 21 Bom. 223 (225).

47. *Dittu Ram v. Nawab*, (1926) 92 I.C. 272=1925 Lah. 639; also see 1930 Mad. 222=122 I.C. 35 (Order of substituted service rightly made,—Knowledge of defendant is immaterial. Time runs from date of decree).

48. *Punjab Rao v. Bali Ram*, (1922) 69 I.C. 549=1923 Nag. 13; Followed *Habibullah v. Karanju*, 19 I.C. 425=9 N.L.R. 35.

49. *Dittu Ram v. Nawab*, (1926) 92 I.C. 272=1925 Lah. 639=7 L.L. J. 448=20 P.L.R. 704.

50. *Rajeswari Prasad Singh v. Brahmandndlal*, (1933) 145 I.C. 314=1933 Pat. 279=12 Pat. 745; also see *Mirahmad v. Pirbaksh-Khudabaksh*, 1930 Lah. 397=129 I.C. 689; *Kassim Ebrahim v. Johurmull*, (1915) 43 Cal. 447; also see *The Hope Mills v. Vithaldas*, 12 Bom.L.R. 730.

1. *Charndas v. Puranmal Govind Pershad*, 116 I.C. 620=1929 Lah. 235.

2. *Subramania Iyer v. Krishnaswami Naidu*, (1928) 108 I.C. 753 (Mad.); Followed *Doraiswamy v. Balasundram*, 94 I.C. 420=1926 Mad.

from the date when the *defendant* has knowledge of *the* particular decree which is sought to be set aside.³ In the case of an application for setting aside an *ex parte* decree the law requires, in order to show that the applicant had knowledge of the decree, that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum, and not merely the knowledge that a decree had been passed by some Court against him.⁴ Knowledge of the decree within the meaning and intention of Art. 164 of the Limitation Act means no more than knowledge of the fact that a decree of the kind is in existence. The words cannot be extended one inch further so as to let in the possibility of embracing knowledge of the contents and general effects of the decree.⁵ But, a party applying to set aside an *ex parte* decree cannot be held to have had knowledge of the decree that had been passed against him from the mere fact that he was told that some unknown plaintiff has obtained against him some sort of a decree in a suit, of which he is given no details. The fact that such information might have put the defendant on inquiry does not impose on him any obligation to inquire further. The duty rather is on the plaintiff of giving him full information as to the litigation and the nature of the decree.⁶ A vague knowledge that a decree had been passed by some Court is not enough.⁷

2364. In an application under this article, the burden of proving want of knowledge of the decree till within thirty days before the application is on the applicant.⁸ Accordingly, where a District Judge, on

558; (N.F. *Muhd. Sahib v. Alagappa*, 90 I.C. 1042=49 M.L.J. 445=1926 Mad. 31).

3. *Kumudnath Roy v. Jotindranath*, (1911) 9 I.C. 189=15 C.W.N. 399=38 Cal. 394 (403) (Knowledge of the brother is not sufficient); Relied on *Pundlick v. Vasant Rao*, (1909) 11 Bom.L.R. 1296 (Knowledge means a certain and clear perception of a fact, *viz.*, of the decree, and not of a decree).

4. *Chintaman Pawar v. Pannalal*, (1931) 134 I.C. 279=1931 Nag. 119=27 N.L.R. 53; Relied on *Bapurao Sitaram v. Sadhu Shiva*, 72 I.C. 130=1923 Bom. 193=47 Bom. 485=25 Bom.L.R. 74; also see *Girindra Mohan Roy v. Bochadas*, 36 Cal. 394 (402)=1 I.C. 49=9 C.L.J. 226=13 C.W.N. 1004; *Muhammad Saheb v. Alagappa Chettiar*, 90 I.C. 1042=1926 Mad. 31=49 M.L.J. 445=22 L.W. 423.

5. *Abdool Hoosein Esufally v. Esmailji Abdool Hoosein*, (1910) 6 I.C. 901=12 Bom.L.R. 462.

6. *Palaniappa Chettiar v. Vedachala Mudaliar*, (1927) 99 I.C. 621=1927 Mad. 381.

7. *Bapurao v. Sadhu Bhiva*, (1922) 47 Bom. 485, *supra*; *Syed Muhd. v. Alagappa*, (1925) 49 M.L.J. 445 (448, 449)=1926 Mad. 31; *Hansraj v. Narain Singh*, 1931 Lah. 118; *Isram v. Gangia*, (1924) 92 I.C. 295 (Nag.); *Kumudnath v. Jotindra*, (1911) 38 Cal. 394.

8. *Charan Das v. Shamlal-Gokal Chand*, (1918) 46 I.C. 777=146 P.W.R. 1918; also see *Pirojshah v. Qarib-Shah*, (1926) 95 I.C. 124=1926 Lah.

appeal, had misunderstood and misapplied the law by holding that it was for the plaintiff to show that the defendant had knowledge of the decree, it was held by the **Punjab Chief Court**, that he had thereby committed a material irregularity in the exercise of his jurisdiction, justifying interference in revision.⁹ When an *ex parte* decree is passed, the suit is terminated, and it does not revive, if at all, until after the proceedings on an application to set aside the *ex parte* decree are terminated. The proceedings on the application since they involve the reversal of a final order and decree in a suit, are in themselves a "case" within the meaning of S. 115 of the Civil Procedure Code. Where, therefore, such an application is allowed, the order setting aside the *ex parte* decree is open to revision under that section.¹⁰ Where, however, the defendant against whom an *ex parte* decree had been passed applied to set it aside on the 37th day after decree had been passed, and he led evidence to show that the summons was never sent to be served on him and there was no rebuttal, it was held, that under the circumstances the *onus* was upon the plaintiff to show that the defendant had knowledge of the decree more than thirty days before the date of his application.¹¹ Under Art. 164, Limitation Act, it is necessary for a Court setting aside an *ex parte* decree on the ground that summons was not duly served, to find definitely that the applicant did not have knowledge of the decree more than thirty days before the application was made.¹² A mere assertion of the defendant's ignorance will not do. The Court will have to decide whether the summons was not duly served.¹³ The second part of Art. 164, Limitation Act, comes into operation only where the application is made more than thirty days after the passing of the decree and the applicant pleads that he had not been served, and had knowledge of the *decree* within thirty days from the day on which he made the application.¹⁴ The *onus* is on the defendant-applicant to show when he had knowledge of the decree.¹⁵

379=7 Lah. 161 and *Nagishwar Bup v. Bissesswar Dayal*, (1923) 3 Pat. 236=78 I.C. 889 and *Venkatachalam v. Subbayya*, (1927) 54 M.L.J. 448=1923 Mad. 655=108 I.C. 889.

9. *Charandas v. Shamlal-Gokalchand*, (1918) 46 I.C. 777, *supra*.

10. *Pirojshah v. Qaribshah*, *supra*; Followed in *Tipparchand-Lakhmi Chand v. Habibul Rehman*, (1932) 139 I.C. 131=33 P.L.R. 123 (2).

11. *Nihala v. Khazan Singh*, (1923) 73 I.C. 34=1924 Lah. 233.

12. *Charndas v. Puranlal-Gobind Pershad*, (1929) 116 I.C. 620=1929 Lah. 235; also see *Mohla v. Kahnun*, (1925) 7 L.L.J. 408=1925 Lah. 577.

13. *Doraisami v. Balsundaram*, (1925) 23 L.W. 319=1926 Mad. 558; also see *Subramania Iyer v. Krishnaswami Naidu*, (1928) 108 I.C. 753.

14. *Mir Ahmed v. Pir Baksh-Khuda Baksh*, (1931) 129 I.C. 689=1930 Lah. 397; also see *Rajeswari Prasad Singh v. Brahmanandlal*, (1933) 145 I.C. 314=1933 Pat. 279=12 Pat. 745 (Knowledge of the *decree*, not suit is material).

15. *Karamchand v. Barkat Ram*, (1928) 109 I.C. 82; *Maghimal v.*

2365. PERIOD OF LIMITATION.—(1) An application

(i) **Review of judgment.** for setting aside an *ex parte* decree cannot be regarded as one for review, and the law of limitation cannot be evaded merely

by altering the description of the application and calling it a review.¹⁶ There is a conflict of view on the question whether a defendant who does not apply within thirty days prescribed by Art. 164, Limitation Act, is entitled to apply for a review after the expiry of the period. The **Calcutta High Court** held in an early case that he is not so entitled, but in later cases, the right of review is recognised.¹⁷ The **Patna High Court** follows the earlier Calcutta view that to allow a review in such a case amounts to an evasion of the rule of limitation.¹⁸ The **Bombay High Court** is of opinion that since the decision of the Privy Council in *Chhajju Ram v. Neki*,¹⁹ there is no remedy by way of review.²⁰ But, this view is not shared by the **Madras**²¹ and **Allahabad**²² High Courts which take the view that the mere fact that a party has not applied to set aside the *ex parte* decree within thirty days is no bar to his applying for a review of judgment, and the question would be whether he has shown sufficient cause for not applying earlier.

(2) **Section 5 of the Limitation Act** does not apply to applications for setting aside an *ex parte* decree,²³ except where there are special rules made by the High Court.²⁴ A Court has no jurisdiction, or discretionary power, to enlarge the limita-

Gopiram, (1923) 75 I.C. 1020=1924 Lah. 603; *Rajo v. Ali*, (1924) 107 I.C. 284; also *Pirojshah v. Qaribshah*, (1925) 7 Lah. 161; *Dittu Ram v. Nawab*, (1925) 7 L.L.J. 448; *Sughrumal v. Shamlal*, (1918) 46 I.C. 777 and *Mode Narain v. Bikram*, (1923) 84 I.C. 1028 (Pat.).

16. *Mt. Laldevi v. Amarnath*, 57 I.C. 15 (16); *Santu v. Arjandas*, 13 I.C. 318=131 P.W.R. 1912; *Decruze v. Pitts*, (1933) 147 I.C. 179=1933 Pat. 557.

17. *Koilash Mondal v. Nabadweep Chandra*, 2 C.W.N. 318; cf. *Raj Narain v. Auga Mohan*, (1899) 26 Cal. 598 and *Lal Chet Narain v. Rampal*, (1911) 16 C.W.N. 643=15 I.C. 554.

18. *Deodip v. Gopal*, (1916) 1 P.L.J. 547; also see *Decruze v. Pitts*, 1933 Pat. 557=147 I.C. 179.

19. (1922) 49 I.A. 144=3 Lah. 127=43 M.L.J. 332 (P.C.).

20. *Mahadeo Gobind v. Lakshminarayan*, (1925) 49 Bom. 839.

21. *Chhokhalingam v. Lakshmanan*, 38 M.L.J. 224=55 I.C. 444.

22. *Janki v. Parmeshwar*, 29 I.C. 975 (All.).

23. *Surjit Singh v. Tonce*, (1923) 76 I.C. 14=1924 Lah. 666; *Khairati Ram v. Umardin*, 1922 Lah. 266=66 I.C. 270; *Ma Naw Naw v. Somasundaram*, (1924) 2 Rang. 655.

24. *Sennimalai Goundan v. Palani Goundan*, (1915) 32 I.C. 975 (Mad.); *Balakrishna Aiyar v. Pichamuthu*, (1921) 70 I.C. 496 (Mad.); *Krishnammachariar v. Srirangammal*, (1924) 47 Mad. 824=47 M.L.J. 409 (F.B.); cf. *Sudalaimuthu v. Andi Reddiar*, (1922) 45 Mad. 628=42 M.L.J. 484; *Koil Pillai v. Sappanimuthu*, (1922) 44 M.L.J. 247=1923 Mad. 354 (2); also see *Pandarinath v. Thakoredas*, 53 Bom. 453.

tion of 30 days provided by Art. 164, Limitation Act, for an application to set aside an *ex parte* decree.²⁵ The provisions of S. 151, Civil Procedure Code cannot be made use of to defeat the imperative provisions of S. 3, Limitation Act, read with Art. 164, Sch. I, Limitation Act.²⁶ Section 6 of the Limitation Act has no application to such applications, and time under Art. 146 cannot be extended on ground of applicant's legal disability.²⁷ A second application for restoration of the proceedings in continuance of a previous pending application is not barred by 30 days' rule in this article, the original application for setting aside the *ex parte* decree, though consigned to the record room, made as it was within 30 days of the *ex parte* decree was bound to succeed.²⁸

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
165.	Under the Code of Civil Procedure, 1908, by a person dispossessed of immovable property and disputing the right of the decreeholder or purchaser at a sale in execution of a decree to be put into possession.	Thirty days.	The date of the dispossession.

SYNOPSIS.

- 2366. Previous history.
- 2367. Scope and application.
- 2368. Suit for dispossession.

NOTES.

2366. PREVIOUS HISTORY.—Section 230 of the Code of Civil Procedure, 1859, dealt only with obstruction by (dispossession of) persons *other than the defendant*; and it was re-enacted

25. *Shavaksha v. Hogarth*, 12 Bom.L.R. 886=8 I.C. 616; *Abdul Hossein v. Esmailji*, (1910) 12 Bom.L.R. 462; *Godil v. Brijnandan*, (1923) 45 All. 332 (334); *Tarashanker v. Basiruddi*, (1915) 19 C.W.N. 970=22 C.L.J. 589; *Pandlik v. Ganpat*, (1933) 144 I.C. 394 (Nag.) and *Pirojshah v. Qaribshah*, (1925) 7 Lah. 161 (166); *Wiru Ram v. Amarchand*, (1926) 8 L.L.J. 170=94 I.C. 117; *Palsingh v. Harnam Singh*, 1927 Lah. 342=100 I.C. 936.

26. *Ajabkhan v. Alafgul*, 1935 Pesh. 146; cf. *Krishnaswamy Naidu v. Chengalroya*, (1924) 76 I.C. 836=47 Mad. 171=45 M.L.J. 813=1924 Mad. 114; see *Khairati v. Umardin*, (1922) 66 I.C. 270=1922 Lah. 266; *Totaram v. Pannalal*, 1924 All. 668=79 I.C. 997=46 All. 631 and *Ajudhia Mah-ton v. Phul Kuer*, (1922) 65 I.C. 341=1 Pat. 277=1922 Pat. 479.

27. *Rati Ram v. Naidar*, (1919) 49 I.C. 990 (All.); *Panchu v. Isab*, (1913) 17 C.W.N. 667; *Chidambara v. Karuppan*, (1910) 35 Mad. 678.

28. *Barkatullah v. Fazal-i-maula*, (1920) 55 I.C. 824 (Lah.).

as Art. 158 of the Limitation Act, 1871. But there was no corresponding provision in the Limitation Act XIV of 1859.

Under Art. 165 of Act XV of 1877, was a re-enactment of Art. 158 of the Limitation Act, IX of 1871, with the addition of the words "*or purchaser at a sale in execution of a decree*", after the word "*decree-holder*". The present article is reproduction of the Art. 165 of the Act XV of 1877, as amended.

2367. SCOPE AND APPLICATION.—This article contemplates the case of a person *other than the judgment-debtor*, who applies to be restored to possession under O. 21, R. 100 of the Code of Civil Procedure. Article 165 does not contemplate an application by a judgment-debtor.²⁹ Article 181 of the Limitation Act applies if the applicant is judgment-debtor having no remedy by suit.³⁰ Article 165 applies only to applications under O. 21, R. 100, Civil Procedure Code³¹; and the application of a judgment-debtor for restoration of immoveable property seized by the decree-holder in excess of what has been decreed is one under S. 47 of the Code of Civil Procedure, and is governed by Art. 181, Limitation Act.³² Order 21, R. 100, Civil Procedure Code provides a special summary remedy which is available only to a stranger to a decree. If he chooses to adopt it, Art. 165, Limitation Act provides that he must seek it within 30 days; but if he does not choose to adopt it, he can bring a regular suit for possession at any time within 12 years. This latter remedy by way of suit is denied to a judgment-debtor, according to the consensus of opinion of several High Courts. If the decree-holder realizes something in excess from the judgment-debtor, he cannot come in Art. 165, Limitation Act, but has three years under Art. 181, Limitation Act within which to seek redress.³³ The earlier cases taking a contrary view are no longer good law.³⁴

29. *Sharju v. Mir Khan*, 1 L.L.J. 230.

30. *Rasul v. Amina*, 1922 Bom. 271=46 Bom. 1031=24 Bom.L.R. 771=68 I.C. 349.

31. *Bahir Das v. Giris*, 67 I.C. 663=1923 Cal. 287.

32. *Abdul Karim v. Islamunnissa*, (1916) 38 All. 339; Diss. *Ratnam Ayyar v. Krishnadoss*, (1898) 21 Mad. 494 and *Har Din Singh v. Lachman Singh*, 25 All. 343; also see *Arjun Singh v. Machhal Singh*, (1906) 3 A.L.J. 601; *Lachhmandas v. Jagannath Singh*, (1900) 22 All. 376.

33. *Abdul Karim v. Islamunnissa*, 38 All. 339 (344)=14 A.L.J. 401=34 I.C. 231; *Rasul v. Amina*, 46 Bom. 1031 (1036)=1922 Bom. 271; *Bahirdas v. Giris*, 67 I.C. 663=1923 Cal. 287; also see *Indu Bhushan v. Haricharan*, (1930) 58 Cal. 55; *Sharju v. Mir Khan*, 1 L.L.J. 230 (Lah.); *Vachali Rohini v. Kombi Aliassan*, 42 Mad. 753 (760) (F.B.); *Jilai v. Abdul*, 4 Luck. 209=115 I.C. 444=1929 Oudh 76 (79); *Maung Tha v. Ma Pyu*, (1918) 46 I.C. 323=3 U.B.R. 79.

34. *Mahomed Hossein v. Kokil Singh*, (1881) 7 Cal. 91; *Ratnam Ayyar v. Krishna*, (1898) 21 Mad. 494; *Hardin v. Lachman*, (1900) 25 All. 343;

2368. Where the plaintiff had been dispossessed under a certificate of sale which was not conformable to or warranted by the sale itself, and had made no complaint to the Court which was executing the decree, it was held that he was entitled to bring a regular suit for confirmation of his title, and to be restored to possession of the property from which he was ousted, at any time within twelve years from the time of his dispossession.³⁵ The term "dispossession", conveys actual delivery of possession to auction-purchaser: and formal or symbolical delivery of possession does not constitute dispossession of third parties.³⁶

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
166.	Under the same Code to set aside a sale in execution of a decree (including any such application by a Judgment Debtor.)	Thirty days.	The date of the sale.

SYNOPSIS.

Title I.

2369. Previous history.

Title II.

2370. Scope and application.

2371. Under the Code.

2372. Sales in execution of a decree.

2373. Voidable sales.

2374. *Illustrative cases.*

Title III.

2375. Starting point of limitation.

(1) Date of Sale.

(2) Sale when complete.

2376. Enlargement of time.

2377. Fraud vitiating execution sale.

(1) Application of Art. 166.

(2) O. 21, R. 90, Civil Procedure Code.

(3) *Onus probandi.*

NOTES.

TITLE I.

2369. PREVIOUS HISTORY.—The article corresponding to this provision in Act IX of 1871, was Art. 159, which ran as

Vythilinga v. Seetha, (1890) 1 M.L.J. 42 and *Jagannath v. Datta*, 6 O.C. 44; *Rajaram v. Itraj Kunwar*, 17 O.C. 94=24 I.C. 137.

35. *Pertaub Chunder Chowdhry v. Brojolal Shaha*, (1867) 7 W.R. 253 (F.B.); *Brajabala v. Gurudas*, (1906) 33 Cal. 487; cf. *Venkatakrisna v. Venkappa*, (1903) 27 Mad. 262.

36. *Ibrahim v. Ramjadu* (1903) 30 Cal. 710; also see *Ayyakutti v. Periaswami*, (1913) 30 M.L.J. 404 (410)=2 L.W. 1181=31 I.C. 615.

follows:—

“To set aside a sale in execution of a decree, on the ground of irregularity in publishing or conducting the sale”—“Thirty days”—“The date of sale”.

Prior to this, provision was made in Civil Procedure Code, Act VIII of 1859, by its S. 256, which enacted that

“at any time *within thirty days from the date of the sale* application may be made to the Court to set aside the sale on the ground of any material irregularity in publishing or conducting the sale, etc.”

The provision in Art. 159 of Act IX of 1871, was reproduced in Art. 166 of the Limitation Act XV of 1877: and was confined to applications to set aside a sale in execution on the ground of irregularity in publishing or conducting a sale (O. 21, R. 90). Separate provision was made in Act XV of 1877, for **application by purchaser** to set aside a sale on the ground that the judgment-debtor had no saleable interest—S. 313, old Code (now O. 21, R. 91, Civil Procedure Code). The dispute arising as to purchase by decree-holder without permission of the Court, was covered by S. 244 (old Code), corresponding to S. 47 of the new Code.³⁷ By **Act XII of 1879**, the scope of Art. 166 of the Limitation Act XV of 1877 was enlarged, so as to include as a ground for setting aside a sale in execution of a decree, “that the decree-holder had purchased without the permission of the Court”. A similar clause was added to Civil Procedure Code, Act X of 1877 as its S. 294, which ran as follows:—

“When a decree-holder purchases, by himself, or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any person interested in the sale, by order set aside the sale. . . .”

Art. 166 of the new Act corresponds to the amended Art. 166 of Act XV of 1877, which expressly mentioned the grounds for setting aside the sale (*see* Ss. 294 and 311 of the old Code). Under the Code of 1882, an application to set aside a sale on the ground of fraud, in publishing or conducting a sale had to be made under S. 244 (now S. 47), but not under S. 311 (now O. 21, R. 90).³⁸ Such an application to set aside a sale on the ground of fraud, whether or not the auction-purchaser is a party to the fraud, was governed by Art. 178, and not by Art. 166 of Act XV of 1877.³⁹ Under S. 310-A (O. 21, R. 89), the judgment-debtor might obtain the setting aside of execution by deposit of the decretal amount

37. *Vallabhan v. Pangunni*, (1889) 12 Mad. 454; also *Durga Kunwar v. Balwant Singh*, (1901) 23 All. 478.

38. *Mitra's Limitation Act*, Vol. II, p. 1867, citing *Wahid-un-nissa v. Girdhari*, (1905) 27 All. 702; *Durga Charan v. Kali Prasanna*, (1899) 26 Cal. 727.

39. *Ibid.*, citing *Motilal Chakrabatty v. Russick Chandra*, (1896) 26 Cal. 326; *Golam Ahad v. Judhisther*, (1902) 30 Cal. 142 and *Purna Chandra v. Anukul*, 36 Cal. 654 (656).

plus five per cent. This provision made by Act V of 1894, was held to be retrospective in character.⁴⁰ The present Code of Civil Procedure has enlarged the scope of O. 21, R. 90 (old S. 311) to include also applications to set aside a sale on the ground of fraud in publishing or conducting a sale. The Limitation Act has given a general and comprehensive form to Art. 166, by making it stop at the word decree. Another change in this article was made by Act I of 1927, which added the last few words in the present article, viz., "*including any such application by a judgment-debtor*". These italicised words were added in the first column in pursuance of the following recommendations of the Civil Justice Committee:

"There is a difference of opinion as to whether this Article (Art. 166) which deals with a petition to set aside a sale in execution of a decree applies when the petition is by a judgment-debtor under S. 47, C. P. Code. It is sometimes contended that that article applies only to a petition under O. 21, R. 90 alone. It will be better if the matter is made clear by adding words in the first column so as to include a petition under S. 47, Civil Procedure Code."

The Art. 166 thus refers generally to all applications under O. 21, Rr. 72, 89, 90 and 91, Civil Procedure Code, and takes the place of Arts. 166 and 172 of the Act of 1877: and is wider in its scope.⁴¹

TITLE II.

2370-2374. SCOPE AND APPLICATION.

2370. This article applies quite generally to *all* applications under the Code of Civil Procedure "to set aside a sale in execution of a decree," and it will include under the amendment of 1927, also applications by the judgment-debtor to set aside execution sales which fall under S. 47, Civil Procedure Code.⁴² Such an application was not held to fall within Art. 166 of Act XV of 1877, but was governed by the residuary Art. 178 (now Art. 181), Limitation Act.⁴³ The present article is wider than Art. 166 of the Act of 1877, inasmuch as it is not confined to any specified grounds for setting aside a sale. Art. 166, Limitation Act, governs all applications based upon whatever grounds, to have an execution sale set

40. *Jogodanand v. Amritlal*, (1895) 22 Cal. 767 (F.B.); also see *Rangasami v. Virasami*, (1895) 18 Mad. 477.

41. *Haripada Haldar v. Barada Prosad*, 1925 Cal. 351=51 Cal. 1014=82 I.C. 322; *Ma Pwa v. Mohammad Tambi*, 1 Rang. 533=1924 Rang. 124 (Setting aside sale on the ground of want of attachment).

42. *Ramdhari v. Deonandan*, 2 Pat. 65=77 I.C. 957=3 Pat. L. T. 501=1922 Pat. 507; *Kashi Ram v. Hasmat*, 1931 All. 145 (146)=1931 A. L. J. 119=130 I.C. 708; *Haripada v. Barada Prosad*, 51 Cal. 1014=1925 Cal. 351; *Ganapathi v. Krishnamachariar*, 1922 Mad. 417=70 I.C. 743=43 M.L.J. 184; *Ma Pwa v. Mohammad Tambi*, 1 Rang. 533=77 I.C. 368=1924 Rang. 124.

43. *Sakharam Gobinda Kal v. Damodar*, (1885) 9 Bom. 468; *Nemai v. Deno*, 2 C.W.N. 691; *Sarat v. Nemai*, 5 C.W.N. 265; *Bhuban Mohun v. Nundalal*, 26 Cal. 324; *Purna Chandra v. Annukul*, 36 Cal. 654 (656).

aside, and is not restricted to applications under O. 21, R. 90, Civil Procedure Code.⁴⁴ It applies to an application to set aside execution sale on the ground that there was an attachment prior to the sale, or that there had been a defective attachment⁴⁵; or, on the ground that the sale took place contrary to directions given in the decree⁴⁶; or, on the ground of irregularity in the service of notice under O. 21, R. 22⁴⁷; or on the ground of fraud.⁴⁸ An application under O. 21, R. 91 to set aside the sale on the ground of judgment-debtor having no saleable interest falls under Art. 166; but an application for refund of purchase-money under O. 21, R. 93 will be governed by Art. 181.⁴⁹

In *Paramasiva v. Pulukaruppa*,⁵⁰ it has been held that

"the wording of the article includes all applications made under the Code to set aside a sale, and not only applications specifically provided for by the Code, under Rr. 89, 90 or 91. Whether the ground for seeking to set aside a sale is the commission of an irregularity or illegality and whether S. 47 or O. 21, R. 90 is the appropriate provision of law, to be entered at the head of the petition, an application under the Code of Civil Procedure to set aside a sale in execution of a decree falls within the definition in Art. 166".

Similarly, in *Satish Chandra v. Nishi Chandra*,¹ it was held by a Bench of **Calcutta High Court**, that an application under S. 47, Civil Procedure Code, for setting aside the sale of a property on the ground that it did not belong to its original judgment-debtor is governed by Art. 166 and not Art. 181, Limitation Act. An application to set aside sale on ground that judgment-debtor had no saleable interest is governed by Art. 166; and Art. 181 being a

44. *Das Narain Singh v. Muhammad Yusaf*, (1921) 61 I.C. 823=1921 Pat. 145.

45. *Ma Pwa v. Muhammad Tambi*, 1 Rang. 533=1924 Rang. 124=77 I.C. 368.

46. *Muthiah Chettiar v. Bava Saheb*, 26 I.C. 46=27 M.L.J. 605.

47. *Das Narayan v. Muhammad Yusaf*, (1921) 61 I.C. 823=1921 Pat. 145=6 Pat. L. J. 319.

48. *Arjun v. Gurendra*, 27 I.C. 294=18 C.W.N. 1266; *Rai Kishori v. Mukunda*, 11 I.C. 295=15 C.W.N. 965; *Ram Dhari v. Deqnandan*, 2 Pat. 65=77 I.C. 957=1922 Pat. 507.

49. *Makar Ali v. Sarfuddin*, 50 Cal. 115=1923 Cal. 85=70 I.C. 606; *Balwant v. Bala*, 46 Bom. 833=1922 Bom. 205=67 I.C. 360.

50. 1924 Mad. 137=45 M.L.J. 829=77 I.C. 631=47 Mad. 525; Reld. on *Neelu Neithiar v. Subramania*, (1919) 53 I.C. 809=11 L.W. 59; *Kamayya v. Ramamma*, 1922 Mad. 95=16 L.W. 934; *Payidanna v. Lakshminarasamma*, (1915) 38 Mad. 1076=29 I.C. 314; *Muthiah Chettiar v. Bava Sahib*, (1915) 26 I.C. 46=1 L.W. 969=27 M.L.J. 605; *Ganapathi v. Krishnamachari*, 1922 Mad. 417; *Satish v. Nishi*, (1919) 46 Cal. 975=54 I.C. 431 and *Das Narayan Singh v. Muhammad Yusaf*, (1921) 2 Pat. L. T. 401=61 I.C. 823.

1. (1919) 46 Cal. 975=54 I.C. 431; Folld. in *Kashiram v. Mt. Hasmat Banoo*, 1931 All. 145=1931 A.L.J. 119=130 I.C. 708; also see *Keshavan v. Bipathumma*, (1935) 159 I.C. 993 (Mad.).

residuary article cannot apply when there is a specific article which is applicable.² Although this article applies to an *application* to set aside a sale, still if a *notice of motion* is made on the original side of the High Court, within thirty days, it is in time.³

2371. It has been held that the words "under the same Code"

Under the Code. mean an application governed by the Code of Civil Procedure so far as procedure is concerned, and not dealing with substantive rights.⁴ However, the decisions of the High Courts have applied Art. 166 to applications that are made under O. 21, Rr. 72, 89, 90 and 91: and also those falling under S. 47, Civil Procedure Code.⁵ No law of limitation applies to proceedings taken by a Collector under the Bombay Act V of 1862 (Bhagdari Act).⁶ An application to set aside a sale under S. 47 of the Chota-Nagpur Tenancy Act is not governed by this article but by the special provision of S. 231 of that Act.⁷ Art. 166 of Limitation Act governs an application under S. 173 of the Bengal Tenancy Act, because the application is cognizable under S. 47 of the Civil Procedure Code.⁸ S. 173 (3) of the Bengal Tenancy Act applies only where a tenure or holding sold in execution of a decree is purchased by judgment-debtor either by himself or through another.⁹ There is a conflict of view on this point between the **Calcutta and Patna High Courts**.¹⁰ An execution sale which is bad on the ground of irregularity and fraud, and is liable to be set aside under O. 21, R. 90, Civil Procedure Code, is voidable and not void, and an application to set aside such a sale must be made within thirty days of the sale.¹¹ On the other hand, an execution sale which takes place in contravention of the pro-

2. *Gulzari Lal v. Sheocharan Lal*, 1935 All. 889=156 I.C. 389=1935 A.L.R. 590=1935 A.L.J. 940=1935 A.W.R. 1006.

3. *Janendra v. Amrita*, 60 Cal. 1106=1933 Cal. 886 (887); Not folld.: *Hinga v. Muna*, 31 Cal. 150 and *Khetter Mohan v. Kashinath*, 20 Cal. 899.

4. See notes under Art. 161, ante; *Agā Mahomed v. Cohen*, (1886) 13 Cal. 221; *Ramasami Pillai v. The Deputy Collector*, (1919) 43 Mad. 51.

5. *Satish Chandra v. Nishi Chandra*, (1919) 46 Cal. 975.

6. *Collector of Broach v. Rajaramlal Das*, (1883) 7 Bom. 542; *Collector of Broach v. Desai Raghunath*, (1883) 7 Bom. 546.

7. *Nilmony v. Rohan*, 1 P.L.J. 483=37 I.C. 683=20 C.W.N. 1243.

8. *Haripada Haldar v. Barāda Prosad*, 1925 Cal. 351=51 Cal. 1014=82 I.C. 322; cf. *Narayan Singh v. Muhammad Siddiq*, (1914) 24 I.C. 366 (Cal.).

9. But see 20 C.W.N. 1243 (Pat.) and *Jagdhār Missir v. Dhorai Khatwa*, (1920) 57 I.C. 404 (Pat.) (Art. 166 applied).

10. *Anantacharan v. Nimai*, 6 Pat. 366=101 I.C. 564=1927 Pat. 177; also see *Jagdhār v. Dhorai*, (1920) 57 I.C. 404 (Pat.); cf. *Chandrama v. Dumran*, (1917) 38 I.C. 209 (Art. 181 applied); also cf. *Gopal Saran v. Mahomed*, (1910) 6 I.C. 804 (Cal.).

11. *Ghanshyam Choudry v. Basdeo Jha*, (1921) 60 I.C. 529 (Pat.); also see *Ramdhuri Chowdhri v. Deonandhan*, 1922 Pat. 507=2 Pat. 65=3 P.L.T. 501 (Application to set aside sale on ground of fraud).

visions of S. 158 (b) of the Bengal Tenancy Act is void, and a suit for a declaration that such a sale is illegal and inoperative is governed by Art. 120, Limitation Act.¹² In *Ramayya v. Ramamma*,¹³ it was held that Art. 166 governs all applications under S. 47, Civil Procedure Code, to set aside sales, on the ground either of illegality or irregularity. It is not necessary that there should be an application in writing; it might be even oral¹⁴; provided it has been made formally, and the Court in its discretion treats the formal statement as an application to set aside the voidable sale.¹⁵

2372. This article is limited in its operation to sales in execution of a decree. An application either of an insolvent or his creditor to cancel sale by Insolvency Court on the ground of fraud does not fall under Art. 166, Limitation Act, but is governed by Art. 181 of the Limitation Act.¹⁶ An application to avoid sale under the Insolvency Act (S. 37, Act III of 1907) has been held, by the **Lahore High Court**, to fall under Art. 181, Limitation Act¹⁷; but the **Nagpur Judicial Commissioner's Court**¹⁸ takes the view that the provisions of O. 21 of the Civil Procedure Code are applicable to insolvency proceedings, and the limitation applicable to a petition for setting aside a sale in insolvency proceedings is thirty days as laid down in O. 21, Civil Procedure Code, read with Art. 166, Limitation Act. Applications under S. 47, Civil Procedure Code, to set aside execution sales which are voidable, have been held to fall under Art. 166, and Art. 181 is not applied.¹⁹

2373. A very clear distinction is to be drawn between sales which are voidable merely, and sales which are void altogether, or a nullity. This article applies only when the sale is voidable, and requires to be set

12. *Ghanshyam Choudry v. Basdeo Jha*, (1921) 60 I.C. 529 (Pat.).

13. 1922 Mad. 95; also see *Mani Singh v. Nazrab Bahadur*, (1919) 46 Cal. 694 (P.C.) and *Ganapathi v. Krishnamachari*, (1922) 70 I.C. 743 (Mad.).

14. *Murugappa Asari v. Shanmuga*, (1924) 86 I.C. 498 (Mad.); *Venkatanarasimma v. Lakshminarasimham*, (1916) 32 I.C. 783; *Parat Veetil Seethi v. Ambalath*, (1915) 32 I.C. 45 (Mad.); *Mariappa Annam v. Harihara Iyer*, (1913) 22 I.C. 291 (Mad.); also see *Sarfi Begam v. Haider Shah*, (1911) 9 A.L.J. 12.

15. *Thathu Naick v. Konda Reddi*, (1909) 32 Mad. 242; also see *Sara-dindu v. Gosta Behari*, (1922) 27 C.W.N. 208=1923 Cal. 302.

16. *Afzal Ali v. Aman Ali*, (1914) 23 I.C. 397=36 P.W.R. 1914=107 P.L.R. 1914.

17. *Nikkamal v. The Marwar Bank*, (1919) 52 I.C. 188=151 P.R. 1919.

18. *Balaji v. Gopal Mali*, (1927) 102 I.C. 543=1927 Nag. 262.

19. *Neelu Neithiar v. Subramania*, (1919) 53 I.C. 809 (Mad.); *Satish v. Nishi*, (1919) 46 Cal. 975=54 I.C. 431; *Das Narain Singh v. Muhammad Yusuf*, (1921) 61 I.C. 823 (Pat.); *Ramdhuri v. Deonandan*, 1922 Pat. 507=2 Pat. 65; *Ma Pwa v. Mohammad Tambi*, 1924 Rang. 124=1 Rang. 533.

aside.²⁰ If the sale is void, or a nullity, and does not require to be set aside, Art. 181, and not Art. 166 will apply.²¹ In the case of *Seshagiri Rao v. Srinivasa*,²² it has been held that when a sale is absolutely void for want of jurisdiction, the article applicable is Art. 181, Limitation Act. The same conclusion was arrived at in *Ram Kinkar v. Stithi Ram*.²³ These decisions were approved of in the **Full Bench** case of *Ragagopala v. Ramanujachariar*,²⁴ relying upon another Madras decision in *Raghunathaswami v. Gopaul Rao*,²⁵ and the observations of their Lordships of the Privy Council in *Khierajmal v. Daim*.²⁶ Schwabbe, J., has reached the conclusion in the Full Bench case that

"if an application is an application to set aside a sale in execution of a decree, it matters not whether the application is made under S. 47, or O. 21, R. 90, Civil Procedure Code; but when a sale is absolutely void for want of jurisdiction, the article applicable is Art. 181 of the Limitation Act".

Similarly, the **Calcutta High Court** has held in *Manmotha Nath Ghose v. Mt. Lachhmi Debi*,²⁷ that an application to declare a sale in contravention of O. 21, R. 22 (1), although under S. 47, and therefore, under the Code, was not an application to set aside a sale, for the sale being void need not have been set aside at all. Such an application falls under the residuary Art. 181, Limitation Act. In *Jogeshwar Mohata v. Jhapal Santal*,²⁸ the sale of an aboriginal tenure in execution of a money-decree was held void under S. 49-K of the Bengal Tenancy Act, and an application to set it aside was held not governed by Art. 12 or Art. 166 of the

20. *Haripada v. Barada Prosad*, (1924) 51 Cal. 1014=82 I.C. 322; *Ganapathy v. Krishnamachari*, (1922) 70 I.C. 743=43 M.L.J. 184=1922 Mad. 417; *Subramaniam v. Vykunda*, (1928) 43 M.L.J. 477; *Rajagopala v. Ramanuja*, (1923) 47 Mad. 288=46 M.L.J. 104 (F.B.); *Paramasiva v. Palukaruppa*, (1923) 47 Mad. 525=45 M.L.J. 829; *Muthukumaraswamy v. Muthuswamy*, (1926) 50 Mad. 639=52 M.L.J. 148; *Ammakutti v. Doraisami*, (1928) 106 I.C. 242=1928 Mad. 140; *Lachman v. Dukhi*, 1927 Pat. 261; *Ma Pwa v. Mahomed Tambi*, (1925) 1 Rang. 533.

21. *Sunder Das v. Nika*, 1931 Lah. 586=132 I.C. 493=32 P.L.R. 440; *Beharilal v. Tanuklal*, 1926 Pat. 397=97 I.C. 798=8 Pat. L. T. 28; also *Khierajmal v. Daim*, 32 Cal. 296=32 I.A. 23 (P.C.); *Manmathanath v. Lachmi Debi*, (1927) 46 C.L.J. 579=55 Cal. 96; *Jogeshwar v. Jhapal*, (1923) 28 C.W.N. 556; *Samandan v. Malikandi*, (1914) 26 M.L.J. 267=23 I.C. 251; *Muthiah v. Bava*, (1914) 27 M.L.J. 605; *Payidanna v. Lakshmi Narasamma*, (1914) 38 Mad. 1076; *Ghanshyam v. Basdeb*, (1921) 60 I.C. 529 (Pat.); *Shivbai v. Yesoo*, 43 Bom. 235=48 I.C. 130.

22. (1920) 43 Mad. 313.

23. (1918) 27 C.L.J. 528.

24. 1924 Mad. 431=47 Mad. 288=80 I.C. 92=46 M.L.J. 104 (F.B.). Folld. in *Mehar Singh v. Lal*, (1935) 159 I.C. 988 (Lah.).

25. 1922 Mad. 307=1921 M.W.N. 732.

26. 32 Cal. 296=32 I.A. 23 (P.C.).

27. 1928 Cal. 60=46 C.L.J. 579=105 I.C. 65=55 Cal. 96; Folld. in *Ramanand Ganpatrai v. Rakhal Mandal*, (1936) 163 I.C. 34 (Pat.).

28. 1924 Cal. 638=28 C.W.N. 556.

Limitation Act. The Madras decision in the leading case of *Paramasiva v. Palukaruppa*²⁹ discusses the case-law fully in support of the proposition that

"if a sale is a nullity, there is no need to have it set aside under S. 47 or O. 21, R. 90".

It can simply be ignored, so long as the applicant's possession is not disturbed. See also *Gopal Devi v. Nikka*,³⁰ where application was made by a judgment-debtor pointing out that sale is null and void without a prayer to set aside sale.

2374. ILLUSTRATIVE CASES.—

(1) If the property is sold under an *ex parte* decree which is subsequently set aside, and at the trial a decree is again passed in plaintiff's favour, the defendant's application, in the meanwhile, to have the sale in execution set aside is not governed by Art. 166, but falls under Art. 181 of the Limitation Act.³¹

Sales under *ex parte* decree subsequently set aside.

(2) An application to set aside certain incomplete sale proceedings and for refund of purchase-money in a sale held by the Registrar of the Original Side of the Calcutta High Court under the rules of the Court, subject to certain conditions as to the furnishing of abstract of title, etc., before the purchaser is compelled to complete it, is not governed by Art. 166 at all.³²

Incomplete sale proceedings on original side of High Court.

(3) In *Malkarjun v. Narhari*,³³ a party, who was brought on as legal representative, objected that he was not the legal representative, but the Court decided that he was, and their Lordships of the Privy Council held that, in view of this decision which was within the jurisdiction of the Court, the sale could not be treated as a nullity even against the real representatives of the deceased who afterwards came forward.

Legal representative of deceased judgment-debtor.

(4) Where a minor, who had no guardian *ad litem* at all, was not a party to the suit in which the sale was made, it was held that she was entitled to bring a suit to declare it not binding without regard to the provisions of S. 47, Civil Procedure Code. The sale was not binding on her and did not require

Minor judgment-debtor not legally represented.

29. 47 Mad. 525=1924 Mad. 137=77 I.C. 631=45 M.L.J. 829.

30. (1931) 132 I.C. 493=1931 Lah. 586, citing *Lakshmi Chand v. Phul Chand*, 125 I.C. 53=1930 Lah. 17=11 Lah. L. J. 457; *Chengalraya Reddy v. Kollapuri Reddi*, 123 I.C. 24=1930 Mad. 12=1929 M.W.N. 811 and *Manmatha Ghose v. Lachmi Debi*, 105 I.C. 65=55 Cal. 96=46 C.L.J. 579=1928 Cal. 60; also see *Ramakinkar v. Staiti Ram Panja*, 46 I.C. 221=27 C.L.J. 528; *Biharilal Mitter v. Tanuklal Mander*, 97 I.C. 798=1926 Pat. 397=8 P.L.T. 28; *Uzir Ali v. Nasimannessa Bibi*, 116 I.C. 634=1928 Cal. 865; *Ramaswamy Chetty v. Maung Tab*, 37 I.C. 827=10 Bur. L. T. 249 and *Shivbai v. Yesoo*, 48 I.C. 130=43 Bom. 235=20 Bom.L.R. 925.

31. *Shiv Bai v. Yesoo*, (1918) 43 Bom. 235.

32. *Satindra Narain v. Chunilal*, (1927) 54 Cal. 493.

33. (1901) 25 Bom. 337 (Art. 12 applied, if suit could be regarded as one to set aside the sale).

to be set aside; and Art. 166 or Art. 12 being alike inapplicable, the suit which was instituted within 3 years of the plaintiff's attainment of majority was not barred.³⁴

(5) In *Rashidunnissa v. Muhd. Ismail Khan*,³⁵ where the suit was brought to declare the nullity as against the plaintiff of certain sales in execution of decree against a deceased person in which the minor plaintiff had been brought on as the legal representative of the deceased judgment-debtor, it was found that in two instances he had been represented by a woman who, as such, was not qualified to act as *guardian ad litem*, and in the third by another person whose interests were adverse. Their Lordships held that the plaintiff had never been a party to any of these suits in the proper sense of the term, and did not come within the operation of S. 244, now S. 47, Civil Procedure Code.³⁶

(6) In a decree awarding maintenance a charge was created on the shares of some of the defendants in lands belonging jointly to them and the appellants, but the shares of the latter were expressly exonerated. In execution of the decree, however, the lands were sold by Court auction, including the shares of the appellants therein. It was held that Art. 181, and not Art. 166, applied to the application to set aside the sale of their shares.³⁷ The article applicable for applications under S. 47, Civil Procedure Code is Art. 181, giving 3 years from the date of sale.³⁸ Where a sale took place in spite of the fact that the Court had ordered a stay of the sale on a claim having been preferred by a third party to the property, the sale was a nullity, and Art. 166 had no applicability.³⁹

(7) Where a person against whom no decree has been passed, or order capable of execution has been made, applies to have the sale in execution of his property set aside, S. 47, Civil Procedure Code, applies if he was a party to the suit, and the sale being without jurisdiction, the proceedings taken to set aside such a sale, which is a nullity, are not covered by Art. 161, but fall under Art. 181, Limitation Act, the right to apply accruing as soon as right to possession of lands is disturbed.⁴⁰

34. *Payidanna v. Lakshmi Narasamma*, (1914) 38 Mad. 1076; Relied on *Khizarajmal v. Daim*, (1905) 32 Cal. 296 (314) (P.C.) and *Rashidunnissa v. Muhd. Ismail Khan*, 31 All. 572=36 I.A. 168 (P.C.); see also *Mehar Singh v. Lal*, (1935) 159 I.C. 988=1935 Lah. 972 (Application to set aside sale on behalf of minor on ground that sale was made in absence of guardian, held, *obiter* to be governed by Art. 181 and not by Art. 166).

35. (1909) 31 All. 572=36 I.A. 168 (P.C.).

36. (1909) 31 All. 572=36 I.A. 168 (P.C.); also see and cf. *Khizarajmal v. Daim*; (1905) 32 Cal. 296 at 314 (P.C.) (The absence from the record of one of the legal representatives of a deceased judgment-debtor is not always sufficient reason for disturbing judicial sales which otherwise have been properly conducted).

37. *Seshagiri v. Srinivasa*, (1919) 43 Mad. 313.

38. *Umapathi v. Shaikh Soleman*, (1926) 54 Cal. 419=1927 Cal. 614.

39. *Lakshmi Chand v. Phul Chand*, 11 L.L.J. 457=125 I.C. 53=1930 Lah. 17 (18).

40. *Chengalraya Reddy v. Kollapuri Reddi*, 1930 Mad. 12=123 I.C. 24 (A party in possession can ignore not only a void sale, but also a symbolical delivery consequent thereon which is equally void).

(8) Where properties are sold in execution of a decree and the judgment-debtor makes an application under S. 47, Civil Procedure Code, which does not contain any prayer for setting aside the sale but merely brings to the notice of the Court the fact that the entire proceedings including the sale are null and void, such an application is not one for setting aside the sale within the meaning of Art. 166, Limitation Act, and is therefore, governed by Art. 181, Limitation Act.⁴¹ However a sale held in contravention of the terms of O. 34, R. 14 is not void but voidable, and an application to set aside the sale must be made under this article within 30 days from the date of the sale.⁴² The right to apply, under S. 47, Civil Procedure Code, to recover property wrongly sold in execution, accrues under Art. 181 of the Limitation Act, at the date of sale.⁴³

(9) Where on an application for execution falling under O. 21, R. 22, and to which Cl. (2) of that rule is not applied, a sale in execution is held without issuing the notice provided for in Cl. (1), the sale is absolutely void and not merely voidable as against the person to whom notice should have been but was not issued. Where an execution sale is void as against a party and he applies for relief under S. 47, Civil Procedure Code, or otherwise, the article applicable is Art. 181, and not Art. 166, Limitation Act.⁴⁴ The Allahabad High Court, however, takes a contrary view.⁴⁵

(10) An auction-sale of property which subsequently turns out not to belong to the judgment-debtor cannot be said to be void. Where the decree-holder is himself the auction-purchaser, and the decree is satisfied by the proceeds of the sale, and the decree-holder subsequently discovers that the judgment-debtor was not the owner of the property and makes an application for the cancellation of the sale and fresh execution of the decree, the application falls within the purview of R. 91 of O. 21 of Civil Procedure Code and cannot be entertained if it is made more than thirty days after the sale.⁴⁶ The decree-holder who has purchased such property cannot apply for execution afresh ignoring the sale altogether. His only remedy lies in applying to have the sale set aside within 30 days prescribed by Art. 166, Limitation Act.⁴⁷

41. *Gopaldevi v. Nikka*, (1931) 132 I.C. 493=32 P.L.R. 440=1931 Lah. 586 (2); Relied on *Rajagopala Ayyar v. Ramanujachariar*, 80 I.C. 92=47 Mad. 288=46 M.L.J. 104=1924 Mad. 431 (F.B.).

42. *Bhai Chand v. Ranchhoddas*, 45 Bom. 174.

43. *Umapati v. Sheikh Soleman*, 1927 Cal. 614=(1926) 54 Cal. 419.

44. *Rajgopala Aiyar v. Ramanujachariar*, 1924 Mad. 431=47 Mad. 288 (F.B.); also see *Manmatha v. Lakshmi*, 55 Cal. 96; *Beharilal v. Taruklal*, 97 I.C. 798 (Pat.); *Ram Kinkar v. Stithi Ram*, 27 C.L.J. 528=46 I.C. 221.

45. *Kashi Ram v. Hasmat Bano*, 1931 All. 145=1931 A.L.J. 119=130 I.C. 708; also see and cf. *Neelu v. Subramania*, 11 L.W. 59=1919 M.W.N. 897=53 I.C. 809 (Art. 166 applied, where sale-proclamation being given to the judgment-debtor is not a nullity).

46. *Muthukumarasamia Pillai v. Muthusami Thevan*, (1927) 100 I.C. 522=52 M.L.J. 148=25 L.W. 232=38 M.L.T. 84=1927 Mad. 304; Followed in *Keshavan v. Bipathumna*, 1935 Mad. 340.

47. *Mundlapati Jagannadha Rao v. Rachapudi Basawayya*, (1927) 104 I.C. 614=1927 M.W.N. 224=53 M.L.J. 255=1927 Mad. 835.

(11) Where a proclamation of sale was not published in the village in which the property was situate, the omission was an illegality but such illegality did not make the sale a nullity and an application by a judgment-debtor to set aside the sale is governed by Art. 166 and not by Art. 181. Every illegality or irregularity does not render the sale a nullity.⁴⁸

TITLE III.

2375. STARTING POINT OF LIMITATION.—(1) Un-

Date of sale. less the knowledge of his right to apply was fraudulently concealed from the applicant, the period of limitation runs from the date of the sale.⁴⁹ It is immaterial, therefore, when he first became aware of the sale. An application under Art. 166, Limitation Act, not filed within thirty days after the sale would be barred by limitation.⁵⁰

(2) There is some conflict of view on the question when the sale in execution is complete within the meaning of Art. 166 of the Limitation Act. **Sale when complete.** The Patna High Court has held that the sale is complete when the presiding officer closes the bidding and formally accepts the bid and declares the purchaser. Mere closing of the bid does not complete the sale.¹ Similarly, according to **Bombay High Court**, the date of sale, within the meaning of Art. 166, Limitation Act, is the date when the property is put up for sale, and knocked down to the highest bidder.² The **Calcutta High Court** has held that the *date of sale* means the day when the sale is held, not the day when the sale is confirmed.³ This is also the view taken by the **Nagpur Judicial Commissioner's Court** in several cases.⁴ The **Allahabad High Court** took the view in *Munshilal v. Ram Narain*,⁵ that a sale of immoveable property in execution of a decree is not complete until the sale officer has accepted the final bid and the purchaser has paid in the deposit of 25 per cent. of the purchase-money (O. 21, R. 84, Civil Procedure Code). The

48. *Paramasiva v. Pulukaruppa*, 47 Mad. 525=1924 Mad. 137=77 I.C. 631=45 M.L.J. 829.

49. *Ramdhuri v. Deonandhan*, 1922 Pat. 507 (509)=2 Pat. 65=3 P.L.T. 501=1 Pat.L.R. 18.

50. *Ma Pwa v. Md. Tambi*, 1924 Rang. 124=1 Rang. 533 (536); also see *Paramasiva v. Pulukarappa*, (1923) 45 M.L.J. 829 (835-837).

1. *Jaibahadur Jha v. Matukdhari*, 1923 Pat. 525=2 Pat. 548=4 P.L.T. 498=76 I.C. 113; Followed in *Kanwal Ram v. Mt. Gurdei*, 1931 Oudh 291.

2. *Vana Khushal Patil v. Ratilal Bhaidas*, (1926) 95 I.C. 549 (1)=28 Bom.L.R. 510=1926 Bom. 335.

3. *Chowdhry Kesri Sahay v. Giani Roy*, (1902) 29 Cal. 626 (631); *Haricharan v. Haridas*, (1905) 2 C.L.J. 506; also see *Kishori Mohun v. Chundernath*, (1887) 14 Cal. 644.

4. *Wasudeo v. Hiralal*, (1912) 17 I.C. 884 (Nag.); *Sitaram v. Asaram*, (1924) 78 I.C. 47=19 N.L.R. 162=1924 Nag. 108; *Roniya v. Bali-ram*, (1927) 106 I.C. 333=1928 Nag. 111.

5. (1912) 35 All. 65.

period of thirty days prescribed by R. 92 will not, therefore, begin to run against a person applying under R. 89 if for any reason the final bid remains for a time unaccepted by the sale officer. This view was followed by Shadilal, J., in the Punjab Chief Court case of *Mt. Khairan v. The Alliance Bank of Simla*.⁶ The *terminus a quo* for the period of thirty days provided by R. 92 (2) of O. 21 must, therefore, be deemed to be the date of the deposit. This dissents from an earlier Punjab decision in *Atma Singh v. Duni Chand*,⁷ which goes too far in holding that a sale in which the 25 per cent. is not made is not complete, and an application to set aside the sale, under Art. 166, made before the final completion of the sale, is within time. The **Lahore High Court** has held that the omission to make the deposit does not render the sale incomplete when the decree-holder is the purchaser, entitled to set off the purchase-money under O. 21, R. 84 (2), Civil Procedure Code.⁸ The **Oudh Court** has followed the Allahabad and Patna view in holding that the *terminus a quo* for application under O. 21, R. 89, Civil Procedure Code, is the date of the sale. It is only on the date when the bid is accepted and a declaration made about a person being a purchaser, which declaration is to be followed immediately with the deposit of one-fourth of the purchase-money, that the sale can be said to have been completed.⁹ But the failure to deposit the one-fourth immediately is no more than an irregularity rendering the sale voidable.¹⁰ The **Peshawar Judicial Commissioner's Court** has held recently that the sale is complete as soon as the offer of the auction-purchaser is accepted by the auctioneer and it is immaterial for the purpose of Art. 166, Limitation Act, whether the 25 per cent. deposit was made or not.¹¹

2376. The Court has no discretion to enlarge the period of thirty days prescribed by Art. 166, under **Enlargement of time.** S. 5 of the Limitation Act, and no order of the Court can have the effect of extending it.¹² But in computing

6. (1919) 50 I.C. 914; Followed 35 All. 65.

7. (N.F.) 1 P.W.R. 1909.

8. *Parjamal Chandimal v. Mulchand-Murarilal*, (1926) 94 I.C. 521=6 Lah. 250.

9. *Kanzeal Ram v. Mt. Gurdei*, (1931) 1931 Oudh 291=132 I.C. 263=8 O.W.N. 633; Followed in *Hari Shanker v. Amina*, 1935 Oudh 131.

10. *Bhim Singh v. Sarwan Singh*, (1888) 16 Cal. 33; *Venkata v. Sama*, (1905) 14 Mad. 227; and *Sita Ram v. Jankiram*, (1922) 44 Ali. 266 (F.B.); O.R. *Amir Begam v. The Bank of Upper India*, (1908) 30 All. 273.

11. *Padamlal v. Mohanlal*, (1935) 159 I.C. 273=1935 Pesh. 160.

12. *Gandamal v. Munshi Ram*, (1920) 57 I.C. 224 (Lah.); *Asanand v. Jhangli Ram*, (1919) 50 I.C. 610 (Punj.); *Bashi Ram v. Hassan Muhd.*, (1919) 51 I.C. 447; *Umrao Singh v. Beni Pershad-Mehrchand*, (1926) 92 I.C. 839 (Lah.); *Ramautar v. Sheo Peary*, 1925 Oudh 411=87 I.C. 722; cf. (1923) 45 M.L.J. 829 (838); also see notes under Arts. 163 and 164, *ante*.

the period of limitation, the time during which the applicant had been prosecuting a suit in good faith will be deducted under S. 14, Limitation Act.¹³ Under the present Limitation Act, a minor entitled to make an application for setting aside sale is not given the privilege of S. 6.¹⁴ Under O. 21, R. 89 of the Civil Procedure Code, a judgment-debtor may obtain a reversal of a sale by deposit of the money in Court, but such deposit must be made within 30 days of the sale.¹⁵ The Court has no jurisdiction, except with the consent of parties, to extend the time, nor can it set aside a sale by allowing the judgment-debtor to deposit the decretal money after the period of limitation has passed.¹⁶ An application under O. 21, R. 89, Civil Procedure Code, **must be made within 30 days from the sale**, and the Court has no power to extend this period.¹⁷ The words "*on his depositing*" qualify the word "*apply*", in O. 21, R. 89, Civil Procedure Code, and a **deposit is a condition precedent to the making of an application** for setting aside a sale.¹⁸ Therefore, unless the deposit itself is made within 30 days of the sale, the Court has no power to entertain an application for setting it aside presented within that period, the requirements of O. 21, R. 92 (2), Civil Procedure Code, not being merely directory but mandatory.¹⁹ If the *application* is made after the 30 days, it is barred in spite of the fact that the deposit required by O. 21, R. 89, Civil Procedure Code was made within that period.²⁰ An application either written or oral is necessary for the setting aside of a sale under O. 21, R. 89 of the Civil Procedure Code and such an application must be made within the period of 30 days laid down by Art. 166, Limitation Act. Where no application to set aside the sale is made, the deposit of the necessary amount re-

13. *Ganapathi v. Krishnamachari*, 1922 Mad. 417=70 I.C. 743=43 M.L.J. 184.

14. *Fazal Karim v. Annada*, 11 I.C. 401=15 C.W.N. 845.

15. *Rameshwar v. Sureshwar*, (1917) 39 I.C. 664 (Pat.); *Md. Cassim v. David*, 6 Rang. 490=1928 Rang. 286.

16. *Rameshwar Singh v. Sureshwar*, (1917) 39 I.C. 664 (Pat.); also see and cf. *Bibi Sharofan v. Mahomed Habibuddin*, (1911) 10 I.C. 148 (Cal.).

17. *Muhd. Din v. Shrampat*, (1926) 96 I.C. 377=1926 Lah. 639; also see *Ganapathi v. Krishnamachari*, (1922) 70 I.C. 743 (Mad.); *Total Ram v. Pannalal*, (1924) 46 All. 631 (Court cannot by the exercise of its inherent powers extend the time).

18. *Vannisami Thevar v. Periaswamy Thevar*, (1916) 33 I.C. 996 (Mad.)=19 M.L.T. 192=3 L.W. 271=1 M.W.N. 179.

19. *Ibid.*, (1916) 33 I.C. 996 (Mad.).

20. *Mathura Prasad v. Ramlal*, (1910) 9 I.C. 33 (All.); *Parat Veetil Seethi v. Ambalath Veetil*, (1915) 32 I.C. 45 (Mad.); *Venkatanarasimma v. Lakshminarasimham*, (1916) 32 I.C. 783 (Mad.); *Pechaiyee v. Vallaimuthu*, (1924) 48 M.L.J. 405; *Raoji v. Bansilal Narayan*, (1919) 43 Bom. 735=53 I.C. 135; *Tipan Gowda v. Ramangowda*, (1919) 22 Bom.L.R. 35; *Sarvi Begam v. Haidar Shah*, 9 A.L.J. 12=13 I.C. 404.

quired under O. 21, R. 89, even if rightly made in the Civil Court, will be of no avail.²¹ Similarly, it is not enough to make the application without the deposit within 30 days.²² As a result of the authorities, both application and deposit must be made within 30 days of the sale.²³

2377. (1) Article 166 applies even though the sale is sought to be set aside on ground of fraud. Under the previous Code, Art. 178, (now Art. 181), applied to such applications.²⁴

Setting aside sale on ground of fraud.

(2) Order 21, R. 90, Civil Procedure Code, 1908, provides for an application to set aside sale on the ground of irregularity or *fraud* in publishing or conducting it, provided that the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. Fraud in bringing about an execution sale is essentially different from irregularity in the conduct of the sale.²⁵ Such an application may be made by the decree-holder, or any person whose interests are affected by the sale. The decree-holder is a necessary party to an application under this rule.²⁶ The proviso to R. 92, sub-R. (2) shows that under the present Code, the auction-purchaser is also a necessary party. An application under this rule must be made within thirty days from the date of sale. But, where the irregularity affecting the sale has by the fraud of the decree-holder or other parties to the sale been kept concealed from the judgment-debtor, he is entitled to apply under this rule, whether the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him.²⁷

21. *Ramautar v. Shoo Piarey Lal Pandey*, (1925) 87 I.C. 722=1925 Oudh 411=12 O.L.J. 137.

22. *Mahomed Akbar v. Sukhdeo Pande*, (1911) 13 C.L.J. 467; *Munna Lal v. Radha Kishan*, (1915) 37 All. 591=30 I.C. 186; *Vanniaswami v. Periyaswami*, (1916) 33 I.C. 996 (Mad.); *Sarjoo Prasad v. Nanoo Rai*, (1916) 35 I.C. 779 (Pat.); *Rameshwar v. Sureshwar*, (1917) 39 I.C. 664 (Pat.).

23. *Mohammad, Cassim v. David*, (1928) 6 Rang. 490.

24. *Alliar Rozether v. Narayana Kadamban*, (1924) 81 I.C. 844 (Mad.); *Konideva Kamayya v. Konideva Ramamma*, 74 I.C. 458=1922 Mad. 95=16 L.W. 934; *Grace Rosamand Rhodes v. Padmanabha*, 26 I.C. 369 (Mad.); *Nemaichand v. Denonath*, (1898) 2 C.W.N. 691; *Motilal v. Russick*, (1896) 26 Cal. 326 (N.); *Golam Ahad v. Judhishter*, (1902) 30 Cal. 142; *Hiralal v. Chundra Kanta*, (1899) 26 Cal. 539.

25. *Bajrang Prasad Singh v. Mt. Sonjhari Kuer*, 85 I.C. 622=6 Pat. L. T. 567; *Reld. on Narayan Sahu v. Mahant Damodar Das*, 16 I.C. 464=16 C.W.N. 894.

26. *Ali Gauhar v. Bansidhar*, (1893) 15 All. 407.

27. *Mohendro Narain v. Gopal*, (1890) 17 Cal. 769 (F.B.); *Golam Ahad v. Judhishter*, (1903) 30 Cal. 142 (153); *Hiralal v. Chundra*, (1899)

(3) Where a suit or application is, on the face of it, barred by limitation, it is for the plaintiff or

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applicant to satisfy the Court of circumstances which would prevent the statute from having its ordinary effect.²⁸ Accordingly, where a judgment-debtor makes an application to have an execution-sale set aside under R. 90 of O. 21 of the Civil Procedure Code, after the expiry of thirty days, he must bring his case within S. 18 of the Limitation Act.²⁹ Where, however, such fraud is proved, it is for the opposite party to show that the judgment-debtor has had clear and definite knowledge of the fact constituting the fraud at a time which is too remote to bring the application within time.³⁰ In order to enable the applicant to bring his case within S. 18 of the Limitation Act, it is not enough for him to show that the execution proceedings were irregular and

Fraudulent concealment of existence of right.

fraudulent, but he must carry the fraud further and show that the *existence of his right to set aside the sale* had been kept concealed from his knowledge by the fraud of the decree-holder and the auction-purchaser.³¹ Section 18 applies only where a person having any right to make an application has by means of fraud been kept from the knowledge of his right.³² An *act* of fraud committed in some other connection is immaterial.³³ Further, it is not sufficient to say that as there was fraud in the conduct of the sale, therefore, it must follow that there was a contrivance on the part of the decree-holder to keep the judgment-debtor from knowledge of the fraudulent sale.³⁴ Where, therefore, a judgment-debtor was by the fraud of the judgment-creditor and the auction-purchaser induced to omit to make an application under R. 89 of O. 21, Civil Procedure Code, it was held that the fraud was not of the kind which would operate to extend the limitation provided for an application to set aside a sale on the ground of irregularity, inasmuch as it did not keep the judgment-debtor from the knowledge of his rights but merely prevented him

26 Cal. 539 (542, 545); *Bhusan v. Profull*, (1921) 48 Cal. 119=60 I.C. 801=1921 Cal. 251; *Sheo Ram v. Ikramut Unnissa*, (1923) 45 All. 316=21 A.L.J. 176=1923 All. 282=71 I.C. 631.

28. *Purna Chundra v. Annakul Biswas*, (1909) 36 Cal. 654; *Nabin Chandra v. Bipin Chandra*, (1925) 87 I.C. 555 (Cal.).

29. *Nabin Chandra v. Bipin Chandra*, (1925) 87 I.C. 555 (Cal.).

30. *Ibid.*

31. *Ibid.*

32. *Harish Chunder v. Ganga Bishun*, (1918) 43 I.C. 671 (All.); *Asanand v. Jhangi Ram*, (1919) 50 I.C. 610 (Punj.) and *Bashi Ram v. Hassan Muhammad*, (1919) 51 I.C. 447 (Punj.).

33. *Asanand v. Jhangi Ram*, (1919) 50 I.C. 610 (Punj.) and *Bashi Ram v. Hassan Muhammad*, 51 I.C. 447 (Punj.).

34. *Bajrang Prosad v. Sonejhari*, (1925) 85 I.C. 622=6 Pat. L. T. 567.

from making an application.³⁵ Where the applicant can invoke the aid of S. 18 of the Limitation Act, limitation will start running from the time of knowledge only.³⁶ The Court has to find as a fact the date or time when the applicant came to know of the sale.³⁷

Confirmation of sale, not a bar. The prior confirmation of a sale is not a bar. Objections to an execution sale on

the ground of fraud can only be made under O. 21, R. 90, Civil Procedure Code, and generally these objections have to come prior to the confirmation of sale.³⁸ When a sale is confirmed, it becomes absolute under the Code; but, it is liable to be challenged by a person interested who is able to satisfy the Court that the sale ought not to have been confirmed either because of fraud or irregularity; and the petitioner can bring his case within S. 18 of the Limitation Act.³⁹ To entitle a person to avail himself of the provisions of S. 18, he is not bound to allege and prove fraud subsequent to the date of the execution sale.⁴⁰ **Fraud is a continuing influence**, and until the influence ends it retains the power of mischief, and, therefore, fraud antecedent to the accrual of the right to action may also be considered under S. 18 of the Limitation Act.⁴¹ The applicant may prove that he was by means of fraud kept from the knowledge of the sale, and he was necessarily kept from the knowledge of his right to have the sale set aside.⁴² A decree-holder who is once guilty of fraud in bringing about an execution sale and keeping the judgment-debtor in ignorance of it, must shew that the opportunity was offered to the judgment-debtor to discover the fraud, and that the fraud was in fact dispelled consequent to the sale. Otherwise the fraud once committed would continue, entitling the judgment-debtor to the benefit of S. 18 of the Limitation Act.⁴³ Where proceedings were carried on against a dead judgment-debtor as if he were still alive, the *onus* was thrown upon the decree-holder to show that the person applying to have the sale set aside had knowledge of the sale before the delivery of possession to the decree-holder purchaser.⁴⁴ Where

35. *Harish Chander v. Ganga Bishun*, (1918) 43 I.C. 671 (All.)

36. *Purna Chandra v. Annakul Biswas*, (1909) 36 Cal. 654; *Nobin Chandra v. Bipin Chandra*, (1925) 87 I.C. 555 (Cal.).

37. *Abba Munshi v. Kamru Molla*, (1918) 48 I.C. 970.

38. *Bashi Ram v. Hassan Muhammad*, (1919) 51 I.C. 447; cf. *Mohendra v. Gopal*, 17 Cal. 769 (F.B.); *Golam v. Judhister*, 30 Cal. 142 (153).

39. *Nilmoni Singh v. Brinda Dasya*, (1912) 16 I.C. 436 (Cal.).

40. *Jotindra Mohun Rai v. Brojendra*, (1914) 24 I.C. 249.

41. *Bajrang Prasad v. Sone Jhari Kuer*, (1925) 85 I.C. 622=6 P.L.T. 567.

42. *Jotindra Mohun Rai v. Brojendra*, (1914) 24 I.C. 249 and *Bajrang Prasad v. Sone Jhari Kuer*, (1925) 85 I.C. 622=6 P.L.T. 567.

43. *Jowala Prasad v. Jhaman*, (1924) 80 I.C. 761 (Pat.).

44. *Arjundas v. Gunendra Nath*, (1915) 27 I.C. 294 (Cal.).

a decree-holder fraudulently contrived not to serve the judgment-debtor with notice of the execution-sale and kept him in ignorance of the sale itself, and the latter came first to know of the fraud only when an application was made for delivery of the property, it was held that the judgment-debtor in seeking to set aside the sale was entitled to the benefit of S. 18 of the Limitation Act for the whole period during which the fraud continued.⁴⁵ A judgment-debtor is not entitled to the benefit of the provisions of S. 18, Limitation Act, for the purpose of making an application to set aside an execution sale if the decree-holder was no party to the fraud alleged.⁴⁶

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
167.	Complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree.	Thirty days.	The date of the resistance or obstruction.

SYNOPSIS.

- 2378. Previous History.
- 2379. Scope and application.
- 2380. Formal or symbolical delivery of possession.
- 2381. Summary procedure is permissive.
- 2382. Starting point of limitation—Time runs anew from second resistance.
- Second application for delivery of possession.

NOTES.

2378. PREVIOUS HISTORY.—*See also* note “Previous History” under Art. 165, *ante*.

There was no corresponding provision in the Limitation Act XIV of 1859. The corresponding provision prior to Act IX of 1871 was contained in S. 226 of the Civil Procedure Code, 1859, which enacted that

“if in the execution of a decree for land or other immoveable property the officer executing the same shall be resisted or obstructed by any person, the person in whose favour such decree was made may apply to the Court at any time *within one month* from the time of such resistance or obstruction”.

Section 268 of the same Code enacted:

“If the purchaser of any immoveable property sold in execution of a decree be resisted or obstructed in obtaining possession of the property the provision contained in the Ss. 226, 227 and 228 relating to resistance or obstruction to a party in whose favour a suit has been decreed in obtaining

45. *Sheikh Muhammad Rowther v. Subba Naicker*, (1923) 72 I.C. 46 =17 L.W. 152=32 M.L.T. 252=1923 Mad. 353.

46. *Azizannessa v. Dwarka Prosad*, (1925) 86 I.C. 745 (Cal.).

possession of the property adjudged to him shall be applicable in the case of such resistance or obstruction."

This was followed by S. 269, which ran as follows:—

"If it shall appear that the resistance or obstruction to the delivery of possession was occasioned by any person other than the defendant claiming a right to the possession of property sold as proprietor . . . ,or if in the delivery of possession to the purchaser any such person claiming as aforesaid shall be dispossessed, the Court, on the complaint of the purchaser, or of such person claiming as aforesaid, if made within one month from the date of such resistance or obstruction or of such dispossession, as the case may be, shall enquire," etc.

Art. 158 of the Limitation Act of 1871 did not provide for applications by a decree-holder who had been resisted by third persons in taking possession under the decree. The corresponding article in **Act IX of 1871**, to the present Art. 167, was **Art. 160**, Sch. II of that Act. This dealt with complaints in the case of Court sales both by the purchaser and by person dispossessed by him (S. 269 of Civil Procedure Code, Act VIII of 1859). In the Act of 1877, this was re-enacted as Art. 167, with the addition of the words "decree or" after the word "property" and of words "the decree-holder or" after words "possession to". In the Act of 1877, Art. 158 was reproduced by Art. 165, and amended by inserting after "decree-holder" the words "or purchaser at a sale in execution of a decree". The object of the amendment in Art. 167 was to extend it to complaints of obstruction by decree-holders as well as purchasers, and by making it applicable to applications complaining of dispossession not only by auction-purchasers but also by decree-holders. Both these cases were however covered by Art. 165 as amended, and the following words in Art. 167, after the word "*decree*" in the first column, *viz.*,

"or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property,"

have now been omitted. In the third column the words "or dispossession" after the word "obstruction" have also been omitted.

2379. SCOPE AND APPLICATION.—Art. 167 has reference to O. 21, Rr. 97 to 99, Civil Procedure Code, which correspond to old S. 328, Civil Procedure Code, 1882. Under this section, decree-holder might in case of obstruction, complain to the Court at any time within *one month*.⁴⁷ Section 334 extended the provisions of S. 328 to cases where the judgment-debtor obstructs the execution-purchaser in obtaining possession of immoveable property. Order 21, Rr. 97 to 103 of the present Code are substantially re-enactments of the corresponding provisions of the previous Codes, the only change being that instead of there being a separate section which makes the sections regarding obstruction

47. *Damodar v. Gopal*, (1884) 7 All. 79 (91) (F.B.).

to a decree-holder applicable to the case of an auction-purchaser, one set of rules has been enacted for both the decree-holder and the auction-purchaser.⁴⁸

2380. FORMÁL OR SYMBOLICAL DELIVERY OF POSSESSION.—Mere symbolical delivery of possession does not necessarily dispossess the party in actual possession,⁴⁹ and cannot therefore save limitation where actual possession might have been obtained.⁵⁰ However, delivery of possession in the immediate presence of the objector or his agents and in spite of their objections, does not amount to dispossession.¹ The delivery of possession under the provisions of Civil Procedure Code in O. 21, Rr. 35, 36, 95 or 96 of the Code cannot be characterised as “symbolical,” or “formal” either as against the judgment-debtor in possession, or against a third party in possession. It amounts to an actual delivery against the judgment-debtor in possession; but not so against a third party, if made in his absence and without knowledge.²

2381. SUMMARY PROCEDURE IS PERMISSIVE.—The decree-holder, or the auction-purchaser, has an option to avail themselves of the summary procedure under the Civil Procedure Code, O. 21, Rr. 97 to 99. It was held in an early Calcutta case that proceedings may be taken against a judgment-debtor in execution of a decree at any time within three years from the last application of the kind, even though they are not instituted within thirty days after a wrongful obstruction alleged to have been put by him in the way of the judgment creditor’s obtaining possession.³ The period of 30 days is important only as to limitation prescribed within which the decree holder may have a speedy remedy by way of ejectment against a stranger without the expense of a regular suit.⁴ Section 328 of the Civil Procedure Code, 1882 did not make it obligatory on a decree-holder to pursue his remedies under that section. Accordingly, the failure on the part of the plaintiff to avail himself of the remedy under that section did not prevent him from proceeding against the defendant by a regular suit.⁵ A petition

48. *Raghunandan v. Ramcharan*, (1919) 49 I.C. 150 (Pat.).

49. *Ibrahim v. Ramjadu*, (1903) 30 Cal. 710.

50. *Shoteenath v. Obhoy*, (1879) 5 Cal. 331.

1. *Kocherlakata v. Vadreja*, (1903) 27 Mad. 262.

2. *Ibid.*

3. *Hunkur Singh v. Madho Lall*, (1874) 21 W.R. 147.

4. See notes under Arts. 137 and 138; also see *Balwant Sant Ram v. Babaji*, 8 Bom. 602; *Barangore Jute Factory v. Rajkumar Rai*, 1 I.C. 785=13 C.W.N. 724 and *Damodar v. Gopal*, 7 All. 79 (F.B.).

5. *Balwant Sant Ram v. Babaji*, (1884) 8 Bom. 602; also see *Narohari v. Annapurna*, (1874) 11 Bom. 160 N. (168); *Vinayakrao v. Devrao*, (1887) 11 Bom. 473; *Shoteenath v. Obhoy*, (1879) 5 Cal. 331; *Ishear v. Jainarain*, (1885) 12 Cal. 169; also see *Raghunandan v. Ram Charan*, (1918) 49 I.C. 150=4 P.L.J. 94 (F.B.).

not presented within one month ought not to be registered as a suit.⁶ But, the dismissal of the application for summary procedure left the decree-holder to seek his remedy by a separate regular suit against certain persons claiming to be in possession.⁷ In *Vinayakrao v. Devrao*,⁸ where at a sale held in execution of a decree, certain property was purchased on behalf of a minor, by the agent nominated by his guardian, and the order for delivery of possession was resisted by third party, it was held that the omission by the agent of minor's guardian to apply, within 30 days of obstruction, or by the minor within 30 days from the date of attaining majority barred the applicant, under Art. 167 of the Limitation Act. But the remedy lay in a fresh suit, which would be governed by either Art. 138, or Art. 144 of the Limitation Act, and in any case the defendant could avail himself of the judgment-debtor's possession, as the alleged purchaser.⁹

2382. STARTING POINT OF LIMITATION.—The

Second application for delivery of possession.

starting point of limitation under column 3 of Art. 167, is the date of resistance or obstruction. We have seen above that summary procedure is permissive, and it has

been held that a second application for delivery of possession is allowable and a complaint by the decree-holder within 30 days from the date of the second obstruction is within time.¹⁰ In *Raghunandan v. Ramcharan*,¹¹ a **Full Bench of the Patna High Court** has discussed the case lawfully, and reached the conclusion that an auction-purchaser who is not the decree-holder having made an application for delivery of possession, and that application having been infructuous by reason of obstruction, is entitled to make an application for a fresh writ of possession within the period of limitation allowed for such an application without applying under R. 97 of O. 21 of the Civil Procedure Code. It was pointed out in *Muthia v. Appasami*,¹² that the language of S. 328 (old Code), now O. 21, R. 97—97 is that the

Madras.

6. *Valliammai v. Shanmugam*, 7 M.L.T. 223=6 I.C. 285; also see *Lala v. Narayan*, (1895) 21 Bom. 392 (Complaint beyond one month of obstruction: Order registering it as suit objected to on appeal against final order).

7. *Ibid.*, 6 I.C. 285 (Mad.).

8. (1887) 11 Bom. 473.

9. *Namdev v. Ramchandra*, 18 Bom. 37.

10. *Ramasekra Pillai v. Dharmaraya*, 5 Mad. 113 (114); *Muttia v. Appasami*, 13 Mad. 504; also see and cf. *Pachaiappa v. Venkatachariar*, (1925) 90 I.C. 952=1925 M.W.N. 577=1925 Mad. 1198; also see *Narain Das v. Hazari Lal*, 18 All. 233=A.W.N. (1896); *Barangore Jute Factory v. Raj Kumar*, 1 I.C. 785=13 C.W.N. 724.

11. (1918) 49 I.C. 150=4 P.L.J. 94 (F.B.).

12. 13 Mad. 504; also see *Muthuswami v. Ethirajulu*, (1912) 16 I.C. 432 (Mad.).

decree-holder 'may', not that he 'must' proceed in the way indicated. Consequently, the failure of the decree-holder-purchaser to take proceedings under O. 21, R. 97 of the Code of Civil Procedure, within the time limited by Art. 167, Limitation Act, does not prevent him from putting in a fresh application for delivery of possession under O. 21, R. 95, Civil Procedure Code.¹³ If the Court grants such application it cannot be objected that it is barred by Art. 167 which applies only to applications complaining of resistance or obstruction.¹⁴ Order 21, R. 97 is permissive and merely affords a summary procedure which an obstructed person has the option to use or forego. Failure to avail of it does not deprive a person entitled to possession of any further right to obtain it in execution.¹⁵ The obstruction referred to in the third column is the fresh obstruction referred to in the complaint and not the one

Bombay.

previous to it. But, the **Bombay High Court** takes the view that a second application for delivery of possession is a renewed attempt to take advantage of old proceedings where the applicant had neglected to complain of resistance or obstruction within the thirty days allowed by Art. 167, Limitation Act.¹⁶ The **Cal-**

Calcutta.

cutta High Court observed in *Shoteenath v. Obhoy*,¹⁷ that the granting of the second application in such a case would virtually make Art. 167 a dead letter. In *Nathu Hari*

Nagpur.

Shanker v. Fatusa,¹⁸ the **Nagpur Court** has held that where the decree-holder purchaser made an application under O. 21, R. 95 for delivery of possession of property which was resisted, the purchaser, as a decree-holder, was not barred by O. 21, R. 97, or by Art. 167, Limitation Act, from making a fresh application for execution or possession.

The **Sind Judicial Commissioner's Court** has observed in a recent case that auction-purchasers who are decree-holders do not cease to be parties to a suit; and, even if they ask for relief as auction-purchasers, they are still decree-holders coming under the provisions

13. *Abdul Karim Sahib v. Timmaraja Chetty*, (1914) 24 I.C. 512 (Mad.); also see *Subbiah Pillai v. Kailasam*, (1914) 26 I.C. 19 (Mad.).

14. *Ibid.*, 13 Mad. 504; 24 I.C. 512 (Mad.); 26 I.C. 19 (Mad.); also see (1918) 4 P.L.J. 94.

15. *Meyappa Chetti v. Meyappan Servai*, (1922) 66 I.C. 722; Folld. 5 Mad. 113.

16. *Vinayakrao v. Devrao*, (1887) 11 Bom. 473; cf. *Balwant v. Babaji*, (1884) 8 Bom. 602.

17. (1879) 5 Cal. 331.

18. 1933 Nag. 369=147 I.C. 582; Expld. *Chotelal v. Sarwan*, 1932 Nag. 140=28 N.L.R. 250=140 I.C. 683; Folld. *Balaji Kashinath v. Anand-rao*, 1927 Nag. 294.

of S. 47, Civil Procedure Code. If a decree directing the sale is to be executed not only by the sale but by the removal of the obstruction, then the provisions of cl. (d) of S. 30, Civil Procedure Code, have not to be considered at all.¹⁹ As regards an auction-purchaser, he has the option to bring a regular suit to recover possession of property sold in execution of decree, and such a suit is not barred by his failure to proceed according to the summary provisions of Civil Procedure Code.²⁰

Article.	Description of Suit.	Period of Limitation.	Time from which. period begins to run.
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168.	For the readmission of an appeal dismissed for want of prosecution.	Thirty days.	The date of the dismissal.
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SYNOPSIS.

- 2383. Corresponding provisions.
- 2384. Scope and application.
- 2385. Re-admission of an appeal.
- 2386. Want of prosecution.
- 2387. Failure to deposit security.
- 2388. Failure to deposit cost of paper-book, etc.
- 2389. Starting point of limitation.

NOTES.

2383. CORRESPONDING PROVISIONS.—This article corresponds to Art. 161 of Act IX of 1871; and Art. 168 of Act XV of 1877. There was no corresponding provision in Act XIV of 1859; but, a similar provision was made in S. 347 of the Civil Procedure Code (Act VIII of 1859), which enacted that

“if an appeal be dismissed for default of prosecution, the appellant may, *within thirty days* from the date of dismissal, apply to the appellate Court for the re-admission of the appeal”.

2384. SCOPE AND APPLICATION.—This article deals with re-admissions, under O. 41, R. 19 of the Code of Civil Procedure, of appeals dismissed for default under O. 41, R. 11, sub-R. (2), and Rr. 17 and 18, Civil Procedure Code. Rules 11 and 17 empower the Court to dismiss an appeal for non-appearance of the appellant on the date fixed for the hearing. Rule 18 empowers the Court to dismiss the appeal if on the day fixed it is found that the *notice to the respondent* has not been served in consequence of the failure by the appellant to deposit, within the period fixed, the sum required to defray the costs of serving notice. The **Rangoon High Court** observes in *Abdul Ganny v. Mrs. Russel*,^{20-a} that it may be taken that Art. 168 would apply only to applications

19. *British India Steam Navigation Co. v. Jivwan Jee & Co.*, (1936) 161 I.C. 524=1936 Sind 11.

20. *Sevu v. Muttusami*, (1886) 10 Mad. 53.

20-a. 1930 Rang. 228 (F.B.).

to re-admit appeals dismissed for want of prosecution as provided or contemplated by the Code of Civil Procedure.^{20-b}

2385. RE-ADMISSION OF AN APPEAL.—O. 41, R. 19, Civil Procedure Code, deals with re-admission of appeals dismissed for default. If sufficient cause is shown, restoration is made obligatory on the Courts, there being no discretion in the matter. Whereas, in other cases the merits of the applicant's case will form an important element for consideration, when the Court is asked to exercise its discretion.²¹ The application must be made to the Court which dismissed the appeal for default, and not to the Court which had transferred the appeal.²² In an application for restoration of the appeal, falling under O. 41, R. 19, Civil Procedure Code, the only thing that the Court can consider is whether there was "sufficient cause" for appellant's default.²³ An application for re-admission made not under O. 41, R. 19, Civil Procedure Code (old S. 558), but under the rules of the Court is not governed by Art. 168, and is not subject to any law of limitation.²⁴ Art. 168, Limitation Act, does not apply where order of dismissal is not under the Code of Civil Procedure, but is *ultra vires*. For example, where no notice was given of date of hearing, and order of dismissal was passed without fixing the date of hearing.²⁵ However, this article was applied where an appeal was dismissed under R. 18 before date of hearing.²⁶ Rules and orders applicable only to defaulters would be wrongly applied in the case of a dead party.²⁷ A deceased party cannot make default, and the order of dismissal for default of appearance or attendance would be inappropriate and

20-b. *Lakhimoni Dassi v. Dwijendra Nath*, (1919) 46 Cal. 249=51 I.C. 941; *Wadia Gardhy & Co. v. Purshotam Sivji*, (1908) 32 Bom. 1=9 Bom. L. R. 508 and *Narendralal Khan v. Tarubala Dassi*, 1921 Cal. 67 66 I.C. 209=48 Cal. 817.

21. *Somayya v. Subbamma*, (1903) 26 Mad. 599 (601) (The expression used in S. 558 of the old Code was "may re-admit the appeal"); also see *Maung Potu v. Chaung Taik*, (1912) 15 I.C. 358=5 Bur.L.T. 72; also see *Sonubai v. Shivaji Rao*, 45 Bom. 648 (652)=1921 Bom. 20.

22. *Sakharam Lakshman v. Govind Joti*, (1890) 15 Bom. 107 (109).

23. *Mt. Janat v. Syed Kamil Shah*, (1921) 60 I.C. 948 (949)=14 S.L. R. 239; also see *Srinivasa v. Raja Kumara*, (1915) 28 I.C. 64 (65)=28 M. L.J. 67=1915 M.W.N. 101.

24. *Ramhari v. Madan Mohan*, (1896) 23 Cal. 339 (347) [O.R. 24 Cal. 350 (F.B.)]; *Duraiyya Solagan v. Venkatarama*, (1921) 60 I.C. 123=12 M. L.W. 535; Cf. *Abdul Ganny v. Mrs. Russel*, (1930) 8 Rang. 380=127 I.C. 161=1930 Rang. 228 (234) (F.B.).

25. *Ata Mohd. v. Shankerdas*, (1924) 69 I.C. 618=1924 Lah. 279 (280).

26. *Abdul Ganny v. Mrs. Russel*, (1930) 8 Rang. 380, *supra*.

27. *Debi Baksh Singh v. Habib Shah*, (1913) 35 All. 331=40 I.A. 151 19 I.C. 526 (527) (P. C.).

inoperative as a bar to application by deceased's representative to be brought on the record.²⁸

Th period of thirty days, under Art. 168 cannot be enlarged under S. 5, Limitation Act,²⁹ or under S. 151, Civil Procedure Code³⁰; and it is not extended under S. 6 of the Limitation Act.³¹

2386. WANT OF PROSECUTION.—See note under heading "default of appearance" under Art. 163, *ante*.

In *Patinhari v. Vellur Krishnan*,³² where on an appeal being called on for hearing, the pleader for the appellants duly appeared, but asked for an adjournment, as the records were in possession of another counsel who was absent, and he could not argue the appeal, but he did not withdraw from the case, it was held that the Judge when refusing the adjournment, was bound to write a judgment and dispose of the appeal. He could not dismiss it for default. However, the

Patna. word "appearance" in R. 17 of O. 41 of the Civil Procedure Code, does not simply mean that the party and his pleader are physically present in Court and, therefore, can be seen by the eye, but it has a much more technical meaning, that is to say, that they are actually present in Court for the purpose of conducting the case.³³ The Madras case

Madras. of *Patinhari v. Vellur Krishnan*,³⁴ has been distinguished in the later Madras case of *Muhammad v. Manavikraman*,³⁵ on the ground that it is applicable only where there is no default, and no withdrawal of vakil from the case. But, it is no authority on the question what constitutes default. It has been held in *Venkatarama Aiyar v. Nataraja Aiyar*,³⁶ that where the vakil was not instructed to argue the case but only to apply for an adjournment there was no appearance. In such cases, the appellate Court has no power to go into the merits.³⁷ The leading authority on the question, what consti-

28. *Daulat Rai v. Jagat Ram*, (1918) 96 P.R. 1918=47 I.C. 962 (Punj.); Followed 35 All. 331 (P.C.).

29. See S. 2389: *Starting point of limitation—Enlargement of time*, post.

30. *Ibid*.

31. *Ibid*.

32. (1902) 26 Mad. 267; Followed *Jamnadas Chhabildas v. Sorabji Kharsedji*, 16 Bom. 27.

33. *Ramdhan Tewari v. Bishun Pragash Narain Singh*, (1920) 54 I. C. 715=5 P.L.J. 17=1 P.L.T. 156; Relied on *Lalji Sahu v. Lachmi Narain Singh*, 47 I.C. 27=3 P.L.J. 355; also see *Gopala Rao v. Maria Susaya Pillai*, 30 Mad. 274=17 M.L.J. 225.

34. (1903) 26 Mad. 267.

35. (1922) 45 Mad. 882.

36. (1913) 24 M.L.J. 235.

37. *Mohesh Chunder Bose v. Thakoor Dass Gossamee*, (1873) 20 W.R. 425 quoted with approval in *Satish Chandra Mukerji v. Ahara Prasad Mukerjee*, (1907) 34 Cal. 403 (F.B.).

Calcutta. tutes default of appearance, is the **Calcutta Full Bench** decision in *Satish Chandra v. Aparā Prosad*,³⁸ where the referring Judge, Mookerjee, J., has made a very elaborate survey of the case-law on the point. In *Administrator-General v. Dayaram*,³⁹ where the defendant had filed a written statement in a suit, the counsel applied for adjournment, and the same being refused, stated that he had no instructions to go on with the case. The suit was heard *ex parte* and a decree given in favour of the plaintiff. In *Baldeo Misser v. Ahmed Husain*,⁴⁰ where an appeal was called on for hearing, and one of the pleaders being absent from illness, the other asked for a postponement, which was refused, and he then refused to proceed with the appeal, the High Court held that the appeal must be looked upon as having been dealt with on default, and that it was competent to the appellant to apply for a re-hearing. This decision was referred to with approval in *Mohesh Chunder v. Thakurdas*⁴¹ and adopted as sound in *Shibendra Narain v. Kinooram*,⁴² where it was held that if, when an appeal is called on for hearing, the pleader is present but not prepared to go on with the case, and the appeal is consequently dismissed, the dismissal is one for default within the meaning of S. 556, Civil Procedure Code, 1882. The same view appears to have been assumed as well founded in *Anwar Ali v. Jaffer Ali*.⁴³ The **Full Bench** in *Radhanath Singh v. Chandi Charan Singh*,⁴⁴ regarded the order as one of dismissal for default, *i.e.*, the non-appearance of the appellant where his pleader was not prepared to go on with the appeal. Similar view was taken by Amir Ali, J., in the case of *Ram Pertab Mull v. Jakeeram*.⁴⁵ The decision in *Watson v. Ambika Dasi*,⁴⁶ follows the Bombay view in *Ram Chandra v. Madhav*,⁴⁷ that the dismissal is not for default where the application for an adjournment being refused, the pleader present in Court, refused to argue the appeal. This view Mookerjee, J., considers unsound, observing that:

"If a pleader is instructed to apply merely for adjournment, and upon refusal of the application refuses to conduct the case on the ground that he is not prepared to do so, the position at the moment becomes identical with the

38. (1907) 34 Cal. 403=11 C.W.N. 329 (F.B.).

39. (1871) 6 B.L.R. 688; Approved in *Zainulabdin v. Ahmed Reza*, (1878) 5 I.A. 233 (P.C.).

40. (1871) 15 W.R. 143.

41. (1873) 20 W.R. 425; cf. *Dhan Bhagat v. Ramessur*, (1873) 20 W. R. 53—per *contra*.

42. (1886) 12 Cal. 605.

43. (1896) 23 Cal. 827.

44. (1903) 30 Cal. 660 (662) (F.B.).

45. (1896) 23 Cal. 991.

46. (1899) 4 C.W.N. 237.

47. (1891) 16 Bom. 23; cf. *Shibendra Narain v. Kinooram*, (1886) 12 Cal. 605.

position in the case in which the pleader, as soon as the case is called on, informs the Court that he has no instructions to proceed with it. Even if, therefore, it be held that an appearance by counsel or pleader solely for the purpose of applying for adjournment, technically constitutes an appearance in law, such appearance would cease as soon as the limited purpose, for which it was made, had been exhausted. A subsequent dismissal of the case on the ground that there was no one to proceed with it, would be, in substance as well as in form, a dismissal for default."⁴⁸

In *Cook v. Equitable Coal Co.*,⁴⁹ the earlier decision in *Watson v. Ambika*⁵⁰ was doubted. The learned Chief Justice held, that where a pleader is only instructed to make an application practically for an adjournment, and upon refusal of that application, leaves the Court and takes no part in the hearing of the case, the decree passed cannot be regarded as other than an *ex parte* decree. This decision was followed by Mookerjee, J., in the case of *Rajkishore Roy v. Raja Ramranjan*,¹ The view set forth above was adopted by Sale, J., in *Hinga Bibi v. Manna Bibi*,² where it was ruled that an appearance by counsel on the calling on of a case, merely to ask for an adjournment, is not such an appearance in the suit as will render Ss. 102 and 103 inapplicable, if, upon a refusal of the application, counsel does not proceed with the case because he has no instructions to do so. The **Bombay High**

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Court takes a similar view in *Bhimacharya v. Fakirappa*³ and *Soonderlal v. Goor Prasad*,⁴ but the opposite view is favoured in *Ram Chandra v. Madhav*,⁵ although one of the learned Judges was prepared to hold that, if a case is dismissed by reason of refusal on the part of the pleader to argue the case, it might be a dismissal for default. There is a large preponderance of

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authorities, in **Allahabad High Court**, in favour of the aforesaid view. See *Hira Dai v. Hira Lal*,⁶ *Ramtahal v. Rameshar*,⁷ *Shankar Dat v. Radha Krishna*,⁸ and *Lalta Prasad v. Nand Kishore*.⁹ The decision of the Judicial Committee in *Radha Kissen v. Collector of Jaunpore*,¹⁰ which affirmed the decision of the **Allahabad High Court** in *Shan-*

48. Per Mookerjee, J., referring order in *Satish Chandra v. Ahara Prasad*, (1907) 34 Cal. 403 (411).

49. (1904) 8 C.W.N. 621.

50. (1899) 4 C.W.N. 237.

1. (1905) 1 C.L.J. 76 n.

2. (1903) 31 Cal. 150.

3. (1867) 4 Bom.H.C. 206.

4. (1898) 23 Bom. 414.

5. (1891) 16 Bom. 23.

6. (1885) 7 All. 538.

7. (1886) 8 All. 140.

8. (1897) 20 All. 195.

9. (1899) 22 All. 66.

10. (1900) 23 All. 220 (P.C.).

kar Dat v. Radha Krishna,¹¹ appears to point in the same direction. In *Lalta Prasad v. Nand Kishore*, Sir Arthur Strachey, C.J., pointed out, that if the plaintiff appeared by pleaders, who were not duly instructed and able to answer all material questions relating to the suit, if they were instructed only to apply for an adjournment, there was in substance no appearance at all. In the same case, Mr. Justice Bannerjee, pointed out that there was a consensus of rulings in favour of the view, that the party represented by a pleader without instructions, must be deemed not to have appeared. The decision in the case of *Chirangi Lal v. Kundan Lal*,¹² is based upon its own special facts. The Madras decision in *Patinhare v. Vellur*,¹³ which relies on the Bombay case of *Ram Chandra v. Madhav*,¹⁴ may be logical in conclusion but the view was not accepted observing the impropriety of considering or deciding upon the merits of a case, when the Judge has no opportunity of hearing what the appellant has to say in support of it.¹⁵ In the Chief

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Court of the Punjab, the rule is settled that where a counsel has instructions to apply merely for an adjournment, if upon refusal of the application the case is not argued, there is no appearance within the meaning of the law.¹⁶ This current of authorities so carefully collected and dealt with by Mooker-

jee, J., was considered by the Full Bench as leaving no doubt as to the manner in which the questions submitted to Full Bench ought to be answered. It was held accordingly (1) that an application by a counsel or pleader, who is instructed only to apply for an adjournment, which is refused is *not* an appearance within the meaning of the Code.

(2) That where in such circumstances an appeal is dismissed, the dismissal is one for default so as to entitle the appellant to apply for re-admission.

(3) That the case of *Watson & Co. v. Ambika Dasi*,^{16-a} has been wrongly decided.¹⁷

2387. FAILURE TO DEPOSIT SECURITY.—According to the Madras High Court, an application to restore an appeal dismissed under R. 10 (2), O. 41, Civil Procedure Code, is governed by Art. 168, Limitation Act. Failure to furnish security for costs

11. (1897) 20 All. 195.

12. (1898) 20 All. 294.

13. (1902) 26 Mad. 267.

14. (1891) 16 Bom. 23.

15. *Mohesh Chandra v. Thakur Das*, (1873) 20 W.R. 425.

16. *Gurdit Singh v. Sohan Singh*, (1904) 6 P.L.R. 595.

16-a. (1899) 4 C.W.N. 237.

17. *Satish Chandra v. Aparna Prasad*, (1907) 34 Cal. 403=11 C.W.N. 329 (F.B.).

comes under the general description of "want of prosecution".¹⁸ The **Calcutta High Court** has expressed a doubt whether such an application would fall under Art. 168 of the Limitation Act. A Judge has jurisdiction to re-admit an appeal dismissed by an order under cl. (2), R. 10, O. 41, Civil Procedure Code. Even if Art. 168 of the Limitation Act does not apply to an application for restoration of an appeal dismissed under R. 10, O. 41, Civil Procedure Code, such an application ought to be made within a reasonable time, and ordinarily would be too late if made after thirty days from the date of dismissal.¹⁹ The **Judicial Committee** have held that an appeal although it may have been rejected by the appellate Court, upon failure by the appellant to furnish security demanded under S. 540 (old Code), may be restored on sufficient grounds, at the Court's discretion.²⁰ The **Allahabad High Court** considers that the Court granting time to furnish security for costs has jurisdiction to review the order rejecting the appeal and to extend time for filing security for costs.²¹ But this view is not shared by the **Madras High Court** in *Srinivasan Pillai v. Rukmani Ammal*,²² where it is observed that the power of the Court to restore the appeal which has been rejected upon default in furnishing security demand from an appellant under O. 41, R. 10, and sub-R. (2) of that rule, may be derived in two ways: (a) by reviewing the order of rejection under O. 47, R. 1; and (b) by applying the corresponding provision contained in O. 25, R. 2, for the restoration of a suit, by force of S. 107 (2) of the Code. As regards the power to review, the words "*other sufficient cause*" in R. 1, O. 47, would not include such a ground as an explanation of default of appearance,²³ as these words must mean something *ejusdem generis* with what precedes them.²⁴ It may be an open question whether in such circumstances the order could be reviewed but the order restoring the appeal may be justified upon the second ground.²⁵

2388. FAILURE TO DEPOSIT COST OF PAPER-BOOK, OR TO PAY COURT-FEE.—Order 41, R. 19, Civil Procedure Code applies only when the dismissal has been under any of

18. *Sirur v. Mythili Ammal*, 1932 Mad. 170=61 M.L.J. 688=136 I.C. 45=1931 M.W.N. 1124=34 M.L.W. 783.

19. *Goljan Bibi v. Nafar Ali*, (1917) 40 I.C. 234 (Cal.).

20. *Balixant Singh v. Daulat Singh*, (1886) 8 All. 315=13 I.A. 57 (P.C.).

21. *Sundar v. Habib Chick*, (1920) 42 All. 626=18 A.L.J. 820.

22. 1928 Mad. 964=55 M.L.J. 330=28 M.L.W. 358=1928 M.W.N. 701.

23. *Ramaraghava Reddi v. Rajah of Venkataqiri*, 1927 Mad. 355.

24. *Chajju Ram v. Neki*, 1922 P.C. 112=3 Lah. 127=49 I.A. 144 (P.C.).

25. *Srinivasan v. Rukmani*, 1928 Mad. 964=55 M.L.J. 330.

the Rules, R. 11, sub-R. (2), or R. 17, or R. 18, specified therein.²⁶

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In *Ramhari Sahu v. Madan Mohan Mitter*,²⁷ where the appellant in an appeal from an original decree has failed to deposit the estimated amount of costs for the preparation of the paper-book, and the appeal was dismissed under R. 17 of the High Court Rules, Part II, Chap. VIII, it was held that an application for re-admission of the appeal made on behalf of the appellant was not an application for review of judgment, and it was not one under S. 558, (old Code), now O. 41, R. 19, Civil Procedure Code; and consequently it was not barred under Art. 168 of the Limitation Act, the law of limitation not applying to an application under the Rules of the High Court. This has been overruled in the **Full Bench** case of *Fatimunnissa v. Deoki Pershad*,²⁸ where it has been held that a decree of a division Bench of the High Court, dismissing an appeal for default in depositing the estimated costs of preparation of the paper-book under R. 17 of the High Court Rules, Part II, Ch. VIII, can only be set

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aside by an order on an application for review. **A Full Bench of the Rangoon High Court** has held that R. 9 (2), Appellate Side Rules of Procedure of the Rangoon High Court is *ultra vires* in so far as it prescribes a period of limitation less than that prescribed in Art. 168 of the Limitation Act.²⁹ It was observed that there is no distinction in principle or substance between an appeal dismissed on the day fixed for the hearing for default in payment of process fee under O. 41, R. 18 and an appeal dismissed before the hearing for default in payment of process-fee or of the costs of preparing the paper-book. They stand upon the same footing and cannot be differentiated and an application to restore an appeal in the one case is *ejusdem generis* with similar applications in the other cases. In each instance the appeal is dismissed for want of prosecution and to an application to restore any such appeals **Art. 168, Limitation Act applies.**³⁰

26. *Tarachand v. Anand Chander*, (1868) 10 W.R. 450 (451)=2 B.L. R.A.C. 110; also see *Peary Choudhury v. Sonoory Dass*, (1915) 27 I.C. 628 (629)=19 C.W.N. 419 (Inherent jurisdiction of Court to remedy its own procedure, where it has been misled in awarding a consent decree obtained fraudulently); and *In re Bisharat Hussain*, (1898) A.W.N. 155 (156) (Dismissal under R. 43-A of the High Court rules, application under S. 558, Civil Procedure Code, 1882, O. 41, R. 19, held not maintainable); also see *Krishnasami v. Chengalroya*, 1924 Mad. 114=45 M.L.J. 813 (No inherent power to restore an appeal dismissed for default).

27. (1895) 23 Cal. 339.

28. (1896) 24 Cal. 350 (354)=1 C.W.N. 21 (F.B.).

29. *Abdul Gunny v. Russel*, 1930 Rang. 228=8 Rang. 380=127 I.C. 161 (F.B.).

30. *Ibid.*, 1930 Rang. 228 (231) (F.B.); Diss. *Ramhari Sahu v. Madan Mohan Mitter*, (1896) 23 Cal. 339.

The **Patna High Court** takes the view that when the appellant fails to put in the deficit Court-fee on the memorandum of appeal, the order dismissing an appeal for default is an order rejecting the memorandum of appeal. It is therefore a "decree" under S. 2 (2) and **does not fall under O. 41, R. 19**, applicable to cases under O. 41, R. 11 (2), 17 or 18, Civil Procedure Code.³¹ An appeal dismissed for failure to deposit printing costs **may be restored on an application for review**, although not under O. 41, R. 19, Civil Procedure Code. However, S. 151, Civil Procedure Code is not applicable where another remedy is open.³² An order dismissing a memorandum of appeal on the ground that it is insufficiently stamped, is open to review under O. 47, R. 1, Civil Procedure Code, and no application for restoration of the appeal can in such a case be made under R. 19 of O. 41 of the Code. The proper procedure, according to the Patna High Court, is by way of application for review bearing Court-fees prescribed for such application.³³

The **Madras High Court** has held that R. 105 of the Appellate Side Rules of the High Court directing dismissal of an appeal for default of prosecution if any of the papers mentioned therein have not been printed owing to the appellant's failure to make the necessary deposit therefor, is covered by S. 37 of the Letters Patent, and is not *ultra vires*. The rule does not contravene the provisions of the Code of Civil Procedure by limiting the right of appeal conferred by S. 100 nor is it at variance with the provisions of O. 41 as to the manner of disposal of an appeal.³⁴ Order 41, Rr. 17 and 19 are exhaustive in respect of cases where an appellant has made default in appearance in an appeal, and the Court has no inherent power under S. 151, Civil Procedure Code, or otherwise, to restore an appeal dismissed in default.³⁵

2389. STARTING POINT OF LIMITATION.—Time runs under Art. 168 of the Limitation Act, from the date of dismissal, irrespective of any considerations applicable to the case. The period of thirty days for an application for restoration of the

31. *Surajpal Pandey v. Utam Pandey*, (1922) 1922 Pat. 281=6 P.L.J. 625=63 I.C. 99.

32. *Anant Potdar v. Mangal Potdar*, 1926 Pat. 27 (28)=4 Pat. 704=91 I.C. 483.

33. *Sirdar Singh v. Christian*, (1920) 55 I.C. 502 (Pat.).

34. *Kcepilacheri Parkum v. Vecnathankandiyil*, (1915) 31 I.C. 75=2 L.W. 999=18 M.L.T. 383=1915 M.W.N. 817=29 M.L.J. 784.

35. *Krishnasami Naidu v. Chengalroya Naidu*, 1924 Mad. 114=45 M.L.J. 813; cf. *Debia Baksh Singh v. Habib Shah*, (1913) 35 All. 331=40 I.A. 151=19 I.C. 526=25 M.L.J. 148 (P.C.); Not followed *Sona Bai v. Shivaji Rao*, (1920) 45 Bom. 648=23 Bom.L.R. 110=1921 Bom. 20=60 I.C. 919—Section 151 applied under circumstances of the case).

Enlargement of time. appeal cannot be enlarged, under provisions of S. 5 of the Limitation Act.³⁶ And S. 6 of the Limitation Act is also inapplicable to an application under O. 41, R. 19 of the Civil Procedure Code.³⁷ Nor can the period of thirty days be got over by treating the application as one for the Court's exercise of its inherent jurisdiction under S. 151, Civil Procedure Code,³⁸ or by treating the application as one for review.³⁹ Where specific procedure is provided in the Code which the party neglected to avail himself of, S. 151 cannot be invoked in his aid.⁴⁰ Accordingly, where a suit is dismissed for default and the plaintiff fails to make an application for restoration within thirty days from the date of dismissal, the Court has no power to set aside the dismissal in the exercise of its inherent powers.⁴¹ Similarly, the Court would not in such a case exercise its inherent powers to help the appellant as this would be amounting to overriding an express statutory provision in S. 3 of the Limitation Act.⁴² But, the **Bombay High Court** takes the view that it is open to the Court in exercise of its inherent powers to deal with these applications under S. 151, Civil Procedure Code, and to make an order to that effect for the ends of justice or to prevent abuse of the Court, without any reference to the period of limitation fixed.⁴³

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
169.	For the rehearing of an appeal heard <i>ex parte</i>	Thirty days.	The date of the decree in appeal or, where notice of the appeal was not duly

36. *Krishnasami v. Chengalroya*, 47 Mad. 171=76 I.C. 886=1924 Mad. 114; *Ma Seni v. S. T. R. M. Firm*, 1933 Rang. 96=142 I.C. 185; *Devi Das v. Anant Ram*, 91 I.C. 168 (Lah.); *Mahi v. Jiwan*, 141 P.R. 1879; *Ramlal v. Natha Singh*, 45 P.R. 1882; *Maurā Khan v. Sobha Singh*, (1890) A.W.N. 196, etc.

37. *Sonubai v. Sivajirao*, (1921) 60 I.C. 919=45 Bom. 648=1921 Bom. 28 (Section 151, Civil Procedure Code, may be used for the ends of justice or to prevent abuse of the Court).

38. *Bissamal v. Kesar Singh*, (1920) 1 Lah. 363=58 I.C. 789; *Khairati v. Umar Din*, (1921) 66 I.C. 270; *Joshi Sahib v. Jhiri Guria*, (1923) 46 All. 144=1924 All. 446; *Narayana Chettiar v. Muthu Chettiar*, 1926 Mad. 980=51 M.L.J. 219 (226); cf. *Mt. Gauran v. Brij Raj*, (1919) 51 I.C. 607 (Punj.).

39. *Manphul Singh v. Hamid Ali*, 1923 All. 576.

40. *Shib Prakash Joshi v. Jhinguria*, 1924 All. 446=46 All. 144.

41. *Dunichand Gokalchand v. Pritamdas*, (1925) 86 I.C. 256.

42. *Devidas v. Anant Ram*, (1925) 91 I.C. 168 (Lah.).

43. *Sonubai v. Sivaji Rao*, (1921) 60 I.C. 919=45 Bom. 648, *supra*.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run. served, when the appellant has knowledge of the decree.
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SYNOPSIS.

- 2390. Corresponding provision.
- 2391. Scope and application.
- 2392. Starting point of limitation.

NOTES.

2390. CORRESPONDING PROVISION.—This article corresponds to Art. 169 of Act XV of 1877, which had the words “in the absence of the respondent” after the word “*ex parte*” in the first column. In the third column that article had only the words “the date of the decree in appeal”. Act IX of 1871 had no corresponding provision.

This article is analogous to Art. 164, which applies to suits heard *ex parte*. See notes under headings “Decree passed *ex parte*”, “Service of summons”, “Knowledge of decree” and “Period of Limitation”.

2391. SCOPE AND APPLICATION.—This article contemplates applications under O. 41, R. 21, Civil Procedure Code (old S. 560, Civil Procedure Code, 1882), for the re-hearing of an appeal heard *ex parte*.

An application to the appellate Court by a defendant, who was not duly served with summons in the lower Court and who, has not appealed to set aside the *original* decree under O. 9, R. 13 (S. 108, Civil Procedure Code, 1882) is, for purposes of limitation governed by Art. 164, and not Art. 169, Limitation Act.⁴⁴

This article can have no application where a respondent had no notice of an appeal. Where an appeal was heard *ex parte* by a lower appellate Court and the decree of the Court of first instance reversed in the absence of the respondent, on whom notice of appeal had not been duly served, and who was not aware of the proceedings till after the time for applying for a re-hearing had expired, it was held that the High Court had power to interfere in second appeal.⁴⁵ Under this article where notice had not been served, limitation for an application for re-hearing the appeal dates from the time when the applicant had knowledge of the decree.⁴⁶ But where on death

44. *Sankara v. Subraya*, (1907) 30 Mad. 535=17 M.L.J. 436.

45. *Balaji Ram v. Sitabhoy*, (1896) 19 Mad. 414.

46. *Daulat Rai v. Jagat Ram*, 96 P.R. 1918.

of appellant his appeal was dismissed in default, it was held that a dead man is not a defaulter within Art. 169, Limitation Act, and that in such a case his representative can get the usual period of six months for applying to be brought on to the record, the order of dismissal for default being inappropriate and inoperative as a bar.⁴⁷

“Knowledge of decree” in Art. 169, as in Art. 164, *ante*, refers to knowledge of the *particular decree* in appeal.⁴⁸

2392. STARTING POINT OF LIMITATION.—In column 3, the words

“or, where notice of the appeal was not duly served when the applicant has knowledge of the decree”

are new, on the analogy of Art. 164, *ante*. Where the period pre-

scribed for making an application for
Enlargement of time. setting aside an *ex parte* decree has expired, the party aggrieved by the decree is **not entitled to ask for review of judgment.**⁴⁹ Where a notice of appeal was sent to a *sepoy* respondent without the intervention of his commanding officer and the *sepoy* received it without demur, he cannot subsequently urge in an application to set aside the *ex parte* decree, that he was not duly served, the notice not having been sent through his commanding officer.⁵⁰ Under this article, an application for re-hearing of an appeal heard *ex parte* in the absence of the respondent must be presented not later than thirty days from the date of the decree in appeal; and where such time has expired the Court has no discretion to extend the period.¹ Where an application for re-hearing of an appeal presented originally was made within time, but being defective was returned for amendment, and it was re-presented after amendment when the period of limitation had expired, it was held that the amendment related back to the date of original presentation.² If the period of thirty days under Art. 169 has expired, the bar cannot be got over by treating the application as one for the exercise of the Court’s inherent powers under S. 151 of the Civil Procedure Code.³ Section 6 of the

47. *Daulat Rai v. Jagat Ram*, 96 P.R. 1918=47 I.C. 962; also see and cf. *Gyanammal v. Abdul Husain Sahib*, 1931 Mad. 813 (All the rules in the Code relative to service of defendants and respondents are intended to carry out the cardinal principle of administration of civil justice that no decree shall be made against a party behind his back).

48. See notes under Art. 164.

49. *Santu v. Arjun Das*, (1912) 13 I.C. 318=131 P.W.R. 1912; cf. *Lal Devi v. Amar Nath*, 57 I.C. 15 (Lah.), etc., see notes under Art. 164.

50. *Ibid.*

1. *Sher v. Mahan Singh*, (1885) 66 P.R. 1885.

2. *Shama Prasad v. Taki Mallick*, 5 C.W.N. 816 (817).

3. *Bissamal v. Kesar Singh*, (1920) 1 Lah. 363=58 I.C. 789. See notes under Art. 168, *ante*.

Limitation Act is not applicable to such cases, and the prescribed period cannot be enlarged by reason of the applicant's disability.⁴

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
170.	For leave to appeal as a pauper.	Thirty days.	The date of the decree appealed from.

SYNOPSIS.

2393. Corresponding provision.

2394. Scope and application.

NOTES.

2393. CORRESPONDING PROVISION.—This article is same as Art. 170 of Act XV of 1877. The corresponding provision in Art. 162 of Act IX of 1871, the period of limitation for an application “for leave to appeal as a pauper” was ninety days, commencing to run from “the date of the decree appealed against”. No corresponding provision was made in the Limitation Act, XIV of 1859, but the Code of Civil Procedure (Act VIII of 1859) contained S. 368, which enacted that

“the application to be allowed to appeal *in forma pauperis* . . . shall be presented in the appellate Court within the period allowed for the presentation of a memorandum of appeal”.

2394. SCOPE AND APPLICATION.—This article contemplates applications made under the Code of Civil Procedure, O. 44, R. 1 (S. 592, old Code). See observations made in connection with Art. 162, *ante*. O. 44, R. 1, Civil Procedure Code, has been held not to apply to appeals to Privy Council (O. 45, Civil Procedure Code).⁵

This article applies only to applications for *leave to appeal* as a pauper. Thus, an application for leave to file a petition of **cross-objections in *forma pauperis***, is not covered by the present article, although such an application can also be entertained under the Civil Procedure Code.⁶ Where an appeal was filed in the High Court long after thirty days had expired from the decision of the Court below, and on the report of the office as to the deficiency of the Court-fees, the appellant expressed his inability to pay the Court-fee and asked the Court to take the appeal in *forma pauperis*, it was held that the appeal having been filed beyond thirty days of the deci-

4. *Bissamal v. Kesar Singh*, 1 Lah. 363=58 I.C. 789; also see and cf. *Sonubai v. Sivajirao*, (1921) 60 I.C. 919=45 Bom. 648=1921 Bom. 20.

5. *Jagadanand Asram v. Rajendra Roy*, (1912) 17 C.L.J. 381; *Amba v. Srinivasa*, (1918) 42 Mad. 32; *Ramkishan v. Manna Kumari*, (1917) 3 P.L.J. 179.

6. *Gobinda Rani v. Radhaballabh*, (1910) 12 C.L.J. 173=15 C.W.N. 205; also *Chandra Kala v. Dulhin Raja*, (1928) 7 Pat. 827=1929 Pat. 31.

sion of the Court below could not be treated as an application for leave to appeal *in forma pauperis* and was barred by limitation.⁷ Similarly, where an appeal in a partition suit was presented to High Court on a Rs. 10 Court-fee stamp, but the memorandum of appeal was held insufficiently stamped, being chargeable with *ad valorem* stamp on the value of plaintiff's share, the plaintiff applied for leave to appeal *in forma pauperis*, it was held at the hearing of appeal, that the application for leave to appeal *in forma pauperis* having been presented beyond the thirty days allowed by Art. 170, Limitation Act, was barred by time.⁸ In *Mg. Wa Tha v. Abdul Gany Osman*,⁹ where an application to appeal *in forma pauperis* was made and was dismissed, and where the regularly stamped appeal was filed after the prescribed period of limitation had expired, it was held that though an unstamped memorandum of appeal accompanied the petition for leave to appeal *in forma pauperis*, the regular appeal could not be treated, for purposes of limitation, as having been presented on the day on which the application to appeal *in forma pauperis* was presented. Section 5 did not apply to extend the time for an application for leave to appeal as a pauper, but in computing the period of limitation prescribed for an appeal or for an application for leave to appeal as a pauper, where the decree appealed against was not signed until a date subsequent to the date of delivery of judgment, the intermediate period was excluded under S. 12 of the Limitation Act, where the delay in signing the decree had delayed the appellant or applicant in obtaining a copy of the decree.¹⁰ Under the present Code, however, the S. 5 is made applicable to such applications.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
171.	Under the Code of Civil Procedure, 1908, for an order to set aside an abatement.	Sixty days.	The date of the abatement.
172.	Under the same Code by the assignee or the Receiver of an insolvent plaintiff or	Sixty days.	The date of the order of dismissal.

7. *Gati v. Rachla Kunwar*, (1915) 29 I.C. 1003=13 A.L.J. 635.

8. *Mahadev Balwant v. Lakshman*, (1894) 19 Bom. 48 (An application for leave to appeal and the memorandum of appeal are two separate and distinct documents).

9. (1913) 18 I.C. 518=5 Bur. L. T. 294.

10. *Parbati v. Bhola*, (1889) 12 All. 79; also see *Bechi v. Ahsanullah*, 5 All. 461 (F.B.) (Held, that S. 5 of the Limitation Act cannot be applied in making the computation of time provided for by S. 12, and does not become applicable until after such computation has been made).

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
	appellant for an order to set aside the dismissal of a suit or appeal.		

SYNOPSIS.

2395. **Previous History.**
 2396. (1) Procedure under Code of 1882.
 2397. (2) Under the Present Code.
 2398-2402. **Scope and application.**
 2399. Order 21, Rr. 9 (2) and 11.
 2400. Suits under S. 92, Civil Procedure Code.
 2401. Death of party after final decree.
 2402. Death of party before suit.
 2403-2407. **Starting point.**
 2404. Date of abatement.
 2405. Sufficient cause for delay.
 2406. Revival of suit.
 2407. Minor representative.
 2408. **Scope of Art. 172.**

NOTES.

2395. PREVIOUS HISTORY.—Articles 171 and 172 of the present Act, together correspond to Art. 171 of Act XV of 1877 (as amended) which corresponded to Art. 171-C, of Act XII of 1879, as amended by Act VII of 1888, S. 66.

Act XV of 1877, as originally enacted did not contain any such provision. Applications under S. 371 of the old Code, corresponding to the present O. 22, R. 9, Civil Procedure Code, 1908, fell under the residuary Art. 178 (now Art. 181), Limitation Act. Article 171-C, was introduced into the Limitation Act by Act XII of 1879, which laid down as follows:—

“Under S. 371 of the same Code, for an order to set aside an *order* for abatement or dismissal—Sixty days—The date of the order for abatement or dismissal.”

This was further amended by Act VII of 1888, S. 66, and numbered as Art. 171, which stood as follows after the amendment:—

“Under S. 371 of the Code of Civil Procedure *or under that section* and S. 582, for an order to set aside an order for abatement or dismissal—Sixty years—The date of the order for abatement or dismissal.”

In *Bhoyrub Das v. Doman Thakoor*,¹¹ the **Calcutta High Court** held that upon the death of a sole plaintiff, if no application to revive is made within sixty days from the date of the plaintiff's death, the suit abates. But the Court may, under S. 371 of the Code of Civil Procedure (Act X of 1877), revive the

11. (1879) 5 Cal. 139.

suit, on the application of the legal representative of the plaintiff, within three years from the time when the right to apply accrues, if he can show that he was prevented by sufficient cause from continuing the suit. This decision must be deemed to be abrogated by

Art. 171-C as introduced by Act XII of 1879, and amended by Act VII of 1888, S. 66. Notwithstanding the provisions of

(i) **Procedure under Code of 1882.**

S. 365 of the Civil Procedure Code, 1882, and of the Limitation Act, 1877, it was held by **Bombay High Court**, that it was competent for a Judge in chambers to revive the suit by making an order for abatement under S. 366 of the Code, coupled with an order under S. 371 setting aside the order for abatement.¹² In the case of death of defendants S. 368 provided that

"when the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period".

There could be no application, under the old Code, by the plaintiff (or appellant), to set aside an order of abatement, under S. 368 after the death of a defendant (or a respondent). The order of abatement would be made in Court after the plaintiff (or appellant) had shown cause against it. Section 371, Civil Procedure Code (O. 22, R. 9), did not apply to the case in which a defendant or respondent died.¹³ Where an application under S. 372, Civil Procedure Code was rejected, the applicant was entitled to make the application within three years, as allowed by Act XV of 1877, Art. 178.¹⁴ Where a respondent died pending an appeal to the High Court in a suit for accounts of partnership, and an application to have a representative substituted for him on the record was not made within six months after his death, and no sufficient cause was shown, the Judicial Committee upheld the order of High Court, by which the appeal abated under S. 368 (as amended) and S. 582 of the Civil Procedure Code.¹⁵ Article 171 of the Limitation Act, 1877, applied only to applications by the legal representatives of a deceased plaintiff (or appellant) to set aside an order of abatement under S. 366 only, or by the legal representative of an insolvent plaintiff (or appellant) to set aside an order of dismissal under S. 370 of the Code. The present Civil Procedure Code, (Act V of 1908), does not contemplate an order

(ii) **Under the present Code.**

of abatement being passed by a Court. The suit abates *ipso facto* after the death of a

12. *Fulzahu v. Goculdas Valabdas*, (1885) 9 Bom. 275; also see *Ram Protap v. Lal Chand*, 9 C.W.N. 369 (370) and *Lachmi Narain v. Md. Yusuf*, 42 All. 540 (541) (Application to set aside abatement beyond six months: but within eight months of death of party: procedure to declare abatement, and then to set aside abatement, thus reviving the suit).

13. *Suri Bhatta v. Sitarama Bhatta*, (1883) 7 Mad. 195.

14. *Benode Mohini v. Sharat Chander*, (1882) 8 Cal. 837.

15. *Raj Chunder Sain v. Gangadas Seal*, (1904) 31 Cal. 487 (P.C.).

sole plaintiff (or sole appellant) or of a defendant (or respondent) if the application is not made within the time allowed by Arts. 176 and 177 of Limitation Act. *See* O. 22, Rr. 3 and 4, Civil Procedure Code, 1908. There is no question of demanding or not demanding an abatement, as an abatement takes place *ipso facto* if the representative is not impleaded in time.¹⁶ The **Allahabad High Court** has held that whether or not a formal order to that effect is passed, a suit or appeal abates automatically when no application is made within time to bring upon the record the representative of a deceased plaintiff or appellant. If no formal order has been made, an application for substitution must be considered as an application under O. 22, R. 9 (2) of the Code of Civil Procedure.¹⁷ Order refusing to set aside the abatement of an appeal, is appealable under S. 10 of the Letters Patent.¹⁸ The scope of S. 371 (O. 22, R. 9, Civil Procedure Code) of the Code of 1882 was enlarged so as to include the plaintiff also; so that under the new Code (O. 22, R. 9):

“the plaintiff, or the person claiming to be the legal representative of a deceased plaintiff, or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal”.

The provisions of S. 5, Limitation Act, shall apply to applications under sub-R. (2) of R. 9, O. 22, Civil Procedure Code. If an application is made within sixty days, the Court has the power under S. 5 of the Limitation Act to admit the application after the expiry of that period, if the applicant satisfies the Court that he had sufficient cause for not making the application within sixty days. *See* sub-R. (3). The Limitation Act of 1908, has split up the old Art. 171, which is now replaced by Art. 171 referring to applications for an order to set aside an abatement; and Art. 172 referring to applications by the assignee or the receiver of an insolvent plaintiff (or appellant), for an order to set aside the dismissal of a suit (or an appeal). (*See* Mitra's Limitation Act, Vol. II, p. 1882.)

2398-2402. SCOPE AND APPLICATION.

2399. (1) This article refers to applications for an order to set aside an abatement, under O. 22, Rr. 9 (2) and 11, Civil Procedure Code, 1908. These rules apply to both suits and appeals,
- (i) Order 22, Rules 9 (2), 11.

16. *Ram Gopal v. Harkishen*, 1925 Lah. 598=7 L.L.J. 517 (519).

17. *Lachmi Narayan v. Muhd. Yusuf*, (1920) 42 All. 540=59 I.C. 903=18 A.L.J. 688; Approved in *Churya v. Baneshwar*, 1926 All. 217=24 A.L.J. 369 (F.B.) (*Held*, that in order to work abatement of a suit or appeal it is not necessary for the Court to pass any order).

18. *Sadiq Ali v. Anwar Ali*, (1922) 45 All. 66; also see *Sarat Chandra v. Maihar Stone and Lime Company*, (1922) 49 Cal. 62=67 I.C. 917=1922 Cal. 335 [An order setting aside the abatement of a suit is a “judgment” within the meaning of Cl. (15) of the Letters Patent].

but they do not apply to execution proceedings. (See R. 12 of O. 22, Civil Procedure Code). Accordingly a pending execution proceeding does not abate by reason of the death of any of the joint decree-holders¹⁹; and any appeal arising out of an order passed in the course of proceedings in execution of a decree or order does not abate on the death of a respondent if the appellant fails to apply to make the legal representative of the deceased respondent a party to the appeal within time prescribed by law.²⁰

Where within the time limited by law no application is made under R. 3, sub-R. (1), the suit shall abate so far as the deceased plaintiff is concerned; similarly, where within the time limited by law no application is made under R. 4, sub-R. (1) the suit shall abate as against the deceased defendant. These applications are to be made within the time as prescribed in Arts. 176 and 177 of the Limitation Act, *viz.*, 90 days, from "the date of the death of the deceased plaintiff or appellant", or from "the date of the death of the deceased defendant or respondent, respectively. This time can, under no circumstances be extended. If no such application is made within the aforesaid period, the suits abates²¹; and *after* abatement, the only course open to the plaintiff is to make an application under R. 9, sub-R. (2) to have the abatement set aside.

Such an application should be made within 60 days from the date of the abatement, under Art. 171, Limitation Act, but the Court may entertain the application even after 60 days if sufficient cause is shown under S. 5 of the Limitation Act.²² Where an abatement is not set aside within the period of 60 days under Art. 171, or a period further extended by S. 5, Limitation Act, the suit or appeal is dead.²³

2400. (2) The rule of abatement does not apply to an action of a representative character. A suit
(ii) Representative suits—S. 92, C.P.C. under S. 92, Civil Procedure Code, 1908, (S. 539, Civil Procedure Code, 1882) does

19. *Bimbadhar v. Abdul Zalil*, (1929) 117 I.C. 165=1929 Pat. 200.

20. *Hakeem Syed Mohd. v. Fateh Bahadur Singh*, 1929 Pat. 565=10 P.L.T. 763 (F.B.).

21. *Sayad Mir Nawab v. Hardeo*, 60 P.R. 1911=12 I.C. 871; *Hadu v. Lala*, 41 P.R. 1915=21 I.C. 951; *Jamna v. Sarjit*, 67 P.R. 1919=52 I.C. 510; cf. *Daya Singh v. Buta Singh*, 118 P.R. 1916=38 I.C. 7 (Ignorance of death as a ground for setting aside the abatement).

22. *Lakhmi Chand v. Kachubhai*, 11 I.C. 559=35 Bom. 393; *Secretary of State v. Jowahir Lal*, (1914) 36 All. 235=25 I.C. 48; cf. *Bhani Ram v. Narain*, 31 I.C. 697=196 P.W.R. 1912 and *Kandasami v. Murugappa*, (1915) 26 I.C. 472 (Mad.) (Sufficient cause not shown).

23. *Sarat Chandra v. Maihar Stone and Lime Company*, (1921) 49 Cal. 62; *Raghubir v. Mt. Sohandevi*, (1925) 6 Lah. 233; *Ramgopal v. Harkishen*, (1925) 88 I.C. 478 (Lah.); *Qaim v. Nura*, (1925) 7 Lah. 73 and *Churya v. Baneswar*, (1926) 24 A.L.J. 369=1926 All. 217.

not abate ;

"it being a suit which is not prosecuted by any individuals for their own interest, but as representatives of the general public".²⁴

A representative suit, *e.g.*, a suit by a reversioner, filed by one or more persons under O. 1, R. 8, Civil Procedure Code, on behalf of themselves and others having the same interest in the suit, does not abate by the death of any plaintiff.²⁵ This view is held by the **Chief Court of the Punjab**,²⁶ and also by the **High Courts at Madras**,²⁷ and **Rangoon**.²⁸ The **Allahabad** decision to the contrary, in *Chhabildas v. Durga*,²⁹ is no longer binding in view of the Privy Council pronouncement above cited. Articles 171, or 176, or 177, do not apply to such suits.

2401. (3) A suit cannot abate between preliminary and final decree.³⁰ The Privy Council decision in *Lachmi Narain v. Balmukand*,³¹ has rendered obsolete the Madras and other rulings where the rule (O. 22, R. 3) had been applied to death of the plaintiff after the preliminary decree but before the final decree.³² The provisions of O. 22, R. 3, do not apply where a party dies after the final decree is passed. Thus, if *A* sues *B*, but the

24. *Raja Anand Rao v. Ramdas Dadurain*, 1921 P.C. 123=48 Cal. 493=48 I.A. 12 (P.C.).

25. *Krishnaswami v. Sitalakshmi*, (1918) 49 I.C. 268=1918 M.W.N. 888 (Application by reversioners).

26. *Gopidas v. Laldas*, 97 P.R. 1918; cf. *Ram Gopal v. Hari Kishen*, 7 L.L.J. 517.

27. *Parmeshwaram v. Narayan*, (1916) 40 Mad. 110; *Mahomed K. Rowther v. Naina Mahomed Rowther*, (1931) 54 Mad. 770; *Sayyed v. Dost*, (1924) 47 M.L.J. 745=1925 Mad. 244; *Krishnaswami v. Sitalakshmi*, 49 I.C. 268=1918 M.W.N. 888.

28. *Dooply v. Moola*, (1927) 5 Rang. 263=1927 Rang. 180.

29. (1915) 37 All. 296 (*Held*, that a representative suit abates by the death of one of the plaintiffs pending suit).

30. *Lakpati v. Daulat Singh*, (1927) 2 Luck. 464=101 I.C. 174=1927 Oudh 156; *Perumal v. Perumal*, (1928) 51 Mad. 701=112 I.C. 116=1928 Mad. 914 (F.B.); [*O. R. Subbarayadu v. Ramadasu*, (1922) 45 Mad. 872=68 I.C. 942=1923 Mad. 237]; also see *Utankalal v. Taraknath*, (1928) 48 C.L.J. 357; *Nazif v. Tamijaddu*, 1929 Cal. 430; *Dobinath v. Bissesar Das*, 1929 Nag. 206; *Bapu v. Golab Chand*, (1929) 116 I.C. 657 (N.).

31. (1924) 51 I.A. 321=4 Pat. 61=81 I.C. 747=1924 P.C. 198 (P.C.).

32. *Lakshmi v. Subbaramma*, (1916) 39 Mad. 488 (492)=29 I.C. 142; *Subbarayadu v. Ramadasu*, (1922) 45 Mad. 872=68 I.C. 942=1923 Mad. 237; *Seshamma v. Venkatrao*, 47 M.L.J. 235; *Natesa v. Kannammal*, (1924) 46 M.L.J. 181=78 I.C. 64=1924 Mad. 786; also see *Motilal v. Ram Narain*, (1917) 39 All. 551; *Jagarnath v. Ramkaran*, (1922) 20 A.L.J. 575; *Jungli Lal v. Laddu Ram*, (1919) 4 P.L.J. 250 (F.B.); *Bhutnath v. Tara Chand*, (1920) 25 C.W.N. 595 (Proceedings after preliminary decree not proceedings in execution).

suit is dismissed, and *A* dies after the dismissal, his legal representative may appeal from the decree without making any application under O. 22, R. 3, Civil Procedure Code, to be brought on record in place of the deceased.³³ In *Hemendra v. Fakir*,³⁴ where after a preliminary decree was passed on a mortgage, a compromise decree was passed which operated as a final decree, and the plaintiff died after the final decree, it was held that the legal representative could apply for execution under O. 21, R. 16, Civil Procedure Code, and there was no occasion for substitution. In all such cases the application for bringing the legal representative on the record will *not* be an application for setting aside an abatement within the meaning of Art. 171 of the Limitation Act, as no question of abatement would arise where a party dies after a final decree. It has been held in several cases that an action will not abate after judgment³⁵; and the benefit of the judgment goes to the legal representatives of a person obtaining it.³⁶ Section 365, Civil Procedure Code, 1877 (as amended by Act XII of 1879, S. 61), was held not to apply to the case of a sole plaintiff dying after decree, the right to sue being merged in the decree.³⁷ If a plaintiff dies after decree, his representatives are not bound to apply within 60 days to be made parties to the suit, but have the same time to file an appeal as the plaintiff would have had. The Civil Procedure Code, 1877, Ss. 363-365, and the Limitation Act, Art. 171, do not apply to the case of a plaintiff dying after decree.³⁸

2402. (4) But, where a defendant is found, after issue of summons, to have died before the filing of the
 (iv) **Death of party before suit.** complaint against him, the Court has no jurisdiction to decide the suit³⁹; and the plaint cannot be allowed to be amended by substituting the names of the representatives of the deceased, even when the suit is instituted *bona fide* and in ignorance of the death of the defendant.⁴⁰ Where the suit originally as instituted is not merely against a wrong person, but against no person at all, the plaint when amended by substituting the name of his son, is a new suit against a new defendant, and the

33. *Ramanada v. Minatchi*, (1881) 3 Mad. 236.

34. (1923) 50 Cal. 650=74 I.C. 929=1923 Cal. 626.

35. *Muhammad Husain v. Ghughalo*, (1886) 9 All. 131 (F. B.); *Gopal Ganesh v. Ramchandra*, (1902) 26 Bom. 597; also see *Paramen v. Sundararaja*, (1902) 26 Mad. 499 and *Murugappa v. Ponnusami*, (1921) 44 Mad. 828.

36. *Jogendra v. Rasik Chandra*, (1905) 2 C.L.J. 544.

37. *Cally Churn Mullick v. Bhuggobutty Churn*, (1879) 5 C.L.R. 108.

38. *Ramanada Sastri v. Minatchi Ammal*, (1881) 3 Mad. 236.

39. *Mohun Chunder Koondoo v. Azeem Gazeem*, (1869) 12 W.R. 45 (Deduction of limitation in a *bona fide* suit against the dead).

40. *Veerappa Chetty v. Tindal Ponnen*, (1907) 31 Mad. 86.

case is not one of substitution at all.⁴¹ Similarly, where the sole defendant to a suit dies before decree, a decree passed against him on the supposition of his being still alive, is incapable of being executed.⁴² Likewise, it is open to the representatives of a judgment-debtor to object to execution of a decree on the ground that the judgment-debtor was dead at the time the decree was made against him, and that the decree was, therefore, a nullity.⁴³ An application for a final decree with a note about the death of the judgment-debtor and with his widow as the defendant in the petition, when the judgment-debtor had died even before the passing of the preliminary decree, cannot be treated as an application to set aside the abatement as the Court has no jurisdiction to set aside such an application.⁴⁴

2403-2407. STARTING POINT OF LIMITATION.

2404. (1) The starting point of limitation under Art. 171, is the date of abatement. A **Full Bench**

(i) Date of abatement.

of the Allahabad High Court has held that in order to work abatement of a suit or appeal it is not necessary for the Court to pass any order.⁴⁵ In the case of *Lachmi*

Automatic abatement.

Narayan v. Muhd. Yusuf,⁴⁶ Walsh, J., held

"whether or not a formal order to that effect is passed a suit or appeal abates automatically when no application is made within time to bring upon the record the representative of a deceased plaintiff or appellant".

The **Lahore High Court** also takes the view that abatement is automatic after the ninety days have expired and unless that abatement be set aside on an application presented within sixty days or a period further extended in virtue of S. 5 of the Limitation Act, the suit or appeal is dead.⁴⁷ This agrees with the view of the **Calcutta High Court** in *Sarat Chandra v. Maihar Stone and Lime Co., Ltd.*⁴⁸ The **Patna High Court** accepts the Allahabad decision

41. *Ram Pratab v. Gauri Shanker*, (1922) 25 Bom.L.R. 7 (11)=1924 Bom. 109 (111).

42. *Roop Narain Singh v. Ramayee Singh*, (1878) 3 C.L.R. 192.

43. *Jungli Lall v. Laddu Ram*, (1919) 50 I.C. 529=4 P.L.J. 240 (F.B.).

44. *Seshamma v. Yeeranki*, 1924 Mad. 713=80 I.C. 397=34 M.L.T. 196=19 M.L.W. 608=47 M.L.J. 235.

45. *Churya v. Baneshwar*, 1926 All. 217=24 A.L.J. 369=93 I.C. 313=48 All. 334 (F.B.) [O.R. 44 All. 459=1922 All. 209].

46. (1920) 42 All. 540=18 A.L.J. 688; cf. *Gujrati v. Sital Misir*, 44 All. 459=1922 All. 209; Relied on *Secretary of State v. Jawahirlal*, (1914) 36 All. 235=12 A.L.J. 299.

47. *Qaim v. Nura*, 1926 Lah. 234=7 Lah. 73=94 I.C. 422; also see *Raghubir Saran v. Sohan Devi*, 1925 Lah. 381; *Ram Gopal v. Harkishen*, 1925 Lah. 598 and *Badul v. Naraini*, 74 I.C. 17=1924 Lah. 424.

48. 1922 Cal. 335=49 Cal. 62 (65, 67).

in *Lachmi Narayan v. Muhammad Yusuf*^{48-a} as sound.⁴⁹ It was observed that

"when a respondent dies and no substitution is made within the period prescribed by law, the appeal abates automatically, under the provisions of O. 22, R. 4, and the application which is filed after the abatement of the appeal must be an application for setting aside the abatement and then for substitution".

2405. (2) If no application is made within sixty days the Court may under S. 5 of the Limitation Act admit the application if the applicant satisfies the Court that he had sufficient cause for not making the application within sixty days. [O. 22, R. 9 (3).] Under sub-cl. (2) of O. 22, R. 9, an abatement is to be set aside when it is proved that the plaintiff was prevented by sufficient cause from continuing the suit.⁵⁰ Mere ignorance of the factum of death is not a sufficient cause under O. 22, R. 9, Civil Procedure Code.¹ Similarly, distant residence of parties is not necessarily a sufficient cause.² Where an application is made to excuse delay for not bringing the legal representative in time, the Court should consider whether the ignorance of the death was justified and affords sufficient cause for the belated application.³ If the mistake or carelessness is real and unintentional and no damage has been done to the other side that cannot be repaired by costs, or otherwise, the application must be granted. If on the other hand, the negligence is culpable, or there are *mala fides* on the part of the applicant, or irreparable hurt would result to the other side the application must be dismissed.⁴ The question of sufficient cause, in each case, is to be determined with reference to the facts of the particular case.⁵

Illustrations.

(1) Where the legal representatives of a deceased defendant were under the impression that the co-defendant was prosecuting the appeal and challenging the validity of the entire decree, they could not be blamed for their omission to take early steps to have themselves brought on the record.⁶

(2) Where the appellant was an ignorant milkman without any previous experience of litigation and pleaded his ignorance of his duty to substitute the legal representative of the deceased respondent though he was

48-a. (1920) 42 All. 540=18 A.L.J. 688.

49. *Hari Saran Singh v. Mohd. Eradat*, 85 I.C. 1010=2 P.L.R. 279=1925 Pat. 162; Relied on 42 All. 540=59 I.C. 903=18 A.L.J. 688.

50. *Mt. Bibi Khozaima v. The Official Liquidator*, 1923 Pat. 417=(1922) 2 Pat. 168 (170).

1. *Chunni Lal v. Kala Khan*, 1922 Lah. 61=4 L.L.J. 171.

2. *Munshi Ram, etc. v. Radhakishen*, 1924 Lah. 461=6 L.L.J. 192.

3. *Gopalaswami v. Ramachandra*, 1923 Mad. 603=44 M.L.J. 409.

4. *Ramachandra v. Sabapathy*, 1928 Mad. 404=54 M.L.J. 234=108 I.C. 288=27 M.L.W. 756.

5. *Muht. Mohsin v. Muht. Abid*, 91 I.C. 560 (Mad.).

6. *Chandra Kumar Majhi v. Sandhyamani*, (1909) 36 Cal. 418.

warned of the respondents death, it was held that in the circumstances of the case, the delay was *bona fide* and that sufficient cause was shown within the meaning of S. 5 of Limitation Act.⁷

(3) Where the deceased respondent had no stationary residence and the appellants and the respondents were living at a long distance in two different native states, it was held that there was sufficient cause for not applying in time.⁸ Similarly, where a legal representative living in a different province remained long in ignorance of the death, the delay was excused.⁹ But, residence in different districts, and about 200 miles distant one from the other, was not held to be a sufficient reason in itself for failing to make the application for a period of over 3 years in one case, and nearly nine months in the other.¹⁰

2406. (3) If the abatement is set aside the suit or appeal is revived, where the right to sue survives.

(iii) **Revival of suit.** However, if application to revive suit is by a person whose claim is not dependent on the original plaintiff's case, but in conflict with it, the right of suit cannot be said to survive to the applicant within the meaning of the sections of the Civil Procedure Code relating to abatement of suit, and the suit is taken as abated by the death of the plaintiff.¹¹ The representative of a deceased plaintiff can only prosecute the cause of action as originally framed, and the decree in his favour can only be attacked on grounds which were available to the unsuccessful party in the Court of first instance.¹² When a party to suit dies, a legal representative is appointed merely in order that the suit might proceed, and a decision be arrived at. It is the original parties' rights and disabilities that have to be considered and not those of the legal representatives.¹³ In cases of conflict of interests between the deceased plaintiff and the legal representative, the proper course for the legal representative is to file a separate suit to enforce his rights.¹⁴ However, in cases falling under R. 10 of O. 22, Civil Procedure Code, the Court has a wider discretion than in cases falling under R. 3, to allow amendments, and new pleas to be raised to avoid multiplicity of suits, provided the character of the suit is not thereby changed, and the opposite party is not prejudiced.¹⁵ In cases falling under O. 22, R. 3, a legal representative can only ask for such amendment

7. *Krishna Mohan Ghosh v. Surapati Banerji*, 1925 Cal. 684 (1)= 29 C.W.N. 472.

8. *Jowala Ram v. Harikishen Singh*, 1929 Lah. 429=5 Lah. 70.

9. *Raghunath Rai v. Radhakrishen Pannalal*, 1929 Lah. 634=119 I. C. 759.

10. *Munshi Ram v. Radhakishen*, 1924 Lah. 461.

11. *Shamchand v. Bhayaram*, (1894) 22 Cal. 92.

12. *Subbaraya v. Manika*, (1896) 19 Mad. 345.

13. *Gulli v. Sarwan*, 1924 Lah. 45=4 Lah. 72=74 I.C. 146=5 L.L.J. 482.

14. *Venkatarama v. Venkatalingama*, 1922 Mad. 49=(1921) 15 L. W. 72.

15. *Sundaresan Chettiar v. Viswanada Pandara*, (1922) 45 Mad. 703.

as the deceased, or the person whose representative he is, could have asked for.¹⁶ The **Patna High Court** is of opinion that an order for substitution of the legal representative, instead of one for setting aside the abatement is not maintainable,¹⁷ and the plaintiff, under the circumstances, could not be allowed the benefit of S. 5, Limitation Act. But, the **Bombay High Court** has held that the omission to set aside the abatement is a formal defect not affecting the merits of the order, and application after three months allowed by the Amending Act XXVI of 1920 was excused, as the application was made within six months, which was the period allowed by the Act of 1908.¹⁸

2407. (4) In the case of a minor son applying beyond time according to amended article for bringing his name on the record, it was held that the Court should have treated the application as one under O. 22, R. 9, and should not have rejected the application as being made under O. 22, R. 3, and so beyond time.¹⁹ Where on the death of a plaintiff, a minor applies to be brought on the record as plaintiff's legal representative, the analogy to be applied is that under O. 32, R. 3, Civil Procedure Code. The minor may apply in his own right to be brought on record as legal representative of a deceased plaintiff as an adult, but he must apply through a next friend.²⁰ In *Ramchandra v. Sabapathy*,²¹ where a suit was brought on behalf of the minor plaintiff by his mother acting as next friend and on the death of a defendant, a relation of the plaintiff and the next friend, no application was made within time allowed by the law to bring legal representative on the record, and the suit having abated as against the deceased under O. 22, R. 4, there was delay in making the application for setting aside the abatement due to the ignorance of minor's guardian, S. 5, Limitation Act, was applied liberally and the abatement was set aside.²²

2408. **SCOPE OF ART. 172.**—This article refers to applications by the Official Assignee or Receiver of the insolvent for an order to set aside the dismissal of a suit or an appeal. An assignee who has been substituted for the plaintiff may be called upon to deposit security for costs, if the Court sees fit to do so, at

16. *Venkatarama v. Venkatalingama*, (1922) 15 L.W. 72.

17. *Mt. Bibi Khozaima v. The Official Liquidator*, 1923 Pat. 417= (1922) 2 Pat. 168.

18. *Lakshmibai Jagannath v. Yeshwant*, 1922 Bom. 449 (1)=47 Bom. 92.

19. *Vijaysingh v. Shivaji Rao*, 1924 Bom. 416=26 Bom.L.R. 378.

20. *Ruckmani Ammal v. Veerasami Aiyangar*, 1924 Mad. 813=47 M. L.J. 370.

21. (1927) 54 M.L.J. 234=1928 Mad. 404.

22. *Ibid.*

any time before the hearing of the appeal.²³ The insolvency of the plaintiff, or appellant shall not cause the suit or appeal to abate; but, the assignee should be given time within which to continue the suit or appeal, and to give security for costs, if so ordered. On the expiry of the time fixed, if the assignee neglects or refuses to continue the suit or appeal, and to give such security, the *defendant may apply* for the dismissal of the suit or appeal on the ground of the plaintiff's or appellant's insolvency.²⁴ But, the order dismissing the suit, unless the Official Assignee elects on or before the given date to continue the suit, is not in proper form.²⁵ A notice ought to be given to the Official Assignee to appear and state his willingness or not to continue the suit or appeal.²⁶ There is no limitation provided for the Official Assignee to appear, and apply for substitution or for the debtor to appear and apply for the restoration of his name on the record after the adjudication is annulled, until an order is obtained under O. 21, R. 8 of the Civil Procedure Code the proceedings cannot abate and must be deemed to continue.²⁷ Where the Official Assignee adopts the proceedings instituted previous to the insolvency of the insolvent plaintiff, he is liable to give security for the costs of the suit already incurred and not for all costs incurred until its termination.²⁸ Where there has been only an application to declare the plaintiff to a suit an insolvent and a vesting order made, but proceedings are subsequently annulled, and the party is not declared either a bankrupt or an insolvent, the dismissal of the suit for the non-appearance of the plaintiff or the Official Assignee on the date fixed for hearing, is not a dismissal under S. 370 (O. 22, R. 8), Civil Procedure Code, but under S. 102 (O. 9, R. 8), Civil Procedure Code.²⁹ Until an order under O. 22, R. 8 (2) is obtained by the defendant for the dismissal of the suit or appeal, the action must be deemed to continue.³⁰ But, the Lahore High Court has taken the view that where the appellant has become insolvent and the Official Receiver

23. *Heera Lall Seal v. Carapiet*, (1870) 13 W.R. 431; also see *Ibrahim v. Abdur Rahiman*, (1875) 12 Bom. H. C. R. 257 (Under S. 106, Act VIII of 1859, a suit abated by insolvency of the plaintiff).

24. See S. 370, Act XIV of 1882.

25. *Lekhraj Chunilal v. Shamlal Narrandas*, (1892) 16 Bom. 404 (406) (Right form of order pointed out).

26. *Official Receiver v. Chidambaram*, (1920) 12 L.W. 551=61 I.C. 300=1920 M.W.N. 704; also see *Kissen Gopal v. Suklal*, (1926) 53 Cal. 844=1927 Cal. 76=98 I.C. 781=31 C.W.N. 22.

27. *Khunni Lal v. Rameshar*, (1921) 43 All. 621.

28. *Gulam Hussain v. Piarally*, 1926 Bom. 533=(1925) 28 Bom. L. R. 1074.

29. *Amritlal Mukerji v. Rakhali*, (1899) 27 Cal. 217 (219).

30. *Khunnilal v. Rameshar*, (1921) 43 All. 621; *Lekhraj Chunnilal v. Shamlal Narrandas*, *supra*; also see *Kissen Gopal v. Suklal*, *supra* and *Official Receiver v. Chidambaram*, *supra*.

declines to continue the appeal and to furnish security, the appeal abates, even without the respondents' application for dismissal.³¹ Article 172 deals with the setting aside of such a dismissal of the suit or appeal, and time runs, under 3rd column, from the date of the order of dismissal. This article makes no provision for a *defendant* becoming insolvent, which has been dealt with under S. 29, Provincial Insolvency Act, and S. 18 of the Presidency Towns Insolvency Act. The Official Receiver may be made a party to the suit, when the interests of the insolvent devolve on him. (*Vide* O. 22, R. 10, Civil Procedure Code.)

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
173.	For a review of judgment, except in the cases provided for by Art. 161 and Art. 162.	Ninety days.	The date of the decree or order.

SYNOPSIS.

2409. Previous History.
 2410. **Scope and application.**
 —Review of judgment—O. 47, R. 1.
 2411. **Starting point of limitation.**
 —Date of decree or order.

NOTES.

2409. PREVIOUS HISTORY.—Under Civil Procedure Code, Act VIII of 1859, S. 377, enacted that

“the application shall be made within ninety days from the date of the decree, *unless the party preferring the same shall be able to show just and reasonable cause*, to the satisfaction of the Court, for not having preferred such application within the limited period”

There was no corresponding article in the Limitation Act of 1859. The corresponding article, in Act IX of 1871, was Art. 164, which was re-enacted as Art. 173 of Act XV of 1877, with the addition of the words “except in the case provided for by No. 162,” in the first column, and the words “or order” in the third column. This has now been re-enacted as Art. 173, in the present Code, with the words “provided for by Art. 161 and Art. 162”, instead of the words “provided for by No. 162”.

2410. SCOPE AND APPLICATION.—Though this article does not say so expressly, it has been held that this article applies to applications for review of judgment, under O. 47, R. 1 of the Code of Civil Procedure, in respect of judgments of a Civil Court, not being judgments of a High Court in the exercise of its

31. *Mulchand-Ganga Kishen v. Downie & Co.*, 1928 Lah. 596=110 I.C. 910; *Reld. on Peary Mohun v. Narendra Nath*, (1910) 37 Cal. 229=5 I.C. 404=37 I.A. 27 (P.C.).

original jurisdiction (Art. 162), or of a Provincial Court of Small Causes (Art. 161), for which latter provision has been made in the schedule, giving a shorter period of limitation.³² The **Rangoon High Court** has held in *In the matter of L. W. Nasse*,³³ that Art. 173 of the Limitation Act is restricted to applications for review under the Civil Procedure Code. The provisions of the Civil Procedure Code, O. 47, R. 1, where the right of review is mentioned, omits the words "by this Code", which are to be found in S. 114 of the Code as regards review

"from a decree or order (a) from which an appeal is allowed *by this Code*, but from which no appeal has been preferred or (b) from which no appeal is allowed by this Code".

It is pointed out in *Kyone Hoc and Tsee v. Kyon Soon Sun*,³⁴ by the **Rangoon High Court** that the provisions of S. 261 of the Succession Act specifically lay down that where there is contention in dealing with application for Letters, the proceedings shall take as nearly as may be the form of a regular suit according to the provisions of the Code of Civil Procedure. The right of review given by the Code, under O. 47, R. 1, Civil Procedure Code, is a general one, and there is no reason for holding that it does not extend to orders passed in contested proceedings for the grant of Probate or Letters of Administration. An order refusing leave to sue as a pauper is subject to review, under Civil Procedure Code.³⁵ A Court can review as to costs any proper case.³⁶ An order rejecting an application for leave to appeal to His Majesty in Council comes within the description of orders contemplated in S. 114 of the Code of Civil Procedure, 1908, and is subject to review.³⁷ It is competent to the High Court to review judgments in appeals preferred under Cl. (15) of the Letters Patent, because decrees are passed in appeals heard under the Letters Patent only under the Civil Procedure Code,³⁸ and the word 'decree' or 'order' includes a judgment.³⁹ An application to amend a decree under O. 20, R. 6, Civil Procedure Code, is not an application for a review.⁴⁰ Article 173, Limitation

32. In the matter of *L. W. Nasse*, 7 Rang. 201=1929 Rang. 229; Diss. 3 Mysore Law Journal 124.

33. 7 Rang. 201=1929 Rang. 229.

34. 1925 Rang. 314=3 Rang. 261=91 I.C. 509.

35. *Adarji Edulji v. Mamikji Edulji*, (1880) 4 Bom. 414.

36. *Baja Sundar Das v. Jagannath*, 1922 Pat. 1=(1921) 6 P.L.J. 284.

37. *Nand Kishore Singh v. Ram Gulam Sahu*, (1912) 39 Cal. 1037; cf. *Lutf Ali Khan v. Asgur Reza*, (1890) 17 Cal. 455 (Order not a judgment within the meaning of Letters Patent).

38. *Venkata Subbarayadu v. Zemindar Garu*, (1915) 40 Mad. 651.

39. *Krishen Doyal v. Irshad Ali*, (1915) 22 C.L.J. 525.

40. *Darbo v. Kesho Rai*, (1887) 9 All. 364; *Shivappa v. Shivpanch*, (1886) 11 Bom. 284; *Kalu v. Latu*, (1893) 21 Cal. 259; *Joy Kishen v. Ataoor Rehman*, (1880) 6 Cal. 22; *Jivraji v. Pragji*, (1886) 10 Mad. 51.

Act applies to a case where a review (and not a new trial) is the appropriate remedy.⁴¹

2411. STARTING POINT OF LIMITATION.—Under

The date of the decree or order.

Art. 173, Limitation Act, 90 days is allowed to the petitioners for review from the date of decree or order, and the fact that the judgment-debtor had no knowledge of the order makes no difference.⁴² It is open to the judgment-debtor in such a case to apply under S. 5, Limitation Act, for an extension of the period of limitation if in fact he could prove that he had no knowledge.⁴³ The contention, that where the knowledge is after 90 days, there is no period prescribed by the Limitation Act, or Art. 181 of Limitation Act at most applies, is wrong.⁴⁴ The date of the decree or order means the date of judgment (*see* O. 20, R. 7, Civil Procedure Code). Section 12, Limitation Act applies to an application for review of judgment.⁴⁵ The judgment must be pronounced in open Court, and dated and signed by the Judge at the time of pronouncing it.⁴⁶ This rule does not apply to chartered High Courts (*see* O. 49, R. 3), or to the Chief Court of Oudh (U. P. Act, IV of 1925), or to the Court of Judicial Commissioner, North-West Frontier Province (S. 46, sub-cl. (2) of North-West Province Law and Justice Reg. VII of 1901). However in *Mahomed Akil v. Assadunnissa*,⁴⁷ the judgment or opinion written by a deceased Judge, or by a Judge who had left the Court was not treated as a valid judgment. A judgment signed, dated and delivered in the absence of the parties or their pleaders and without previous notice to them is not validly pronounced.⁴⁸ A practice of omitting to pronounce judgment in open Court is both inconvenient to the parties, and in direct opposition to an express provision of the law.⁴⁹ For the purposes of limitation it is impossible to hold that the date of judgment should be any other than that upon which judgment is pronounced in Court, when the parties know the effect of that judgment, whether it would be necessary for them to appeal or not.⁵⁰ Every day's delay in filing

41. *Darbo v. Kesho Rai*, (1887) 9 All. 364.

42. *Baldeo v. Sukhdas*, 1929 All. 485 (488)=121 I.C. 552; also see *Debi Dayal v. Ambika*, 1929 All. 545=119 I.C. 99.

43. *Ibid.*

44. *Debi Dayal v. Ambika Prasad*, 1929 All. 545=119 I.C. 99.

45. *Gangadhar v. Shekhar*, (1916) 35 I.C. 348=20 C.W.N. 967; cf. *Khurshed Alam v. Rehmatullah*, (1917) 43 I.C. 490 (All.) (*Terminus a quo* when two decrees bearing different dates are prepared).

46. *See* C. P. Code, O. 20, R. 3 (S. 202, old Code); also see *Bai Dabi v. Hargovandas*, (1906) 30 Bom. 455.

47. 9 W.R. 1 (F.B.).

48. *Kharak Singh v. Lachham Singh*, 1925 All. 293 (2)=(1924) 47 All. 332.

49. *Tarigopala Nagiah v. Komminai Seshamma*, 1921 Mad. 690=41 M.L.J. 385.

50. *Sagarmal v. Lachmisaran*, 1923 Pat. 129=(1922) 1 Pat. 771.

a petition for review of judgment has to be accounted for, and where the applicant had not done so by affidavit, his application was held time barred.¹

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
174.	For the issue of a notice under the same Code, to show cause why any payment made out of Court of any money payable under a decree or any adjustment of the decree should not be recorded as certified.	Ninety days.	When the payment or adjustment is made.

SYNOPSIS.

- 2412. Corresponding provisions.
- 2413-2416. Scope and application.
- 2414. (1) Payment pending execution.
- 2415. (2) Application by judgment-debtor.
- 2416. (3) Certification by decree-holder.
- 2417. Starting point of limitation.
- 2418. Fraud by decree-holder.

NOTES.

2412. PREVIOUS HISTORY.—There is no corresponding provision in Limitation Act XIV of 1859, or Act IX of 1871. Under the Code of Civil Procedure (Act VIII of 1859), there was no provision for application to Court by the judgment-debtor for recording the adjustment as certified. *See* S. 206, Civil Procedure Code, 1859. Under Act X of 1877, S. 258, the judgment-debtor was enabled to apply in a summary way to the Court for an order *directing the decree-holder to certify the agreement or adjustment*. Act XV of 1877, originally in its Art. 161 made provision for “applications for orders to compel decree-holders to certify under S. 258 of the Code”. This was amended by Act XII of 1879, which made the article applicable to applications for the issue of a notice under S. 258 of the Code of 1877. The period of limitation was only 20 days. The corresponding S. 258 of Act XIV of 1882 (Civil Procedure Code), provided that

“the judgment-debtor also may inform the Court of such payment or adjustment, and *apply to the Court to issue a notice to the decree-holder to show cause on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified*”.

By Act VII of 1888, S. 66, the time was extended to 90 days and the article numbered 173-A. This article referred to applica-

1. *Ramaswami v. Venkatanarasimha*, (1916) 32 I.C. 1000 (Mad.).

tions under S. 258 of Civil Procedure Code, 1882. The present article refers to O. 21, R. 2, Civil Procedure Code, 1908.

2413-2416. SCOPE AND APPLICATION.—Article 174 of the present Limitation Act refers to an application contemplated by O. 21, R. 2 (2), Civil Procedure Code, 1908.

Order 21, R. 2, in its cl. (1) says:—

“where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly”.

The legislature has made the rule applicable to “*the decree*” “*of any kind*”, and not merely “a decree under which money is payable”.² The **Bombay**,³ and **Calcutta**⁴ High Courts take the view that this rule is not restricted to decrees under which money is payable. The **Madras High Court**, however, takes the view that O. 21, R. 2, refers to a decree under which money is payable whether there are other reliefs or not, and if no money is payable under a decree, then R. 2 cannot be held to apply to such a decree. The decree may be a complex decree providing partly for payment of money and partly for other reliefs. This view holds that the words “*payable under a decree*” do not mean any money which the party may, if he chooses, pay, but money which is recoverable by a party in execution against the party liable to pay it⁵; and the words “*the decree*” are interpreted “decree of any kind under which money is payable”.⁶ The points of difference between old S. 258, and the present rule, as noticed in Mulla’s Civil Procedure Code are “*Firstly*, the words ‘of any kind’ have been inserted in sub-R. (1)” — “*Secondly*, in para. 3, of S. 258 the words ‘as a payment or adjustment or the decree’ followed the word recognised. These words have been omitted (*see* Sub-R. 3) to make it clear that the Court

2. *Baba Mahomed v. Webb*, (1881) 6 Cal. 786; s.c. 8 Cal. 36 (Under the corresponding S. 258, Civil Procedure Code, 1877) (*Held*, that S. 258 applied to the adjustment of any decree whatever may be the nature of relief granted by the decree); cf. *Sankaran Nambiar v. Kanara Kurup*, (1898) 22 Mad. 182 (*Held*, that S. 258 is not applicable to decrees for possession of immoveable property).

3. *Pavlo Gharry v. Kitter Philip*, 1922 Bom. 380=(1921) 46 Bom. 226 (*Held*, that the rule applies to the adjustment of any decree, as for instance, a decree for partition).

4. *Shaikh Niamat v. Shaikh Jalil*, 1928 Cal. 715=117 I.C. 833 (*Held*, that the words “of any kind” were added to give effect to the Calcutta view in 6 Cal. 786).

5. *Narayanaswami v. Rangaswami*, 1926 Mad. 749=49 Mad. 716=95 I.C. 731=50 M.L.J. 547=24 L.W. 235; Diss. *Pavlo Gharry v. Kitter Philip*, 1922 Bom. 380=(1921) 46 Bom. 226; also see *Ramkrishna v. Balakrishna*, (1919) 43 Mad. 476; *Abdul Latif v. Bathula*, (1914) 23 I.C. 530 (Mad.) and *Sethurama v. Chhatrajan*, (1917) 40 I.C. 820 (Mad.).

6. *Ibid.*

cannot recognise an uncertified payment or adjustment *for any purpose whatever*".

Sub-rule (2) of O. 21, R. 2 enacts
Mode of certifying. that

"the *judgment-debtor* also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause . . . why such payment or adjustment should not be recorded as certified."

The Court being given the power to record the same sub-R. (3) provides that

"a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree".

2414. The History of sub-R. (3) shows that the Codes of 1859 (S. 206) and 1877 (S. 258), provided that a payment or adjustment made out of Court should not be recognised by any Court *executing the decree* unless it had been certified to that Court. The Code of 1877 was amended in the year 1879, and the amendment provided that an uncertified payment or adjustment should not be recognised by *any Court*, and the same provision occurred in the Code of 1882.⁷ In the year 1888, the section was again altered, by providing that an uncertified payment or adjustment should not be recognised by any Court *executing the decree*, and this is the form in which the rule now stands.⁸ It would be noticed that as in the earlier Codes of 1859 and 1877, this provision applied only to proceedings which were taken while the decree was in execution.⁹ The corresponding rule [O. 21, R. 2 (2)] has been held applicable only when there is a pending execution in the Court. It has no application where the execution has come to an end.¹⁰ Similarly, O. 21, R. 2, Civil Procedure Code has no application to a decree for sale on a mortgage by which the mortgage money happens to be made payable by instalments.¹¹ The rule applies only to parties who stand in the relation of decree-holder and judgment-debtor at the date of payment or adjustment; that is to say, it applies only where a payment is made out of Court by a *judgment-debtor* to the decree-holder.¹² This article has no application where the

7. *Haji Abdul Rahiman v. Khoja Khaki Aruth*, (1887) 11 Bom. 6 (F.B.).

8. Mulla's Civil Procedure Code, O. 21, R. 2.

9. *Obhoy Churn v. Mt. Pearce Dossia*, (1874) 22 W.R. 270.

10. *Bhazani Dai v. Jitendranath*, 1929 Pat. 400.

11. *Ramji Lal v. Karan Singh*, (1917) 39 All. 532.

12. *Rama Ayyan v. Sreenivasa*, (1896) 19 Mad. 230; *Ponnusami v. Letchmanan*, (1912) 35 Mad. 659=12 I.C. 657 (Per Sundara Ayyar, J.); *Brajabashi v. Manik*, (1927) 31 C.W.N. 921=104 I.C. 4=1927 Cal. 694; *contra*, per Abdur Rahim, J., in 35 Mad. 659, *supra*.

decree-holder takes steps under O. 21, R. 2 (1) to report satisfaction *suo motu*.¹³

2415. Art. 74 of the Limitation Act relates to applications by the *judgment-debtor* under O. 21, R. 2, Civil Procedure Code, 1908. Under the corresponding S. 258, Civil Procedure Code, 1882, it was held that the section applied not only to judgment-

Application by judgment-debtor. debtors but to those claiming through them or in their right, and that an adjustment between the decree-holder and the judgment-debtor not certified within ninety

Application by representative of judgment-debtor. days was barred under Art. 173-A of the Limitation Act, 1877 (now Art. 174), and could not be set up as a bar to execution by one claiming through the judgment-debtor or in his right.¹⁴ An executing Court cannot recognise an adjustment out of Court which has not been recorded as certified, nor can it enquire into the judgment-debtor's allegations with respect to such an adjustment where the time allowed for an application under Art. 174, Limitation Act

Uncertified payment. has expired.¹⁵ Sub-rule (3) provides that an uncertified payment *shall not be recognised* by any Court executing its decree. The words "as a payment or adjustment of the decree" appearing in the old Code have been omitted, and under the present rule, the Court cannot recognise an uncertified payment or adjustment *for any purpose whatever*. It can no longer operate as a part-payment so as to extend the period of limitation for an application for the execution of a decree.¹⁶ The judgment-debtor may apply even if the decree is not drawn up.¹⁷ Even objections by the judgment-debtor to the decree-holder applying for execution may be treated as an application to certify the payment or adjustment; provided the objections are filed within ninety days of the payment or adjustment.¹⁸ Sub-rules (2) and (3) of R. 2, O. 21, should be read together, and so long as the

13. *Gopaldas v. Ganga Ram*, 1888 A.W.N. 115.

14. *Manickka Odayan v. Rajagopala Pillai*, (1907) 36 Mad. 537; also see *Mallikarjuna v. Narasimha*, (1901) 24 Mad. 412; *Hatem Ali v. Abdul Ghaffur*, (1903) 8 C.W.N. 102; *Baley Mahammad v. Aijanmai*, (1921) 35 C.L.J. 71.

15. *Sayyid Muhammad Nur v. Kolaw Pan*, (1914) 22 I.C. 963 (U.B.); *Mehbunnissa Begum v. Mehedunnissa Begum*, 1925 Bom. 309=49 Bom. 548 (552, 553) (F.B.); *Hiramony v. Musa Khan*, (1910) 7 I.C. 625 (Cal.); *Radhakant v. Mt. Parbati*, 1921 Pat. 135=63 I.C. 535=6 P.L.J. 337.

16. *Bhajanlal v. Chedalal*, (1914) 24 I.C. 215=12 A.L.J. 825; *Bireswar v. Ambika Charan*, (1918) 45 Cal. 630=42 I.C. 472; *Peare Mohan v. Raghunath*, (1928) 50 All. 259=107 I.C. 40=1928 All. 55.

17. *Giribala Dasi v. Biswambhar*, (1924) 40 C.L.J. 87.

18. *Badruddeen v. Gulam Moiddeen*, (1911) 36 Mad. 357 (360); also see *Ganga Dihal v. Ramoudh*, 1929 All. 79 (Applications under O. 21, R. 2 and R. 58 may be combined).

judgment-debtor applies under sub-R. (2) within the time allowed for him to do so, he has the right to have his application heard.¹⁹ Application by the judgment-debtor made six months after a payment, applying for deposit of balance and attaching a receipt for the previous payment and containing an endorsement of the subsequent payment by the decree-holder's pleader is not an application for recording and certifying the previous payment under O. 21, R. 2 (2), and even if it can be so regarded it is barred by limitation under Limitation Act, Art. 74.²⁰ Having regard to the provisions of R. 2, O. 21, Civil Procedure Code, and Art. 174, it is not open to a judgment-debtor to prove adjustment or satisfaction, if he did not take steps to have the same certified within a period of ninety days from the date on which the alleged payment or adjustment was made. This rule would apply whether the payment pleaded is sought to be proved against the decree-holder or his assignee.²¹

2416. Their Lordships of the Privy Council have explained in the case of *Raja Shri Parakash Singh*

Certification by decree-holder.

v. The Allahabad Bank, Ltd.,²² that sub-R.

(1) of O. 21, R. 2, Civil Procedure Code, 1908, contemplates a certification of payment by the decree-holder to the Court and a record by the Court of the payment; it does not provide for any notice being given to the judgment-debtor; while sub-R. (2) does contemplate an application by the judgment-debtor; further, it provides for notice being given to the decree-holder, it affords an opportunity for the decree-holder to appear, and it involves a judicial decision by the Court whether the payment should be recorded. The mere certification by the decree-holder of a payment to him out of Court by the judgment-debtor under R. 2 (1) is therefore not an "application" within the meaning of Art. 181, Limitation Act. The **certification by a decree-holder**, therefore, is **not subject to any law of limitation**. The limitation of ninety days prescribed by Art. 174 of the Limitation Act does not apply to a certification by the decree-holder.²³ The High Courts

19. *Maung Tin v. Ma Mi*, 1928 Rang. 62=5 Rang. 833=110 I.C. 123.

20. *Frank Coombs v. Mufassil Bank, Ltd.*, 1929 All. 674=115 I.C. 139.

21. *Murari Lal v. Raghubir Saran*, (1934) 148 I.C. 1118=3 A.W.R. 477=1934 All. 209.

22. 1929 P.C. 19=56 I.A. 30=3 Luck. 684=56 M.L.J. 233 (P.C.).

23. *Joti Prasad v. Srichand*, (1928) 51 All. 237=1928 All. 629 (F.B.); *Peare Mohan v. Raghunath Lal*, (1927) 50 All. 259 (Per Mukerji, J.); *Purmanand Das v. Vallabdas*, (1887) 11 Bom. 506; *Tukaram v. Babaji*, (1895) 21 Bom. 122; *Pandurang Balakrishna v. Jagya Bhan*, (1920) 45 Bom. 91=22 Bom. L. R. 1120; *Jalam Chand v. Yusaf Ali*, (1924) 54 Cal. 143; *Hriday Mohan v. Khagendra*, 1929 Cal. 687; *Bahy Muhammad v. Aijanmai*, (1921) 26 C.W.N. 529=1922 Cal. 30=68 I.C. 780; *Madan Mohan v. Harulal*, (1921) 26 C.W.N. 534; *Esufseman v. Sanchialal*, (1915) 43 Cal. 207; *Lakhi Narain v. Felamani*, (1914) 20 C.L.J. 131; also see *Fattu v.*

of Calcutta,²⁴ Madras,²⁵ Bombay²⁶ and Rangoon²⁷ have held that the decree-holder may apply to "certify" the payment of any interest on the decretal amount, or any part-payment made by the judgment-debtor out of Court, by an application made expressly for that purpose; but that it is not obligatory, and the payment may be *certified* by a declaration in an application for execution of the decree that he has received such payment. [See O. 21, R. 11 (e).] The Allahabad High Court held in some earlier cases²⁸ that the payment or adjustment must be certified in a separate proceeding distinct from and prior to the application for execution, but these rulings have now been rendered obsolete by the Full Bench decision in *Joti Prasad v. Sri Chand*.²⁹ The Sind Judicial Commissioner's Court has also held in a Full Bench decision (differing from its earlier view), that O. 21, R. 2 (1) makes it obligatory on the decree-holder to certify payment and on the Court to record the same. But, the decree-holder may do so at any time, and it is enough if he mentions the payment in his application for execution. When he has done so, the bar of sub-R. (3) is removed, and the payment or adjustment is a fact which can be proved either for the purpose of extending limitation under S. 20, Limitation Act, or of fixing a new starting point under Art. 182 (7).³⁰ According to Calcutta³¹ and Madras³² High Courts, payments may be certified by the decree-holder after the period of limitation has expired. The opposite view taken by the Allahabad High Court in *Chattar*

Nanak, (1923) 75 I.C. 1029 (Lah.); *Masilamani v. Sethuswami*, (1917) 41 Mad. 234; *Maung Law San v. Maung Po Thein*, (1924) 2 Rang. 393; *Sundardas Virbhan v. Bishendas*, (1935) 15 Lah. 910=1935 Lah. 194 (2)=37 P.L.R. 196=155 I.C. 315 and *Sheikh Elahi v. Nawablal*, 4 P.L.J. 159 (169)=50 I.C. 364.

24. *Eusuffzeman v. Sanchia Lal*, (1916) 43 Cal. 207=34 I.C. 606; *Bahy v. Aijanmai*, (1921) 26 C.W.N. 529=68 I.C. 780=1922 Cal. 30; *Madan v. Harulal*, (1921) 26 C.W.N. 534=64 I.C. 72=1921 Cal. 643.

25. *Masilamani v. Sethuswami*, (1918) 41 Mad. 25=41 I.C. 701.

26. *Pandurang v. Jegya*, (1921) 45 Bom. 91=59 I.C. 399=1921 Bom. 411.

27. *Maung Law San v. Maung Po Thein*, (1924) 2 Rang. 393=84 I.C. 473=1925 Rang. 26; *Maung Tin v. Ma Mi*, (1928) 5 Rang. 833=110 I.C. 123=1928 Rang. 62.

28. *Gokul Chand v. Bhika*, (1914) 3 I.C. 753=12 A.L.J. 387; *Bhajan Lal v. Chheda Lal*, (1914) 24 I.C. 215=12 A.L.J. 825; *Chattar Singh v. Amir Singh*, (1916) 38 All. 204=32 I.C. 590=14 A.L.J. 132; *Baijnath v. Pannalal*, (1924) 46 All. 635=83 I.C. 737=1924 All. 706.

29. (1928) 26 A.L.J. 966=112 I.C. 73=1928 All. 629 (F.B.).

30. *Shafi Mahomed v. Choithram*, (1919) 52 I.C. 804=13 S.L.R. 37 (F.B.); cf. *Narsoomal v. Tirathmal*, 30 I.C. 51=9 S.L.R. 27.

31. *Esuf-Zeman v. Sanchialal*, 34 I.C. 606=43 Cal. 207=20 C.W.N. 272=23 C.L.J. 390.

32. *Rajaram Aiyar v. Anantharatnam*, 31 I.C. 318=29 M.L.J. 669.

Singh v. Amir Singh,³³ where it was observed that it would not be within the spirit of O. 21, R. 2, that certifying of payments on the foot of a decree should rest entirely with the decree-holder, is now untenable in view of the Privy Council ruling mentioned above. The conclusion deducible from the authorities is that where the judgment-debtor applies within the prescribed period, or where the information is conveyed in any manner by the decree-holder at any time before orders are passed, the Court may record the adjustment.³⁴

2417-2418. STARTING POINT OF LIMITATION.

2418. Under O. 21, R. 2, read with Art. 174, Limitation Act, the law allows the judgment-debtor ninety days to apply to have the payment or adjustment certified. If he does not make the application, and the decree-holder applies for execution, it would be open to the judgment-debtor to file objections to the decree-holder's application for execution, provided these *objections* are filed within the prescribed period of ninety days. They may be treated as an *application* to certify the payment or adjustment. The authorities are agreed that the judgment-debtor is not entitled to an extension of the time even if fraud is established on the part of the decree-holder, which does not keep the judgment-debtor in ignorance of his right. (*See S. 18.*)

2419. It was held in an early case in Madras, that where a decree is adjusted to the satisfaction of the decree-holder, and he agrees to certify the adjustment to the Court, but omits to do so, and subsequently applies to the Court for execution of the decree, the judgment-debtor may object to the execution and prove the adjustment *in execution proceedings*, and the Court executing the decree may take cognizance of the payment notwithstanding the provisions of the rule, the reason given being that the suppression of the adjustment from the Court is not only a fraud upon the judgment-debtor, but a fraud upon the Court.³⁵ The later Madras rulings are to a contrary effect. Where money was paid in full discharge of the judgment-debt, the creditor undertaking to enter up satisfaction, but no satisfaction was entered up, and no application by judgment-debtor was made within the sixty days of the payment, it was held that it was not competent for the executing Court to determine whether the payment had been made or not.³⁶ An adjustment of a

33. 32 I.C. 590=38 All. 204=14 A.L.J. 132.

34. *Lodd Govindas v. Rajah of Karvetnagar*, (1915) 29 M.L.J. 219 (226); *Raja Chinna Mummidi v. Raja Somasekara*, (1929) 30 L.W. 526; *Maung Law San v. Maung Po Thein*, (1924) 2 Rang. 393.

35. *Ramayyar v. Ramayyar*, (1897) 21 Mad. 356.

36. *Periatambi v. Vellaya Goundan*, (1897) 21 Mad. 409 (The only course open to the judgment-debtor was to bring a suit for the amount).

decree out of Court which is not certified to the Court cannot be pleaded as a bar to the execution.³⁷ Though a judgment-debtor's counter-petition may be treated as an application to certify, the same cannot be allowed in the absence of any fraud, if it is made beyond ninety days of the adjustment.³⁸ Even assuming that there has been fraud on the part of the decree-holder, an application presented after ninety days by the judgment-debtor cannot be treated as one for certifying adjustment of the decree.³⁹

2420. The Bombay Full Bench in *Mehbubunnissa v. Mehedunnissa*,⁴⁰ overruling *Trimbak v. Hari Laxman*,⁴¹ affirms the view in *Ganesh v. Yeshwant*,⁴² that the Court executing a decree is barred *in limine* from considering any allegation that a payment not certified has been made.

2421. The Calcutta High Court takes the view that if the adjustment of a decree out of Court has not been certified as required by R. 2 of O. 21, Civil Procedure Code, the Court executing the decree cannot take notice of it. In such a case it is not open to the Court to investigate under S. 47 of the Code allegations of fraud made by the judgment-debtor against the decree-holder.⁴³ Even if it is established that the conduct of a decree-holder is fraudulent, the judgment-debtor is not entitled to obtain an extension of the time within which to make an application to the Court under cl. (2) of R. 2 of O. 21, because the judgment-debtor is not, by means of fraud kept from the *knowledge* of his right to make the application within the meaning of S. 18 of the Limitation Act, but from the *exercise* of his right to make the application.⁴⁴ It is not competent to an execution Court to allow credit for uncerified payments even where

37. *Ganapathy Ayyar v. Chenga Reddi*, (1905) 29 Mad. 312; also see *Veerappa v. Ponnayya*, (1907) 17 M.L.J. 527.

38. *Badraddin v. Ghulam Moideen*, (1911) 36 Mad. 357; cf. *Sambasiva v. Muhd. Husain*, (1913) 31 I.C. 917 (Mad.).

39. *Murugappa v. Appavoo*, (1934) 152 I.C. 763=40 L.W. 622.

40. 1925 Bom. 309=27 Bom.L.R. 403=49 Bom. 548 (F.B.).

41. (1910) 34 Bom. 575=7 I.C. 940=22 Bom.L.R. 686; also see *Hansa Godhaji v. Bhaw Jogaji*, (1916) 33 I.C. 232=40 Bom. 333 (Fraud upon Court not to be covered and condoned by the provisions of O. 21, R. 2, Civil Procedure Code).

42. 1923 Bom. 253=25 Bom.L.R. 247=95 I.C. 410.

43. *Biroo Gorain v. Jainurat Koer*, (1912) 13 I.C. 63=16 C.W.N. 923 (926, 927); Followed *Kamini Debi v. Aghore Nath*, 4 I.C. 402=11 C.L.J. 91=14 C.W.N. 357; *Nistarini Dasi v. Kazimali*, 12 C.L.J. 65=7 I.C. 258; *Monmohan v. Dwarkanath*, 7 I.C. 55=12 C.L.J. 312; and *Hiramonny Biswas v. Musæ Khan*, 7 I.C. 625; also see *Kutabullah Sarkar v. Doorga Charan*, (1911) 16 C.W.N. 396.

44. *Ibid.*, 13 I.C. 63=16 C.W.N. 923 (926, 927); also see *Golan Mujabar v. Galoke Charan Das*, (1914) 25 I.C. 884 (Cal.).

the omission on the part of the decree-holder to give credit for them amounts to an act of fraud.⁴⁵

2422. The Punjab Chief Court follows the view in Madras and Calcutta High Courts, in holding that
Punjab. it is not open to an executing Court to investigate in execution proceedings the fact of receipt of the decretal amount or of an adjustment of the decree out of Court. By reason of the special provision of the law contained in O. 21, R. 2 (3) of the Civil Procedure Code, the determination of this question has been taken out of the purview of S. 47 of the Code of Civil Procedure.⁴⁶

2423. A Full Bench of the Oudh Chief Court⁴⁷ follows the
Oudh. Bombay Full Bench decision in the case of *Mehbunnissa v. Mehmedunnissa*,⁴⁸ in holding that a Court executing a particular decree is barred by the provisions of sub-R. (3), R. 2 of O. 21, Civil Procedure Code, from trying the question of the satisfaction or adjustment has not been certified to the Court under sub-R. (1) or (2) of the same rule.⁴⁹

2424. The Patna High Court has observed that the provisions of cl. (3) of O. 21, Civil Procedure
Patna. Code are imperative, and no executing Court can take cognizance of an adjustment of any decree which is not certified in accordance with the provisions of the rule above cited.⁵⁰ Where an alleged payment or adjustment is not certified by the decree-holder and no application is made by the judgment-debtor within the prescribed period to have the payment or adjustment recorded, it cannot be recognized by the execution Court, and whatever the remedy of the judgment-debtor may be in such a case, the executing Court cannot enquire into the matter and compel the decree-holder to give the judgment-debtor credit for the payment or to carry out the agreement of adjustment. The decree-holder can, in such a case, so far as the executing Court is concerned, execute the decree as if no payment or adjustment out of Court

45. *Jogendra Prosad Mitra v. Asutosh Goswami*, 37 I.C. 738=24 C.L.J. 462.

46. *Parma Ram v. Lehna Singh*, (1919) 135 P.R. 1919=53 I.C. 443 (Punj.); Relied on *Mathar Dravai v. Subramania Pillai*, 40 I.C. 889=5 L.W. 644; *Alathoor Badruddin v. Gulam Mohideen*, 12 I.C. 562=36 Mad. 357=24 M.L.J. 541; *Jogendra Prosad v. Asutosh Goswami*, 37 I.C. 738=24 C.L.J. 462.

47. *Fatimunnissa v. Asghar Husain*, 3 Luck. 170=108 I.C. 105=1928 Oudh 195 (F.B.).

48. 49 Bom. 548=95 I.C. 687=1925 Bom. 309 (F.B.).

49. *Fatimunnissa v. Asghar Husain*, 3 Luck. 170=1928 Oudh 195 (F.B.).

50. *Imamuddin Khan v. Bindabasini Prasad*, (1920) 55 I.C. 890=5 P.L.J. 70.

has been made.¹ Case-law has been fully discussed in *Radhakant Lal's case* which has been relied upon in the recent *Patna* case of *Harihar Prasad Singh v. Bhubenewari Prasad*,² where it has been held that

"an omission on the part of the decree-holder to certify a payment, even if he may have promised to do so, does not entitle the judgment-debtor to override the 90 days' limitation of Art. 174 for making an application under O. 21, R. 2, and to secure an investigation of the same matter by invoking S. 47, Civil Procedure Code. The decree-holder may be guilty of fraud, but if the judgment-debtor does not avail himself of the procedure laid down in Cl. (2) of the rule, he must be content to let the sale of his properties in execution stand, and as Rankin, C.J., said in the Full Bench decision in *Lakshman Chandra Naskar v. Ramdas Mandal*,^{2-a} seek his remedy in damages or otherwise without challenging the sale".

This represents the correct summing up of the case-law on the point, and the view taken in some old decisions to the contrary is not now accepted in any High Court.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
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175.	For payment of the amount of a decree by instalments.	Six months.	The date of the decree.
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SYNOPSIS.

2425. Corresponding provisions.

2426. Scope and application.

(1) Order 20, R. 11 (2), Civil Procedure Code.

(2) Order after expiry of period—invalid.

(3) Estoppel by conduct of parties.

NOTES.

2425. CORRESPONDING PROVISIONS.—There was no corresponding provision in the Limitation Act XIV of 1859 and even the Civil Procedure Code, 1859, did not contain any such provision for subsequent alteration of a decree (*see* S. 194 of the Act). Act IX of 1871 also did not contain any such provision. This article corresponds to Art. 175 of Limitation Act, XV of 1877.

2426. SCOPE AND APPLICATION.—(1) This article
(i) Order 20, R. 11 refers to an application contemplated by
O. 20, R. 11 (2), Civil Procedure Code,
(2), C.P. Code. 1908, which corresponds with S. 210 of the

1. *Radha Kantlal v. Mt. Parbati Kuer*, (1921) 63 I.C. 535=1921 Pat. 135 (Case-law discussed by Jwala Prasad, J.).

2. (1936) 162 I.C. 849=1936 Pat. 270=17 P.L.T. 195; Relied on *Mehbunissa Begum v. Mehmed Unnissa Begum*, 49 Bom. 548 (F.B.); *Lakshman Chandra v. Ramdas*, 57 Cal. 403=118 I.C. 857=1929 Cal. 374 (F.B.); also see *Imamudin v. Bindabasini*, 5 P.L.J. 70=55 I.C. 890=1920 Pat. 833 and *Biroo Gosain v. Jaimurat Koer*, 16 C.W.N. 923=13 I.C. 63 and *Sukhdei Kumari v. Mahamaya Prasad*, 48 I.C. 765=1918 Pat. 278.

2-a. (1929) 57 Cal. 403=118 I.C. 857=33 C.W.N. 795.

Code of 1882, with certain modifications. Sub-R. (1) of the R. 11 applies where an application is made by the judgment-debtor *at the time of passing* the decree. **Sub-Rule (2)** applies where an application is made *after* the passing of the decree. In the latter case, no order can be made for payment by instalments, nor can payment be postponed except with the consent of the decree-holder.³ Art. 175 of the Limitation Act applies to application for **payment by instalments**, and not applications for postponement of payment. This latter application will fall under the residuary Art. 181 of the Limitation Act.

(2) Where an application to execute decree was made within time, but while the application was pending, the judgment-debtor presented a petition to be allowed to pay the debt by instalments, and the decree-holder consenting to this, ordered the case to be struck-off according to the application of both parties. The details of the instalments mentioned in the petition were endorsed on the decree by a Court Official. Later, in an application for execution in accordance with this arrangement, it was held that the order was not one recognising or sanctioning the arrangement within the meaning of S. 210 (old Code), inasmuch as the Court at the time it made the order had no power to make any order for instalments, any application for that purpose being then barred by Art. 175, Limitation Act. The application for execution was, therefore, barred by limitation as not having been made within three years of the first application for execution.⁴ Similarly, in *Nanak Chand v. Anant Ram*,⁵ the **Punjab Chief Court** held that the order in question was not one passed under S. 210, Civil Procedure Code because it was made after the expiry of the period prescribed by Art. 175, Limitation Act.

(3) However, it was also laid down in express terms that

(iii) **Estoppel by conduct of parties.** "where the parties have agreed to an alteration in the decree, either party may be estopped from questioning hereafter the validity of such alteration".

In that case the parties were found not to have consented to such an alteration and the Court also did not consent to such an alteration. But the principle was applied in a later case of *Banarsi Das*

3. *Shankarapa v. Danapa*, (1881) 5 Bom. 604 (Deccan Agriculturists Relief Act XVII of 1879, S. 20 allows a similar order to pay the decretal amount by instalments, but without the consent of the decree-holder).

4. *Abdul Rahman v. Dullaram*, (1886) 14 Cal. 348.

5. 26 P.R. 1894.

v. Ramzan,⁶ where the parties undoubtedly entered into a compromise by which the decree was made payable by instalments and the Court accepted that arrangement and passed an order which substantially complied with the requirements of S. 210 (O. 20, R. 11, Civil Procedure Code, 1908), and further, both the parties having acted upon that arrangement, it was held that they could not be allowed to say that the order was not properly made.

Article. Description of Suit. Period of Limitation. Time from which period begins to run.

176. Under the same Code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	Ninety days.	The date of the death of the deceased plaintiff or appellant.
177. Under the same Code to have the legal representative of a deceased defendant or of a deceased respondent made a party.	Ninety days.	The date of the death of the deceased defendant or respondent.

SYNOPSIS.

- 2427. Previous History.
- 2428. Change in Art. 177.
- 2429-2439. Scope and application (Art. 176).
- 2430. (1) Applications made in suit or appeal.
- 2431. (2) No abatement of execution proceedings by death of decree-holder.
- 2432. (3) Two or more legal representatives.
- 2433. (i) *Allahabad*.
- 2434. (ii) *Lahore*.
- 2435. (iii) *Calcutta*.
- 2436. (iv) *Madras*.
- 2437. (v) *Bombay*.
- 2438. (vi) *Nagpur*.
- 2439. (vii) *Sindh*.
- 2440. Scope and application (Art. 177).
 - (i) Applies to suits.
 - (ii) Applies to appeals.
 - (iii) Not applicable to execution proceedings.

NOTES.

2427. PREVIOUS HISTORY.—These two articles have been substituted for the three articles 175-A, 175-B, and 175-C, of the Limitation Act, XV of 1877. These two articles were

6. (1923) 73 I.C. 671=1923 Lah. 381; (Followed *Akbar Khan v. Dinanath*, 200 P.R. 1889—*Held*, that where both parties have agreed to such an order being passed and have acted upon it, they are precluded from contending that it was an improper one).

inserted by Act VII of 1888, which came into force on 1st July, 1888. Articles 175-A, B, C, of Act XV of 1877, stood as follows:—

Art. 175-A: "Under S. 365 of the Code of Civil Procedure by the legal representative of a deceased plaintiff or under that section and S. 582 of the same Code by the legal representative of a deceased plaintiff-appellant or defendant-appellant"—"Six months"—"The date of the death of the deceased plaintiff or of the deceased plaintiff-*appellant* or defendant-*appellant*".

Art. 175-B: "Under S. 366 of the Code of Civil Procedure, by a *defendant*, or under that section and S. 582 of the same Code by a plaintiff-*respondent* or defendant-*respondent*"—"Six months"—"the date of the death of the deceased plaintiff or of the deceased defendant-appellant, or plaintiff-appellant."

Art. 175-C: "Under S. 368 of the Code of Civil Procedure to have the legal representative of a deceased defendant made a defendant, or under that section and S. 582 of the same Code to have the legal representative of a deceased plaintiff-respondent, or defendant-respondent, made a plaintiff-respondent, or defendant-respondent"—"Six months"—"the date of the death of the deceased-defendant, or of the deceased plaintiff-respondent or defendant-respondent."

Article 175-A, of Act XV of 1877, originally appeared as Art. 171, in that Act, making provision for applications

"under S. 363 or 365 of the Code of Civil Procedure by a person claiming to be the legal representative of a deceased *plaintiff*".

Subsequently, Act XII of 1879 extended its scope to applications by the representative of deceased *appellants*. This Act XII of 1879 also introduced Arts. 171-A, and 171-B. These articles were further amended and numbered as Arts. 175-A, 175-B, and 175-C, by the Amending Act VII of 1888. Article 171-A, as introduced by Act XII of 1879, applied to an application by a defendant in a suit in which the sole plaintiff had died, and his legal representative had not been made a party within sixty days, that the suit might abate, and that the defendant might have his costs out of the estate of the deceased plaintiff, or for such other order as to bringing in the representative of the deceased plaintiff as the Court might thereto fix. By the amended Act, VII of 1888, it was made to apply also to the case of a death of an *appellant*. Similarly, Art. 175-C, which did not appear in Act IX of 1871, was introduced by Act XII of 1879, as Art. 171-B, in the Act of 1877. Originally it applied to applications by a plaintiff to have the representatives of a deceased defendant made parties to a suit. The amendment of 1888 made it applicable to the case of the death of a *respondent* also. **The period prescribed in Arts. 171 to 171-B, was sixty days.** There was some conflict of view as to whether these articles as they stood then were applicable to an appellant or respondent in an *appcal* (whether plaintiff or defendant) as distinguished from a suit. **Act VII of 1888**, set this conflict at rest, and the period was also extended from sixty days to **six months**. Under the Code of Civil Procedure, 1908, O. 22,

Rr. 3, 4 and 11 take the place of old Ss. 363, 365, 366, 368 and 582 of the Code of 1882.

Article 176 contemplates applications under O. 22, Rr. 3 and 11, and refers to cases where the plaintiff, or appellant is dead. This article now applies to *appeals*, whether the appellant is the plaintiff or the defendant.⁷ The period originally prescribed was six months, which was reduced to 90 days by the **Amending Act XXVI of 1920**. This Act, though not retrospective in operation,⁸ applies to applications for bringing on record the legal representatives of a plaintiff-appellant made after the Act came into force even in cases in which the death of the plaintiff took place before that date.⁹

2428. CHANGE IN ART. 177.—Article 177 corresponds to Art. 175-C of the Limitation Act XV of 1877. The changes to be noticed are that the period of limitation has been reduced from six months to 90 days by S. 2 of the Indian Limitation and Civil Procedure Code Amendment Act XXVI of 1920, and by the Amending and Repealing Act 1923 (IX of 1923). Section 2 of the Act XXVI of 1920 ran as follows:—

“In the Third Division of the First Schedule to the Indian Limitation Act, 1908, in Arts. 176, 178 and 179, for the word ‘Ditto’ in the second column the words ‘ninety days’, ‘six months’, and ‘ninety days’ respectively shall be substituted.”

This section made no mention of Art. 177, but the word “*Ditto*” being retained in Art. 177, and changed in Art. 176 to “ninety days”, the period prescribed became a period of ninety days under Art. 176, instead of the six months originally provided. However, this article was interpreted by the Lahore, and other High Courts, to be unaffected by the change, as no mention of that article was made in the body of the Amending Act.¹⁰

The Amending and Repealing Act, 1923 (XI of 1923) enacted by its S. 2, as follows:—

7. In *re Ram Sunker*, (1878) 3 C.L.R. 440 (Plaintiff-appellant died pending special appeal, and his son applied to be substituted as sole representative appellant in place of deceased. The application was held made under S. 587 incorporated with S. 365, and governed by Art. 171, Limitation Act XV of 1877).

8. *Ajit Singh v. Bhagabati Charan*, (1922) 36 C.L.J. 263=1922 Cal. 291=70 I.C. 370.

9. *Vaithinatha Aiyar v. Govindaswami*, (1921) 41 M.L.J. 65=1921 Mad. 650.

10. *Govind Das v. Rup Kishore*, 4 Lah. 367; *Rup Kishore v. Govind Das*, 1922 Lah. 211=69 I.C. 748; *Arjan Das v. Nanak Chand*, 78 I.C. 771; *Skinner v. Makarram Ali*, 92 I.C. 330=1925 All. 77; *Subramania v. Shanmugam*, 92 I.C. 566=1926 Mad. 65=49 M.L.J. 363; *Rai Brijnandan v. Mahabir*, 97 I.C. 316; also see and cf. *Sevdoyal v. Joharmull*, 50 Cal. 549=75 I.C. 81 (Counsel's argument) and *Husenuddin Nurddin v. Dulakshi Das*, 1923 Bom. 299 (1).

"2. In the Third Division of the First Schedule to the Indian Limitation Act, 1908, in Arts. 176, 177, and 179, for each of the entries in the second column, the entry 'ninety days' shall be substituted."

The statement of objects and reasons explained that

"this amendment is designed to correct a drafting error which had the effect of leaving the period of limitation in Art. 177 as six months though the intention was to reduce it to ninety days"....."In a recent case before the High Court of Judicature at Lahore a doubt arose as to the effect of amendments made by Act XXVI of 1920 in the period of limitation prescribed in items 176, 177 and 179 of the schedule. The object of the present amendment is to substitute for the 'dittos' the actual period prescribed".^{10-a}

It would be noticed that the Amending and Repealing Act of 1923, has omitted all "*Dittos*" from 2nd columns of all the articles of Limitation Act, and substituted the actual periods of limitation.¹¹

2429-2439 SCOPE AND APPLICATION OF ART. 176.

2430. (1) Article 176, is made applicable to applications

(i) Applications made in suit or appeal. made in the course of a *suit* or an *appeal*, and not to applications made during *execution* proceedings. See the words

"plaintiff or appellant". In *Mehari Bibi v. Yakub*,¹² where the plaintiff died after having obtained a decree for sale on a mortgage, under S. 88, Transfer of Property Act, and his sons applied more than six months after their father's death, to be brought on the record in the place of the deceased and to have an order absolute for sale made in their favour, it was held by the Calcutta High Court, that Art. 176 was inapplicable, as *the suit was at an end* when the conditional decree for sale was passed, and the application could not be deemed as one passed in the course of a suit.

2431. (2) In an early **Allahabad Case**,¹³ under Ss. 365, and 366 of Act X of 1877, a question arose as

(ii) No abatement of execution proceedings by death of decree-holder. to the validity of an execution sale of the judgment-debtor's property, where the decree-holder had died when the sale took place, and he was not represented by any

legal representative on the record. The executing Court disallowed the judgment-debtor's objection to the validity of the sale, and made an order confirming such sale. It was held by *Pearson, J.*, that the application for execution of the decree abated on the death of the decree-holder, not having been prosecuted by his legal representative, and such sale was under the circumstances improper and invalid, and the order confirming it should be set aside.

10-a. See *Gazette of India*, 1923, Part. V, pp. 93, 94.

11. B. B. Mitra's Limitation Act, p. 878.

12. 11 C.W.N. 156 (157, 158).

13. *Dulari v. Mohan Singh*, (1881) 3 All. 759=1881 (A.W.N.) 57.

Spankie, J., was of opinion that the sale was not invalid by reason of the decree-holder's death before it took place. The order confirming it, however, was improper, and should be reversed, as the Court executing the decree should have proceeded under Ss. 365, and 366 of Act X of 1877. It was held per *Oldfield and Straight, JJ.*, that the death of the decree-holder prior to such sale did not render it void. The provisions of Ss. 365, and 366 of Act X of 1877 could not be adopted to execution-proceedings. As such sale had been published and conducted according to law, it had properly been confirmed. Similarly, the **Bombay High Court** held in *Gulabdas v. Lakshman Narhar*,¹⁴ that the Code of Civil Procedure (Act X of 1877) did not provide that applications for execution shall, like suits, abate by the death of the judgment-creditor. His representative could, therefore, come in at any time, subject always to the same conditions as would apply to his principal. The provisions of Limitation Act, (Art. 171, Limitation Act, 1877) which gave a period of sixty days to a person claiming to be the legal representative of a deceased *plaintiff* under S. 363 or 365 of the Code of Civil Procedure were held not to apply to the representative of a deceased judgment-creditor claiming admission to continue execution proceedings commenced by him. Under the Code of Civil Procedure, 1908, it has been held that O. 22, R. 12 does not indicate that upon the death of an execution creditor or of a judgment-debtor the proceedings in execution lapse. Therefore, upon the death of the appellant, in an appeal against an order made in the course of execution proceedings, her legal representatives were held entitled to prosecute the appeal.¹⁵ If a plaintiff dies after decree, his representatives are not bound to apply within the period prescribed by Art. 176 (Art. 171, Act XV of 1877), to be made parties to the suit, but have the same time to file an appeal as the plaintiff would have had.¹⁶ The **Patna High Court** has held recently that an execution petition does not abate by reason of the death of any of the decree-holders, as by virtue of O. 22, R. 12, nothing in R. 3 applies to proceedings in execution of a decree or order.¹⁷ The **Bombay High Court** takes the same view in *Shankar v. Hiralal*.¹⁸

14. (1879) 3 Bom. 221.

15. *Jagat Tarini Dasi v. Rakhal Chandra Tewary*, (1909) 3 I.C. 324=14 C.W.N. 752=10 C.L.J. 398; also see *Cally Churn Mullick v. Bhugobutty*, (1880) 5 C.L.R. 108 (111).

16. *Ramanada Sastri v. Minatchi Ammal*, (1881) 3 Mad. 236.

17. *Bimbadhar Panda v. Abdul Zahil*, (1929) 117 I.C. 165=1929 Pat. 200.

18. 1931 Bom. 425 (2)=33 Bom.L.R. 858=134 I.C. 730 (By virtue of O. 22, R. 12, Rr. 3 and 4 of O. 22 do not apply to execution proceedings).

2432. There has been some conflict of view on the question whether on the death of the plaintiff or
 (iii) Two or more legal representatives. appellant, if there are *two or more* legal representatives they should *all* be brought on the record.

2433. According to the **Allahabad High Court**, if only one of several legal representatives, being co-
 (i) Allahabad. heirs of a deceased Muhammadan, applies to be brought on the record in place of the deceased, and he is brought on the record as plaintiff, but no application is made to bring the other legal representatives on the record within the period of limitation, the suit abates.¹⁹ This view takes the expression "*legal representatives*", when there are two or more legal representatives, to mean legal representatives in the plural. Accordingly, either all the legal representatives must be brought on the record as plaintiffs or if any one of them refuses to be joined as a plaintiff, he should be impleaded as a defendant.²⁰

2434. The **Lahore High Court** also takes the view that the
 (ii) Lahore. expression "*legal representative*" means "the representation before the Court of the plenary interest of the deceased party. Sometimes that interest may be represented by a single individual, but it may also be represented by number of persons as the case may be. But there should be a complete representation of the interests of the deceased person whether through a single individual or through a number of persons; so that there cannot be a partial representation of that interest. In other words, the expression '*legal representative*' means and includes one person as well as several persons according as they represent the whole interest of the deceased person".²¹

In *Abdul Rahman v. Shahabuddin*,²² Scott-Smith and Abdul Raoof, JJ., had overruled the preliminary objection where the appellants *bona fide* believed that they were the sole owners and legal representatives of the deceased, and had made the application for substitution relying on that belief. This ruling is not therefore opposed to the view taken in the later Bench case. As held in *Mt. Begam Jan v. Mt. Janat Bibi*,²³ O. 22, R. 4, Civil Procedure

19. *Ghamandi v. Amir Begam*, (1894) 16 All. 211=A.W.N. (1894) 22; *Haider Hussain v. Abdul Ahad*, (1908) 30 All. 117=5 A.L.J. 62.

20. *Ibid.*, 16 All. 211; 30 All. 117; also see *Fazal Muhd. Khan v. Habibulla Khan*, 20 I.C. 366=11 A.L.J. 719; cf. *Md. Zatoryab Khan v. Abdul Razzaq Khan*, 1928 All. 532 (533)=26 A.L.J. 820=50 All. 857=111 I.C. 238 (In cases where legal representatives are added after notice to defendants or respondents, without objection, it is not open to subsequent contention that the suit or appeal has abated by non-inclusion to other representatives).

21. *Muhammad Hassan v. Inayat Hussain* (Sir Shadilal, C.J., and Agha Haider, J.), (1927) 100 I.C. 418=1927 Lah. 94=28 P.L.R. 3; Relied on 16 All. 211=30 All. 117 and 11 A.L.J. 719; also cited, 1 Lah. 481 and 20 M.L.J. 398.

22. 1 Lah. 481=55 I.C. 883=85 P.W.R. 1920.

23. 98 I.C. 612=7 Lah. 438=1927 Lah. 6; Followed *Musala Reddi v. Ramayya*, 23 Mad. 125=9 M.L.J. 313; *Lila Sonar v. Jhagru Sahu*, 85

Code is sufficiently complied with where a *bona fide* application is made to bring on the record all the legal representatives of a deceased party known to the applicant so far as he could ascertain them after the exercise of due care and diligence. An appeal does not, therefore, abate entirely by the mere fact that one of the legal representatives of the deceased respondent was not brought on the record in time where the appellant has done all that could be done to find out the proper legal representative. The Lahore view taken as a whole amounts to this that the words "legal representative" mean all the legal representatives, who taken together represent the estate of the deceased, as held by the Allahabad High Court, but subject to the reservation adopted from a consideration of the Madras and Patna view, that this is not invariably the case. The rule cannot always be literally followed, and it is necessary in practice to relax the terms, and a sufficient compliance may be held made with the directions laid down in O. 22, R. 4, if the applicant makes a *bona fide* application to bring on the record all the legal representatives, known to him, so far as he could ascertain them after the exercise of due care and industry.²⁴

2435. According to the **Calcutta High Court**, the expression
(iii) **Calcutta.** "legal representative," in O. 22, R. 3, Civil

Procedure Code, means the legal representative or representatives of the deceased plaintiff, or all the representatives of whom the representative applying knew or ought to have known.²⁵ Accordingly, where a party to a suit died leaving three sons and two of the sons alone applied under O. 22, R. 3, Civil Procedure Code, for being substituted as legal representatives of the deceased and there was no evidence to show that the third son would not have joined in the application if he had been informed of it; it was held that the application did not sufficiently comply with the requirements of O. 22, R. 3, Civil Procedure Code, and the suit abated.²⁶ But, it was recognised that "it may well be that if one or more of the legal representatives are unknown or are unwilling to join in the application under O. 22, R. 3, different considerations will arise, and that a *bona fide* application by all the representatives who are willing to join in making the application will be a sufficient compliance with O. 22, R. 3."²⁷

I.C. 25=3 Pat. 853=1925 Pat. 123; and *Shif Datta Singh v. Karim Baksh*, 4 Pat. 320.

24. *Mt. Begam Jan v. Janat Bibi*, 7 Lah. 438, *supra*; also see and cf. 23 Mad. 125; 3 Pat. 853 and 4 Pat. 320.

25. *Fajar Banoo v. Rahim Bax*, 115 I.C. 184=1929 Cal. 26=32 C.W.N. 1020.

26. *Ibid.*, 115 I.C. 184=1929 Cal. 26=32 C.W.N. 1020; Relied on 16 All. 211; 30 All. 117.

27. *Ibid.*, 115 I.C. 184=1929 Cal. 26=32 C.W.N. 1020; cited *Bhikaji Chandra v. Purushotam*, 10 Bom. 220; *Musala Reddy v. Ramayya*, 23 Mad.

2436. In *Musala Reddi v. Ramayya*,²⁸ the Madras High Court

(iv) Madras.

held that when there are more than one legal representative of a deceased appellant, all those representatives must, so far as this is possible to be done, join in an application under S. 365 (O. 22, R. 3) and the word "legal representative" in the section strictly construed must, in such a case, be read in the plural as including all legal representatives. But where all the representatives cannot be joined as applicants, Ss. 365 and 366 (O. 22, R. 3) should not be construed so as to have the effect of rendering the application no application by "the legal representative", within the meaning of the section so that the appeal must be held to have abated. Similarly, in *Govindaswami v. Annamalai*,²⁹ Devadoss, J., has held that

"if one of the legal representatives does not choose to be brought on the record as the representative of a deceased plaintiff his share in the suit does not thereby abate. If no legal representative is brought on the record no doubt the suit would abate, but where some legal representatives come on the record and they contend that some other persons are not legal representatives, even though their contention may be found to be untrue, that would not make the whole of the suit or any portion of the suit abate in favour of the defendants."

2437. In *Bhikaji Ramchandra v. Purshotam*,³⁰ where complete

(v) Bombay.

legal representation of a deceased appellant vested in the minor son and his two brothers, it was held that S. 366, Civil Procedure Code, 1882 (O. 22, R. 3) only required an application to be made by a person claiming to be the legal representative, in order to prevent an order of abatement being made. If neither of the brothers was willing to have his name placed on the record, the respondent was entitled to have them made defendants, so that they might be bound by the decree. The minor son could then proceed alone with the appeal.

2438. The Nagpur Judicial Commissioner's Court takes a

(vi) Nagpur.

view contrary to most of the High Courts in refusing to draw a distinction on the ground of the *bona fide* belief of some of the legal representatives and by observing that the words "legal representatives" in O. 22, R. 3, Civil Procedure Code, cannot be construed to mean all the legal representatives. They must include any legal representative to whom the right to sue survives.³¹ The question to be decided in

125=9 M.L.J. 313; and *Abdul Rahman v. Shahabuddin*, 55 I.C. 883=1 Lah. 481=85 P.W.R. 1920.

28. (1899) 23 Mad. 125.

29. 1927 Mad. 1071; Relied on *Kadir Mohideen v. Muthukrishna Ayyar*, (1903) 26 Mad. 230=12 M.L.J. 368.

30. (1885) 10 Bom. 220.

31. *Narayan v. Amrita*, (1922) 65 I.C. 542=18 N.L.R. 21; Relied on *Musala Reddi v. Ramayya*, 23 Mad. 125 (That the strict literal construction

each case is, whether the omission of one of the representatives is fatal to the suit or appeal. Where, therefore, some only of all the legal representatives to whom the right to sue survives apply to have their names substituted for that of a deceased appellant, the appeal does not abate as a whole but abates to the extent of the claim of such of the legal representatives as have not jointly or severally applied for their substitution of their names. If there are rival claimants on death of a party, the application by one claimant in time is for his or her benefit, and the revival of suit cannot benefit the other rival claimant who has not got his name substituted by means of an application made within the time prescribed by Art. 176 of the Limitation Act.³²

2439. The Sind Judicial Commissioner's Court has held that the expression "legal representatives" (vii) Sind. in O. 22, Civil Procedure Code, must be read in the light of its definition as given in S. 2 (11), Civil Procedure Code. It means all the persons on whom the estate of a deceased party devolves. The words "*person who in law represents the estate of a deceased*," in S. 2 (11), Civil Procedure Code, do not mean "a person regarded merely as a representative for the purpose of the suit". When there are more than one legal representative of a deceased party, all of them should be brought on the record within the time allowed by law; otherwise, the proceedings abate so far as such party is concerned.³³ According to this view, in an appeal from a decree in a suit for separate possession by partition, in the absence of all the heirs of one of the deceased party who are jointly interested in upholding the decree of the lower Court, the whole appeal is incompetent and must be dismissed as no effective decree can be passed.³⁴

2440. **SCOPE AND APPLICATION OF Art. 177.**—Art. 177 refers to cases where the defendant or respondent is dead. (See O. 22, Rr. 4 and 11.) It does not refer to an application under O. 22, R. 2, Civil Procedure Code.³⁵ Art. 176 refers to cases where the plaintiff or appellant is dead. The period of limitation is ninety days from the date of the death, under the provisions as amended by Act XXVI of 1920, and this is even if death had

of O. 22, R. 3 (Ss. 365, 366, old Code) in accordance with the view of Allahabad High Court would have unfortunate results).

32. *Mt. Amritibai v. Ratanlal*, 104 I.C. 398=1927 Nag. 343.

33. *Siddik Muhd. Shah v. Saran*, (1923) 76 I.C. 314 (Sind); Relied on 16 All. 211; and 30 All. 117; cf. 10 B. 220; N.F. 23 Mad. 125.

34. *Ibid.*, 76 I.C. 314; Followed, *Kali Dayal v. Nagendra Nath*, 54 I.C. 822=24 C.W.N. 44=30 C.L.J. 217; *Baksh Ali v. Sarat Chandra*, 46 I.C. 911; *Sheikh Farid v. Kulsam Bibi*, 16 I.C. 688=1912 M.W.N. 825; *Samantha v. Devasikamany*, 5 I.C. 924=20 M.L.J. 364 and *Narendra Nath v. Satyadhan*, 54 I.C. 396=30 C.L.J. 203.

35. *Shamanand v. Raj Narain*, 11 C.W.N. 186 (188).

occurred before the amended Act was passed.³⁶

O. 22, Rr. 4 and 11, to which this Art. 177 refers, applies to appeals and suits, but not to execution proceedings. This rule deals with the death of a defendant in a pending suit, but is inapplicable to an application for permission to sue *in forma pauperis*,³⁷ or to proceedings by contributors under S. 214 of the Indian Companies Act of 1882.³⁸ The rule applies where the death of the defendant has been pending the suit, and not where it occurred either before the institution of the suit,³⁹ or after decree in suit.⁴⁰ A suit against a deceased defendant, without a proper representation, would be a nullity.⁴¹ The right to sue should survive but *not* against the surviving defendant *alone*. Thus, if the right to sue does not survive at all the rule will not apply.⁴² And if it survives against the surviving defendant alone, R. 2 will apply, excluding R. 11.⁴³

The rule applies also to the case of the death of respondent in a pending appeal.⁴⁴ It applies whether the deceased respondent was a plaintiff or a defendant in the original suit.⁴⁵ This article is not confined to a

36. *Vaithinatha v. Govindaswami*, 1921 Mad. 650 (651)=41 M.L.J. 65=62 I.C. 795; *Vijaya Singh v. Shivaji Rao*, 1924 Bom. 416 (417)=80 I.C. 761=26 Bom.L.R. 378; *Nimba v. Janki*, 1923 Nag. 106 (167)=71 I.C. 176.

37. *Janardhan v. Anant*, (1893) 7 Bom. 373 (376).

38. *Wall v. Howard*, (1895) 18 All. 156 (158)=1896 A.W.N. 29.

39. *Veerappa Chetty v. Ponan*, (1908) 31 Mad. 86 (88)=3 M.L.T. 12=17 M.L.J. 551.

40. *Burendra Keshab v. Khetter Krishto*, 30 Cal. 609; *Folld. Kedar Nath v. Harra Chand*, 8 Cal. 420; also see *Sambasiva v. Veera Perumal*, (1905) 28 Mad. 361 (362).

41. *Bejoy Chand v. Amulya*, (1914) 24 I.C. 112 (113) (Cal.); *Narendar Bahadur v. Gopal Sah*, (1913) 20 I.C. 506=17 C.L.J. 634; *Krista Das Lal v. Kumar*, (1919) 51 I.C. 160; *Mallikarjuna v. Pullayya*, (1893) 16 Mad. 319 (329); *In re Arunachalam*, (1915) 30 I.C. 679 (680)=2 L.W. 828; *Manager, Encumbered Estates v. Tharamal*, (1924) 78 I.C. 569 (S.).

42. *Rahim Baksh v. Chanan Din*, (1920) 55 I.C. 210 (211)=4 Lah. L. J. 511=1921 Lah. 390; *Harindra v. Dawijendra*, (1932) 36 C.W.N. 1007 (1009).

43. *Shyamanund v. Rajnarain*, (1906) 4 C.L.J. 568 (570, 571)=11 C.W.N. 186; *Jamnadas v. Sorabji*, (1891) 16 Bom. 27 (28).

44. *Raj Chunder v. Ganga Das*, (1904) 31 Cal. 487 (494)=31 I.A. 71=14 M.L.J. 147 (P.C.); *Lakshmi Bai v. Balkrishnan*, (1879) 4 Bom. 654 (655, 656); *Chandrsang v. Khimabhai*, (1898) 22 Bom. 718; *Rajman v. Chandra Kant*, (1882) 8 Cal. 440=10 C.L.R. 437 and *Sheogopal v. Bishen Singh*, (1880) 30 P.R. 1880.

45. *Hem Kunwar v. Amba Prasad*, (1900) 22 All. 430 (431)=1900 A.W.N. 136; also see *Rameshwar Singh v. Bisheshwar Singh*, (1885) 7 All. 734 (738)=1885 A.W.N. 217 and *Vakkallagadda Narasimham v. Valisulla Sahib*, (1905) 28 Mad. 498 (499)=15 M.L.J. 404.

respondent in first appeal, but also in second appeal.⁴⁶

But the rule does not apply to execution proceedings, *viz.*, execution applications, or execution appeals, by virtue of R. 12 containing a specific declaration to that effect.⁴⁷ The Code does not prescribe any substantive application for the substitution of the legal representative of a deceased judgment-debtor, or the decree-holder.⁴⁸ Execution proceedings do not abate.⁴⁹

There is a considerable difference of opinion between different High Courts on the question whether all of the legal representatives should be impleaded and what is the effect of a failure to do so. Chitale notes:

Two or more representatives.

"On this question, the Allahabad,⁵⁰ Bombay,¹ Madras,² Patna³ and Punjab Courts⁴ have held that even if one of them alone is impleaded, he sufficiently represents the estate and the suit does not abate. According to the Lahore High Court a *bona fide* application to bring in all those representatives who can be ascertained by the exercise of due care and industry will save

46. *Upendra Kumar v. Shamlal*, (1907) 34 Cal. 1020; *Madhubandas v. Naraindas*, (1907) 29 All. 535; also see *Arrayil v. Sankaran*, (1910) 34 Mad. 292.

47. *Shankar Balchand v. Hiralal Balchand*, 1931 Bom. 425 (427)=134 I.C. 730; *Shiv Gobind v. Kishenbansi*, 11 Pat. 546; *Mir Khan v. Sharfu*, 1923 Lah. 560 (563)=74 I.C. 577; *Amolak Ram v. Shanu*, (1911) 10 I.C. 405 (Punj.); *Thakur Prasad v. Fakirullah*, (1894) 22 I.A. 44=17 All. 606 (P.C.); *Bimbadhar v. Abdul Zalil*, 1929 Pat. 200; *Palaniappa v. Valliammai*, (1926) 50 Mad. 1=51 M.L.J. 745; *Sarjabai v. Dhanraj*, (1924) 86 I.C. 11 (Nag.).

48. *Jogendra Nath v. Rasik*, (1905) 2 C.L.J. 544; *Jogendra Chandra v. Shyamdas*, (1909) 36 Cal. 543 (558); also see *Raghnath v. Sunderdas*, (1914) 42 Cal. 72=41 I.A. 251=27 M.L.J. 150 (P.C.).

49. *Baijnath v. Ram Bharos*, (1927) 49 All. 509 (F.B.); *Mt. Gulab Kuer v. Syed Muhammad Zaffer*, (1921) 6 P.L.J. 358; *Mt. Bhagwanta v. Zamir Ahmad*, (1924) 3 Pat. 596.

50. *Dip Narain v. Lachman*, (1925) 47 All. 466=87 I.C. 799=1925 All. 479; also *Muhammad Zafar Yab v. Abdul*, 1928 All. 532=26 A.L.J. 820=50 All. 857=111 I.C. 238.

1. *Jehirabi Sadulla Khan v. Bis Millabi*, 1924 Bom. 420 (421)=26 Bom. L. R. 375=80 I.C. 758.

2. *Kadir Mohideen v. Muthukrishna Iyer*, (1903) 26 Mad. 230 (234)=12 M.L.J. 368; *Kunhamad v. Kutti*, (1889) 12 Mad. 90 (91); *Adusupalli v. Mari Kuthanammal*, (1912) 13 I.C. 313=22 M.L.J. 169=11 M.L.T. 19=1912 M.W.N. 9; *Abdulla Saheb v. Wageer*, 1928 Mad. 1199.

3. *Shibdutta Singh v. Sh. Karim Buksh*, 1925 Pat. 551 (552)=4 Pat. 320=89 I.C. 280=7 P.L.T. 186; *Sadu Saran v. Nand Kumar*, 1926 Pat. 276=94 I.C. 209=7 P.L.T. 746; *Mahabir Singh v. Motirani Kuer*, (1917) 38 I.C. 782 (783) (Pat.); *Lilo v. Jhagru*, (1924) 3 Pat. 852=85 I.C. 25=1925 Pat. 123.

4. *Khuda Baksh v. Naraindas*, (1913) 18 I.C. 44 (46)=51 P.L.R. 1913=81 P.W.R. 1913.

abatement.⁵ According to the **Rangoon High Court**,⁶ if the person impleaded as a matter of fact represented the estate and no objection as to the want of proper representation is taken at the time, there will be no abatement and the decree will bind the estate. According to the **Nagpur**⁷ view the plaintiff can get relief against the legal representative impleaded though it will not bind the other representatives. The **Sind Court** has held that all the legal representatives should be brought on record in time, otherwise the suit will abate.⁸ But even in that Court an objection that all the representatives have not been brought on record should be taken at proper time, otherwise the defendants will be estopped from taking it at any subsequent stage.⁹ In any event, if some of the legal representatives are specifically dispensed with, the suit cannot proceed as against them and if the suit cannot proceed in their absence, the whole suit will abate."¹⁰

2441. There has been some conflict of view on the question whether the legal representatives of a deceased person must be brought on the record in their representative character, though they are already on the record in their individual capacity.

Representatives already on the record. According to the **Allahabad High Court**, there can be no abatement under O. 22, R. 2, where the right to sue or be sued against survivors to the surviving plaintiff or defendant, or plaintiffs or defendants alone, after the death of any of them; and it is incumbent on the Court to make an entry to that effect even without any application. Abatement arises only under R. 3 or R. 4 when one of two or more plaintiffs or defendants dies and the right to sue does not survive.¹¹ The **Oudh Judicial Commissioner's Court** has held that where the representatives of a deceased respondent are already on the record in another capacity, and no application is made for substitution within time, an entry should be made in the record under O. 22, R. 2 of the Civil Procedure Code, and such a case is not governed by R. 4 of O. 22 of the Code.¹² The introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages.¹³

5. *Mt. Begum Jan v. Jannat Bibi*, 1927 Lah. 6=7 Lah. 438=98 I.C. 612=28 P.L.R. 287; cf. *Muhammad Hassan v. Inayat*, 1927 Lah. 94 (95) =28 P.L.R. 3=100 I.C. 418 (Where only two out of three heirs of a deceased respondent were brought on record, the appeal abated).

6. *Maung Po Mya v. Ma Gya Bon*, 1923 Rang. 114 (116)=72 I.C. 205=1 Bur. L. J. 272.

7. *Narayan v. Amrita*, 1923 Nag. 101=18 N.L.R. 21=65 I.C. 542.

8. *Sidik Muhammad Shah v. Mt. Saran*, (1925) 76 I.C. 314=1925 Sind 2; *Tulsi Das v. Ramzan*, 1926 Sind 20=89 I.C. 238.

9. *Sahijram v. Bhambomal*, 1930 Sind 147=124 I.C. 377; also see (1932) 36 C.W.N. 1138 (1142, 1143).

10. *Ali Mea v. Nana Gazi*, (1917) 41 I.C. 430 (431) (Cal.).

11. *Nankoo Ahir v. Bhagelu Ahir*, 1929 All. 347 (1)=1929 A.L.J. 618=116 I.C. 746.

12. *Mt. Hafizunnissa v. Jawahir Singh*, (1922) 66 I.C. 24=24 O.C. 374.

13. *Mohammad Mohsin v. Mohammad Ahid*, 1927 Oudh 531 (2)=4

Calcutta. The **Calcutta** view, similarly, appears to be that where the alleged legal representative is already on the record, it is not necessary to implead him in his representative character.¹⁴ In *Kartar Singh v. Lal Singh*,¹⁵

Lahore. Abdul Raoof, J., held that where on the death of a respondent it appears that his heirs are already parties to the appeal, it cannot be said to have abated merely because no fresh application is made to bring on the record the legal representatives of the deceased. Where R. 2 is applicable no application under R. 4 need be made, and that if it is not made, the appeal does not abate where all the representatives of the deceased respondent are already on the record.¹⁶ An informal letter addressed to the Court within time intimating the death of a party and the fact of his legal representatives being on the file already may be treated as an application for bringing the legal representatives of the deceased on the record and the necessary Court-fee may be allowed to be paid up.¹⁷ The **Madras High Court**

Madras. takes the view that when the legal representatives of a deceased defendant or respondent are on record, an application to bring on the legal representatives within three months is not necessary. It is sufficient if the plaintiff or appellant at some time or other before the hearing of the suit or appeal states the fact and gets it noted on the record.¹⁸

Sind. The **Sind Judicial Commissioners** have held in *Lilaram v. Tikamdas*,¹⁹ relying on the Madras and Lahore view, that the word "survive" in O. 22, R. 2 is used simply in its ordinary sense of outliving. Thus, if during the pendency of the appeal one of the parties to it dies, but all his nearer heirs are already on the record it is not necessary to apply under O. 22, R. 4, to join the legal representatives of the deceased as parties, but the Court need only make an entry under O. 22, R. 2, Civil Procedure Code.²⁰

O.W.N. 405=101 I.C. 826; Folld. in *Brij Indar Singh v. Kanshi Ram*, 1917 P.C. 156.

14. *Chowdhry Shamanund v. Rajnarain*, (1906) 11 C.W.N. 186.

15. (1921) 59 I.C. 238=11 P.L.R. 1921=9 P.W.R. 1921.

16. *Gopaldas v. Mulchand*, 1926 Lah. 607=7 Lah. 399=27 P.L.R. 688=98 I.C. 960; cf. *Gurditta Mal v. Mahomed Khan*, 1926 Lah. 37 and also cf. *Lilo Sonar v. Jhagru*, 1925 Pat. 123=3 Pat. 853.

17. *Sher Bahadur v. Abesar*, (1926) 95 I.C. 236 (Lah.).

18. *Achutan Nair v. Manavikrama*, 1929 Mad. 152=51 Mad. 347=54 M.L.J. 675=27 L.W. 422=109 I.C. 372; Not approved *Shankar Bhai v. Motilal*, 1925 Bom. 122 (123); also see *Dawloo Ma v. Karnam Ghowdappa*, 1930 Mad. 579 (Courts are not debarred from passing orders in such matters without formal application); and cf. *Kunbi Kalanda v. Kunbipakki*, 1929 Mad. 69 (71, 72) (The representation may be incomplete, but sufficient).

19. *Ibid.*

20. 1929 Sind 225=119 I.C. 537; Reld. on 1929 Mad. 152; 1926 Lah. 607 and 1925 Rang. 95.

The **Rangoon High Court** has held that the meaning of the word "alone" in O. 22, R. 2, is that the suit can be continued by surviving plaintiff if he had an independent right of suing.²¹ Where the surviving plaintiffs appear to be the sole legal representatives of a deceased plaintiff, the appeal survives as against them, and it can proceed, even though they have not been specifically joined as the deceased's legal representatives.²²

The **Patna High Court** however takes a different view. It has been held in *Daroga Singh v. Raghunandan Singh*,²³ that where one of the plaintiffs-respondents died leaving two sons who were all members of a joint family, and the appellants failed to bring them on record, the whole appeal abated. In *Lilo Sonar v. Jhagru Sahu*,²⁴ it was held that the fact that one of the legal representatives of a deceased respondent is already on the record, but not as such does not relieve the appellant from the duty of applying within time for the substitution of the legal representatives of the deceased. It was pointed out in that case that the fact that one of the legal representatives was already on the record did not relieve the appellant from making an application for substitution in terms of R. 4 of O. 22, Civil Procedure Code. This view has been accepted in *Basist Narayan Singh v. Modnathdas*.²⁵

2442. STARTING POINT OF LIMITATION.—Under the Code of 1882, S. 5 of the Limitation Act was made applicable to applications under the corresponding S. 368-A of the Code (O. 22, R. 4).²⁶ But under the present Code, the law has been changed, and under O. 22, R. 4, if no application for substitution is made within the time limited, the suit or appeal shall abate, and the rule gives the Court no power to enlarge the time for sufficient cause. This period cannot be enlarged, under the present Act by reason of the applicant's disability or minority.²⁷ But after abatement, an application may

21. *Maung Byaung v. Mg. Shwe Barw*, 1924 Rang. 376=2 Rang. 486.

22. *Maung Po v. Ma Shwe Ma*, 1925 Rang. 95=2 Rang. 445; cf. *Ma Zan Nyein v. Mg. Kyaw Zan*, 1 Rang. 187=1923 Rang. 258 and *Sardari Lal v. Ramlal*, (1921) 1 Lah. 225=57 I.C. 199=1 L.L.J. 225.

23. 88 I.C. 669=6 P.L.T. 451=1925 Pat. 590.

24. 85 I.C. 25=6 P.L.T. 313=3 Pat. 853=1925 Pat. 123=3 Pat. L. R. 97.

25. 1928 Pat. 250=7 Pat. 285=9 P.L.T. 153=108 I.C. 552.

26. *Madhuban v. Narain*, 29 All. 535 (537); *Chajmal v. Jagdamba*, 11 All. 408; *Gaman v. Baksha*, 42 P.R. 1887; *Dadu v. Kadu*, 113 P.R. 1907 and *Syed Hossein v. Abdul Rahim*, 7 C.W.N. 529; also see *Badal Khan v. Murtaza*, (1911) 9 I.C. 977 (All.).

27. See notes under Art. 171; also see *Paru v. Ramunni*, (1904) 28 Mad. 359; *Ma Min Thin v. Maung Po Win*, (1916) 35 I.C. 438 (L.B.); *Rihana v. Harditta*, 91 P.R. 1885 and *Mt. Sarwar v. Dina*, 103 P.R. 1881; cf. *Bhikaji v. Purshotum*, (1885) 10 Bom. 220.

be for setting aside of the abatement under O. 22; R. 9, Civil Procedure Code, within the period of two months prescribed by Art. 171, Limitation Act, on the ground that the applicant was prevented by sufficient cause from making the application for substitution within time.²⁸ An application to bring the legal representatives on the record after the prescribed period may be treated as one to set aside the abatement.²⁹ It is not material that the application should expressly contain a prayer for setting aside the abatement, so long as the application is in *form and substance* one to set aside the abatement. [O. 22, R. 9 (3)].³⁰ Where one of the legal representatives has applied in time under Art. 176 of the Limitation Act to be made a party, and the application has been granted, the other legal representative may be brought on the record subsequently.³¹

Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
178.	Under the same Code for the filing in Court of an award in a suit made in any matter referred to arbitration by order of the Court, or of an award made in any matter referred to arbitration without the intervention of a Court.	Six months.	The date of the award.

SYNOPSIS.

- 2443. Corresponding provisions.
- 2444. Scope of the article.
- 2445. The period.
- 2446. Starting point of limitation.

NOTES.

2443. CORRESPONDING PROVISIONS.—This article corresponds to Art. 165 in Act IX of 1871. Prior to that provision

28. *Secretary of State v. Jawahir*, 25 I.C. 48=36 All. 235; *Lachmi Narain v. Md. Yusuf*, 42 All. 540 (541)=18 A.L.J. 688=59 I.C. 903; *Daya Singh v. Buta Singh*, 118 P.R. 1916=38 I.C. 7; *Shah Muhammad v. Karim Illahi*, 1922 Lah. 131=65 I.C. 121=14 P.W.R. 1922.

29. *Kirpa Ram v. Bhagat Chand*, 1928 Lah. 746=112 I.C. 5; *Ataul Rehman v. Maskhur-un-nissa*, 1926 Lah. 474=94 I.C. 300; *Budhi v. Naraini*, (1923) 74 I.C. 17 (Lah.) and *Vijay Sing v. Shivaji Rao*, (1924) 26 Bom. L. R. 378=1924 Bom. 416=80 I.C. 761.

30. *Dinanath v. Sayad Habib*, (1929) 117 I.C. 884=1929 Lah. 129; cf. *Seshamma v. Venkatrao*, (1924) 80 I.C. 397=47 M.L.J. 235=1924 Mad. 713.

31. *Adsupalli Venkatarao v. Marikaruthu Ammal*, (1912) 13 I.C. 313=22 M.L.J. 169=11 M.L.T. 19=1912 M.W.N. 9.

was made in S. 327 of the Code of Civil Procedure, 1859, as follows:—

“When any matter has been referred to arbitration without the intervention of any Court of Justice, and an award has been made, any person interested in the award may, within six months from the date of the award, make application to the Court having jurisdiction in the matter to which the award relates, that the award be filed in Court”

Under Act of 1877, the corresponding Art. 176 ran as follows:—

“Under the Code of Civil Procedure, S. 516 or 525, that an award be filed in Court”—“Six months”—“The date of the award”.

2444. SCOPE AND APPLICATION.—Article 178 of the Limitation Act is restricted to applications for the filing of awards, (para. 20, Sch. II, of the Civil Procedure Code, 1908); and is inapplicable to suits.³² The procedure laid down in Civil Procedure Code, Sch. II, paragraph 20, is not obligatory. Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award,³³ for which the period of limitation is three years at least, in some land cases it may be twelve years, and there is free right of appeal, and second appeal.³⁴ In the case of a suit to enforce an award, the period of limitation is determined by the nature of the relief sought.³⁵ Article 178 (Art. 176 of Act XV of 1877), only prescribes the period of limitation for an *application* to file an award (Sch. II, Civil Procedure Code, Ss. 10, 20; old Ss. 516, 520, Civil Procedure Code, 1882). It does not apply to a regular suit for the recovery of money due under an award or for specific performance of an award. For such a suit, the period of limitation, if not three years, under Art. 115 or Art. 113, would be six years under Art. 120.³⁶ When an award is filed in Court, under para. 10 of Sch. II, to the Code of Civil Procedure, by the person making the same, it is incumbent on the Court to give notice to the parties, and the fact that they might have received knowledge of the award having been filed in Court *aliunde* does not amount to such notice.³⁷ There is no time prescribed for filing the award by the arbitrator himself.³⁸ But it has to be completed and signed

32. *Nga Hla Gyaw v. Mi Ya Po*, (1915) 27 I.C. 31 (U.B.); *Maung Ne Dun v. Maung Cho*, (1922) 70 I.C. 517 (518) (U.B.); *Mi Le Byu v. Nga Chit Pu*, (1909) 4 I.C. 821 (U.B.).

33. *Nga Hla Gyaw v. Mi Ya Po*, (1915) 27 I.C. 31 (U.B.).

34. *Ibid.*

35. *Maung Ne Dun v. Maung Cho*, (1922) 70 I.C. 517 (U.B.); *Reld. on Ma Pon v. Maung San Barw*, 2 U.B.R. (1897-01) 446.

36. *Ma Le Byu v. Nga Chit Pu*, (1909) 4 I.C. 821 (U.B.); *Reld. on Sukho Bibi v. Ram Sukhdas*, 5 All. 263; *Raghubar Dial v. Madan Mohan*, 16 All. 3; *Sornavalli v. Muthayya*, 23 Mad. 593 and *Sheo Narain v. Beni Madho*, 23 All. 285.

37. *Punnoo Ram v. Nebh Raj*, (1929) 119 I.C. 331=1930 Lah. 228; *Reld. on Chatarbuj v. Ganesh Ram*, 20 All. 474=A.W.N. (1898) 132.

38. *Roberts v. Harrison*, (1881) 7 Cal. 333 (No application is necessary for the arbitrators to file an award).

within the period fixed by Court under Sch. II, para. 3 (S. 508, old Code). The present article applies only to application by the *parties* for filing an award.³⁹ When an award has been *lost*, the procedure under this article cannot be resorted to and the parties must be referred to a regular suit.⁴⁰ When any matter has been referred to arbitration *without the intervention of a Court of justice*, any person interested in the award of arbitrator may (under Sch. II, para. 20), *apply* to a competent Court that the award be filed.⁴¹ An award filed without the intervention of the Court can be *split* up, and it need not be filed as a whole.⁴² An award of the arbitrator in disputes referred to him under Co-operative Credit Societies Act, has itself the force of a decree and does not require filing, under para. 20, Sch. II, Civil Procedure Code, and Art. 178 of the Limitation Act, does not apply to the execution on the award.^{42-a}

2445. THE PERIOD.—The period of six months under Art. 178, cannot be enlarged under the scope of S. 5, Limitation Act. S. 5 of the Limitation Act.⁴³ Where pending proceedings for mutation of names the parties concerned referred to arbitration out of Court, the whole question of their title to the property in dispute, and the arbitrator delivered his award; but the mutation proceedings nevertheless continued: and more than six months after the date of the award, some of the parties filed an application in the civil court purporting to be under cl. 17 of the second schedule to the Code of Civil Procedure, and subsequently an amended application under cl. 20; it was held that the application was time-barred. Clause 17 of the schedule was totally inapplicable, and **neither S. 5 nor S. 14** of the Limitation Act, 1908, **could be applied** in favour of the amended application under cl. 20.⁴⁴ The applicant cannot claim the benefit of S. 6 of the Limitation Act; the application though numbered and registered as a suit is not a suit for the purposes of limitation.⁴⁵ If an award is not made a rule of Court (*i.e.*, filed, within the period prescribed by this article, the award does not become invalid and unenforceable by suit.⁴⁶

39. Dr. Pal's Limitation, p. 1159.

40. *Khodeja v. Ghulam*, (1919) 1 Lah. 45.

41. *Raghavendra v. Guru Rao*, (1913) 37 Bom. 442.

42. *Kanshinath v. Gangubai*, 1929 Bom. 193.

42-a. *Ramkrishna Sen Gupta v. Haripur Co-operative Bank*, (1936) 163 I.C. 591 (Cal.).

43. *Ram Ugrah v. Achraj Nath*, (1915) 38 All. 85=31 I.C. 899=13 A.L.J. 1115; cf. *Yereni Anjaya v. Bapaya*, (1910) 9 I.C. 157 (Mad.) (Time spent in infructuous proceedings, in a wrong Court, may be reasonably excluded under S. 14, Limitation Act).

44. *Ibid.*

45. *Ma Thein Tin v. Maung Ba Than*, (1923) 1 Rang. 256=1923 Rang. 226=76 I.C. 493.

46. *Ibid.*

2446. STARTING POINT OF LIMITATION.—

The date of the award. period of limitation for an application to file an award commences to run under Art. 178 of Sch. I to the Limitation Act from the date of the award, and not from the date on which the award is to take effect.⁴⁷ The date of the award is not the date written in the award, as when it was made but when it is given to the parties, when it becomes an award and is handed over to them so that they may be able to give effect to it.⁴⁸ It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award from the time when he is in a position to enforce it.⁴⁹ The date of the award is therefore the date on which it is given to the parties,⁵⁰ i.e., the date when the award is published, or delivered to the parties so that they have notice of its contents, and not the date on which it is actually written and signed or drafted.¹ Time runs from the date of the award, and not the date from which the award is to take effect.²

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
179.	By a person desiring to appeal under the same Code to His Majesty in Council for leave to appeal.	Ninety days.	The date of the decree appealed from.

SYNOPSIS.

- 2447. Previous History.
- 2448. Changes.
- 2449. Scope and application.
- 2450. Starting point for application.
- 2451. Leave to appeal in *forma pauperis*.
- 2452. Security deposit.

NOTES.

2447. PREVIOUS HISTORY.—Regulation XVI of 1797, S. 2, enacted that

"all persons desiring of appealing from a judgment of the Court of Sudder Dewany Adawlut to the King in Council, under the authority, for this purpose, contained in the 21st section of the Statute 21st George III, cap. 70,

47. *Ma Thein Tin v. Maung Ba Than*, (1923) 76 I.C. 493=1 Rang. 256=1923 Rang. 226.

48. *Sreenath v. Koylash*, (1874) 21 W.R. 248 (A case under Act VIII of 1859, S. 326 (corresponding to para. 17 of Second Schedule), where an application for filing the award was made under S. 327, Civil Procedure Code).

49. *Dutto Singh v. Dosad Bahadur*, (1883) 9 Cal. 575.

50. *Ibid*.

1. *Kunj Lall v. Banzari Lall*, (1918) 4 P.L.J. 394=48 I.C. 711.

2. *Ma Thein Tin v. Maung Ba Than*, 1923 Rang. 226=1 Rang. 256=76 I.C. 493.

are required to present their petition of appeal to the Court of the Sudder Dewany Adawlut, either themselves or through one of the authorised pleaders of that Court duly empowered to present such petition in their behalf, within six calendar months from the date on which the judgment appealed against may have been passed."

This Regulation was repealed by **Act VI of 1874 (The Privy Council Appeals Act)**, and by its **S. 8** it was enacted that

"such application must *ordinarily* be made within **six months** from the date of such decree. But if that period expires when the Court is closed, the application may be made on the day when the Court re-opens".

The Privy Council Appeals Act, 1874, was repealed by **Act X of 1877**, and the provision was enacted in its **Ss. 598 and 599**. Section 8 of the Privy Council Appeals Act, was re-enacted in **S. 599** of Act X of 1877 (Civil Procedure Code, 1877). This **S. 599** was repealed by Act XV of 1877, which in its Art. 177 made a provision in the following terms:—

"For the admission of an appeal to Her Majesty in Council Six months The date of the decree appealed against."

The Civil Procedure Code (Act XIV of 1882), however, re-enacted **Ss. 598 and 599** of Act X of 1877, as its **Ss. 598 and 599** respectively. **S. 598** of the Civil Procedure Code, fell within the old Art. 177. The limitation for such an application was provided by **S. 599** of Act X of 1877, until that section was repealed by the Limitation Act of 1877. *The period* of limitation, however, remained the same. Section 599 was restored to its former place by Act XIV of 1882. But **S. 599** of this Code was repealed by Act VII of 1888. **Order 45, R. 2** of the present Civil Procedure Code corresponds to **S. 598** of the Civil Procedure Code of 1882. The present Civil Procedure Code does not contain any provision corresponding to **S. 599** of the Code of 1882.³ Section 598 of the Code of 1882 dealt with the application to be made by an intending appellant; **S. 603** dealt with the admission of the appeal. Section 598 required that the application should pray for a certificate that the case was a fit one for appeal; **S. 603** did not require that any application should be made for the admission of the appeal. The word "may" in **S. 603** of the Code of 1882 was replaced by the word "*shall*" in **O. 45, R. 8** of the present Code. Accordingly the appeal *shall* be admitted where provisions of **R. 8** of **O. 45** is complied with and no application would be necessary under the provisions of the new Civil Procedure Code of 1908.⁴

3. Dr. Pal's Limitation Act, p. 1160; see *In re Sita Ram*, (1892) 15 All. 14 (Held, that **S. 599** of the Civil Procedure Code, 1882, was not inconsistent with Art. 177, that **S. 599** of Act XIV could not be taken to have repealed Art. 177 of Act XV of 1877, that Art. 177 was in force before Act VII of 1888 came into operation and that it was not necessary to revive it).

4. Mitra's Limitation Act, Vol. II, p. 1909.

2448. The period of limitation under Art. 179 has now been **reduced from six months to ninety days.**

Changes.

(See S. 2 of the Limitation Act, and Civil Procedure Code Amendment Act XXVI of 1920.) The Statement of Objects and Reasons (*Gazette of India*, 1920, Part V, p. 156) explains that

"delay in the conduct of Indian appeals to the Privy Council have been the subject of much adverse comment in judgments of the Judicial Committee and remedial measures have been undertaken for some time past. His Majesty's order in Council, dated the 9th February, 1920, has already been issued and the present Bill has been drafted with the object of giving legislative sanction to various further measures calculated to expedite the prosecution of those stages of these appeals which take place in India".

In introducing this Bill, Sir William Vincent observed:—

"This Bill is intended to reduce the delays which have occurred in Privy Council appeals. It affects other cases in certain respects also. The question of these delays in the Privy Council has exercised the minds of the Secretary of State, the Government of India, and their Lordships of the Judicial Committee for some years. On many occasions the Privy Council have criticised the want of expedition in these appeals with great severity, at times they have almost become plaintive about this..... This Bill therefore provides a reduction of the period within which a person may apply for leave to appeal to the Privy Council." 4-a

2449. SCOPE AND APPLICATION.—This article refers,

Special leave to cross-appeal.

by its terms, to one desiring to appeal to His Majesty in Council under the Code of Civil Procedure.⁵ In *Venkayyama Rao*

v. Appa Rao,⁶ where the cause of action in the suit was on a ground common to all the defendants, and the third defendant did not appeal from either of the decrees against him in the District Court and in the High Court; he was, however, in each case made a respondent by another defendant who appealed: and on the appeal to Privy Council by the plaintiff, the Judicial Committee granted the application of the third defendant to be made a respondent and in that capacity granted him special leave to bring a cross-appeal notwithstanding that his right of appeal to His Majesty in Council had then become barred by the Limitation Act. Where an application for a certificate that the case is a fit one to be taken on appeal to the Privy Council is made to the High Court under S. 66 (a), Income-Tax Act, the case is governed by Art. 179, and not by Art. 181, Limitation Act.⁷ A petition presented in time and admitted, if struck off for default, may be re-admitted after the six months.⁸ There cannot be one application for leave to

Re-admission of appeal.

4-a. See *Gazette of India*, 1920, Part VI, p. 1000.

5. *Phillip E. Billingham v. King-Emperor*, (1923) 38 C.L.J. 406.

6. (1916) 39 Mad. 509=43 I.A. 158=31 M.L.J. 58 (63) (P.C.).

7. *Commissioner of Income-tax, Bengal v. Shara Wallace & Co.*, 1932 Cal. 587=36 C.W.N. 127=59 Cal. 251=139 I.C. 236.

8. In *re Radha Benode Misser*, 1867 B.L.R. 730 (F.B.).

appeal to His Majesty in Council in two separate appeals covered by one judgment.⁹

2450. STARTING POINT OF LIMITATION.—The third column enacts that the starting point is the date of the decree appealed from. Art. 179 is included in the “Third Division” of the Sch. I to the Limitation Act, as dealing with an *application* for leave to appeal, as distinguished from an appeal to His Majesty in Council.¹⁰ The granting of leave to appeal to the Privy Council is *ultra vires* where no application for leave was made within the time prescribed.¹¹

The provisions of S. 5, cl. (1) and those of S. 7, Act XV of 1877, are still applicable to applications for the admission of an appeal to His Majesty in Council.¹² Section 5, cl. 2 (as to exclusion of time for sufficient cause), and S. 12, cl. 2 (as to exclusion of time requisite for obtaining a copy of the decree), did not apply to Art. 177, in Act XV of 1877; but, both these sections have now been amended in the present Limitation Act, IX of 1908, and they have been made applicable to applications for leave to appeal.¹³ But, the period

prescribed by Art. 179 cannot be enlarged by reason of the applicant's minority or legal disability.¹⁴ Where in 1885, the High Court in appeal passed a decree to which a minor under the Court of Wards was a party, and the appeal to His Majesty in Council was made within six months of his attaining his majority in 1894, it was held that the application under S. 598 of the Civil Procedure Code, was barred by time.¹⁵ Where an application for leave to appeal to His Majesty in Council was made by ward in his own name and rejected, and the second application was made beyond limitation, after release of estate from superintendence of Court of Wards, it was held that

9. *Gopal Singh v. Johnstone*, 1932 Lah. 441=33 P.L.R. 455=140 I.C. 70 (*Held*, that although the two subsequently filed applications were time-barred, the first application which was pending could be amended so as to cover only one of the suits).

10. *Moroba v. Ghansham*, (1894) 19 Bom. 301.

11. *Gajadhar v. Emamali*, (1875) 15 B.L.R. 221.

12. *In re Sitaram*, (1892) 15 All. 14; cf. *Thurai v. Jainilabdeen*, (1895) 18 Mad. 484 (*Held*, that S. 7, Limitation Act did not apply—In this case, however, the right of the party to make application had become barred under S. 599 of Act XIV of 1882 before that section was repealed by Act VII of 1888—Mitra's Limitation Act, p. 1910).

13. *Ram Sarup v. Jaswant Rai*, (1915) 38 All. 82; *Eastern Mortgage Company v. Purna Chandra*, (1912) 39 Cal. 510; *Harish Chandra v. Chandpur*, (1912) 39 Cal. 766; and *Abdulla Hossein v. The Administrator-General*, (1914) 42 Cal. 35; also see *Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.*, 1932 Cal. 587 (Time requisite for obtaining a copy should be excluded).

14. *Thurai Rajah v. Jainilabdeen Rowthan*, (1895) 18 Mad. 484.

15. *Ibid.*

the first application by a disqualified person was not revived by the second application and it would remain the application of a disqualified person if revived. Secondly, that no sufficient cause had been shown to enable the Court to apply the provisions of S. 5 to the case.¹⁶ Where the High Court reviews and modifies a decree passed

Review. by itself, the period of limitation for an application for leave to appeal to His Majesty in Council begins to run from the date of the decree passed in review.¹⁷ In computing the period of limitation for an application for leave to appeal to Privy Council, the time taken up for review of the judgment sought to be appealed against should be excluded.¹⁸ Where an application for leave to appeal was filed in time, but the application for a review succeeded, and the judgment on review made it unnecessary to proceed with the application, it was held that the application was to be taken as suspended pending disposal of appeal to Privy Council against decree passed on review.¹⁹

2451. It is questionable as to whether a High Court has power to grant leave to appeal to His Majesty in Council *in forma pauperis*, and to dispense with the usual security for the costs of the respondent required by the Code.²⁰ In *In re Gour Surn Dass*,²¹ the usual security for costs was ordered to be given. The **Calcutta High Court** has held that the leave to appeal cannot be granted *in forma pauperis*²² and the **Madras High Court** has followed the view that the High Court cannot entertain applications for leave to appeal to the Privy Council *in forma pauperis*.²³ The **Patna High Court** is also against the grant of leave to appeal *in forma pauperis*.²⁴

2452. As regards security and deposit required on grant of certificate, *see* O. 45, R. 7, Civil Procedure Code. The period of six months originally given has now been reduced to ninety days.

O. 45, R. 7.
Security deposit.

16. *Narendra Bahadur Singh v. Oudh Commercial Bank*, (1918) 46 I.C. 68 (Oudh).

17. *Nawas Ali v. Allu*, (1923) 75 I.C. 520=4 Lah. 185=6 L.L.J. 44=1924 Lah. 82; Relied upon *Joykishen v. Ataoor Rahman*, 6 Cal. 22=6 C.L.R. 575 (P.C.) and *Vadilal v. Fulchand*, 30 Bom. 56=7 Bom.L.R. 664.

18. *Nariman Rustomji Mehta v. Hasham Ismayal*, 1925 Bom. 137=26 Bom.L.R. 1261=49 Bom. 149=85 I.C. 191; Relied upon 42 I.C. 43=44 I.A. 218=45 Cal. 94 (P.C.).

19. *Neki v. Chhajju*, (1923) 4 Lah. 445=77 I.C. 869=1924 Lah. 225.

20. *Thompson v. Calcutta Tramways Company*, (1894) 21 Cal. 523 (525).

21. (1873) 19 W.R. 305.

22. *Jagadanand v. Rajendra*, (1912) 17 C.L.J. 381.

23. *Amba v. Srinivasa Kamathi*, (1918) 42 Mad. 32; Relied on 17 C.L.J. 381 and (1916) 3 P.L.J. 179.

24. *Ramkishanlal v. Manna Kumri*, (1916) 3 P.L.J. 179.

But, it has been held by the Judicial Committee that the High Court may extend the time allowed for giving the security and making the deposit provided there are "cogent reasons" for doing so.²⁵ As to what constitutes "cogent reasons", see *Rangasayi v. Mahalakshamma*.²⁶ Compare *Bagga v. Salihan*.²⁷ Prior to Act XXVI of 1920, it was the uniform practice to extend time for good cause shown. But the object of the amending Act was to expedite Privy Council appeals, and the restrictive words used limit the Court's discretion so that the Court can in no case grant an extension of more than sixty days.²⁸ The **Allahabad High Court** has held that the shorter period allowed by the amending Act does not apply when the decree was passed before the Act came into force.²⁹ According to **Bombay High Court**, an extension can be granted under R. 9 of the Privy Council Rules, 1920.³⁰ This is also the **Madras** view on the joint.³¹

Article.	Description of Suit.	Period of Limitation	Time from which period begins to run.
180.	By a purchaser of immoveable property at a sale in execution of a decree for delivery of possession.	Three years.	When the sale becomes absolute.

SYNOPSIS.

2453. Scope and application.

2454. Starting point of limitation.

(1) Sale absolute.

(2) Confirmation of sale.

NOTES.

2453. SCOPE AND APPLICATION.—This article is new in the present Act. It refers to an *application* by a purchaser in auction-sale to obtain possession, in a summary proceeding, of the

25. *Brojore v. Bhagana*, (1883) 11 I.A. 7 (10)=10 Cal. 557; *Fazlunnissa v. Mulo*, (1884) 6 All. 250; also see *Rangasayi v. Mahalakshamma*, (1890) 14 Mad. 391 and *Bagga v. Salihan*, (1910) 6 I.C. 723 (Punj.).

26. (1890) 14 Mad. 391.

27. 44 P.R. 1910=6 I.C. 723.

28. *Ramdhan v. Prag Narain*, (1922) 44 All. 216=65 I.C. 249=1922 All. 43; *Joti Pershad v. Harkesh Singh*, (1928) 26 A.L.J. 433; *Surty v. Chettyar*, (1926) 4 Rang. 265=98 I.C. 417=1927 Rang. 20; *Kamla Kanta v. Bindhumukhi*, 1929 Pat. 431; *Ramani Ranjan v. Durga Dutt*, 1927 Pat. 330; *Jai Kishen v. Baij Nath*, 1927 Pat. 332.

29. *Debi Ram v. Prahlad Das*, (1922) 44 All. 242=65 I.C. 340=1922 All. 87.

30. *Nikant v. Vidya Narasimha*, (1927) 51 Bom. 430=101 I.C. 555=1927 Bom. 217. See Mulla's Civil Procedure Code and Chitale's Civil Procedure Code.

31. See Mitra's Limitation Act, p. 1912.

property sold to him, under the provisions of O. 21, Rr. 95 and 96 of the Civil Procedure Code, 1908. Compare Arts. 137 and 138 which apply to regular *suits* for possession. (See notes under Arts. 137 and 138.)

Under the old Limitation Act, such applications were held governed by the residuary Art. 178 (now Art. 181), and according to the **Bombay**³² and **Madras**³³ High Courts, the starting point of limitation was the date when the sale certificate was granted, while according to the **Allahabad High Court**,³⁴ time ran from the date of confirmation of sale.

An application for possession by a decree-holder purchaser is not an application to execute the decree, and is governed by Art. 180 of the Limitation Act, 1908.³⁵ Prior to this Act, it fell within Art. 178 (now Art. 181) of Act XV of 1877.³⁶ An application by the purchaser of immoveable property at a sale in execution of a decree is governed by the specific Art. 180, in the new Act, and it is not proper to overlook that article and apply Art. 181 of the Limitation Act which is a residuary article applicable to cases not provided for elsewhere in the First Schedule to the Limitation Act or by S. 48 of the Civil Procedure Code.³⁷ The order directing delivery of possession ceases to be operative when it is not carried into effect owing to the default or laches of the auction-purchaser. Where the Court dismisses an application on this ground, a fresh application would be required if the auction-purchaser thereafter wishes to obtain delivery of possession, and this application will be governed by Art. 180 of Sch. I to the Limitation Act, 1908.³⁸ The

Madras High Court had conflicting views on the point. In *Nandur Subbayya v. Raja Venkataramayyah*,³⁹ it was held *per curiam*, that an application by a decree-holder purchaser for possession of the property

32. *Basapa v. Maya*, 3 Bom. 433 (F.B.); also see *Hanmantrao v. Subaji*, (1884) 8 Bom. 257 and *Kashinath Trimbak v. Duming Zuran*, (1892) 17 Bom. 228.

33. *Sultan Sahib v. Chidambaram*, (1908) 32 Mad. 136.

34. *Ranjit v. Baldeo*, 30 All. 390.

35. *Ramaswami Aiyar v. Abdul Asis Sahib*, (1916) 32 I.C. 993 (Mad.).

36. *Sultan Sahib Marakayar v. Chidambaram Chettiar*, 1 I.C. 998=19 M.L.J. 224=4 M.L.T. 350=32 Mad. 136; cf. *Abdul Asis v. Chokkan*, 1935 Mad. 803 (F.B.).

37. *Vadrenu Viswasundara Rao v. Vannamu Paidigadu*, (1925) 91 I.C. 485=50 M.L.J. 72=23 L.W. 472=1926 Mad. 385; also see *Abdul Asis v. Chokkan*, 1935 Mad. 803 (F.B.).

38. *Ibid.*, 91 I.C. 485=1926 Mad. 385; Follows Oldfield, J.'s view in 43 I.C. 155 (Mad.); cf. *Apparao v. Lakshmana*, 65 M.L.J. 305=145 I.C. 397=1933 Mad. 745 (747, 748).

39. 1918 M.W.N. 214=43 I.C. 155=7 L.W. 16.

purchased by him is not an application for execution of the decree within the meaning of Art. 182 of the Limitation Act and is not, therefore, governed by that article. Abdur Rahim, J., took the view that once an order for delivery of possession is made by the Court, the purpose of Art. 180 of the Limitation Act is satisfied, and the carrying out of that order is no longer governed by that article; and Art. 181 would apply to such a case.⁴⁰ Oldfield, J., dissented. An application for delivery of possession by a purchaser, consequent on the striking off of his prior petition ordering delivery owing to his default or laches in carrying it out, is governed by Art. 180 and not by Art. 181 of the Limitation Act and the latter application cannot be deemed to be a continuation of the prior proceedings which have already terminated.⁴¹ According to this view a decree-holder's proceeding can only be held to be legally continued when the interruption to them was not occasioned by any fault of his own, but either by the successful objection of a judgment-debtor or a third party or by some obstacle interposed by the Court. They are not continued where the only obstacle is the decree-holder's own default. A decree-holder is a party to the suit, and does not cease to be so after the auction-sale; and proceedings as to the delivery of possession to the decree-holder auction-purchaser may not affect the decree nor impeach the sale, but when questions arise as to the kind of possession to be delivered it is a question relating to the execution of the decree. When an application under R. 95 is made in execution of a decree for possession of specific immovable property, the proceedings then not only relate to the decree but may also affect the decree itself. The decree is not satisfied until delivery of possession to the decree-holder auction-purchaser.⁴² Such questions arise under S. 47, Civil Procedure Code. A stranger purchaser at Court auction is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree under execution decided under S. 47, Civil Procedure Code.⁴³ Even if the purchaser has not been also the decree-holder, he would be a representative of the judgment-debtor.⁴⁴ But, this would not bring the case under Art. 182 of the Limitation Act, as Art. 180 covers applications in this matter.⁴⁵ This article applies to all such applications made after the Limitation Act IX of

40. *Appavoo v. Lakshmana*, 65 M.L.J. 305=145 I.C. 397=1933 Mad. 745 (747, 748).

41. *Viswasundra v. Paidagadu*, 50 M.L.J. 72=1926 Mad. 385=91 I.C. 485.

42. *Kailash Chandra v. Gopal Chandra*, 1926 Cal. 798=53 Cal. 781=95 I.C. 494=30 C.W.N. 649=43 C.L.J. 345 (F.B.).

43. *Veyindramuthu v. Maya Nadan*, (1919) 43 Mad. 107=1919 M.W.N. 881=26 M.L.T. 391=54 I.C. 209=38 M.L.J. 32 (F.B.).

44. *Kasinatha Ayyar v. Uthumunsa Rowthan*, 25 Mad. 529; also see and cf. 1927 Nag. 294=103 I.C. 335 (*Balaji v. Anandrao*) (Dual position of decree-holder-auction-purchaser).

45. *Abdul Aziz Sahib v. Chokkan Chettiar*, 1935 Mad. 803 (F.B.).

1908 came into force, though the auction-sale was confirmed before the enforcement of this Act.⁴⁶

2454. STARTING POINT OF LIMITATION.—(1) In

Sale absolute. column 3, the starting point of limitation is given as the date "*when the sale becomes absolute*". A sale becomes absolute on the date it was confirmed by the Court, and not on the day on which objection petition filed by a third party under O. 21, R. 90 (S. 311, old Code) was dismissed. Order 21, R. 92, Civil Procedure Code, provides when the sale becomes absolute, or is to be set aside. An application for delivery of the property, made after three years from the date of sale becoming absolute, becomes barred under Art. 180, Sch. I, of the Limitation Act.⁴⁷ Even where an auction-sale was confirmed before the Limitation Act of 1908 came into force, but the application for possession of purchased property was made after the operation of the Act, it was held governed by Art. 180 of the present Act, and was not governed by the Limitation Act of 1877.⁴⁸

(2) Order 21, R. 92, Civil Procedure Code enacts that where
Confirmation of sale. no application is made under R. 89, R. 90, or R. 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute. In other words the sale becomes absolute as soon as it is confirmed. Applications under Rr. 89, 90, or 91 are to be made within a prescribed time. If no such application is made within certain time given, the Court will be entitled to confirm the sale forthwith. If an application has been made to set aside the sale, and has been disallowed, the order would be subject to an appeal allowed against orders made under O. 21, R. 92 (1), Civil Procedure Code.

Their Lordships of the **Privy Council** have held that in construing the meaning of the words "*when the sale becomes absolute*" in Art. 180 of the Limitation Act, regard must be had not only to the provisions of O. 21, R. 92 (1) of the Civil Procedure Code, but also to the other material sections and orders of the Code, including those which relate to appeals from orders made under O. 21, R. 92 (1). The result is that where there is an appeal from the order of the Sub-Judge, disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Art. 180 of the Limitation Act until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do, when he decided to disallow the above-

46. *Hussein Bux v. Mt. Becha*, (1915) 27 I.C. 420 (Cal.).

47. *Arunagiri Mudaliar v. Uthando Mudali*, (1912) 17 I.C. 242 (Mad.); compare *Muthukorakkai v. Madar Ammal*, 43 Mad. 185 (197, 198) (F.B.) (Which virtually overrules the earlier decision).

48. *Hussein Bux v. Mt. Becha*, (1915) 27 I.C. 420 (Cal.).

mentioned application.⁴⁹ This view overrules the decision of the **Calcutta High Court** in *Neckbar Sahai v. Prakash Chandra*,⁵⁰ which their Lordships found in conflict with the later decision in the case of *Chhaganlal Bagri v. Beharilal*,¹ which their Lordships approved. In this later case, the decree-holder in execution of his mortgage-decree purchased the property on the 17th September, 1924. An application for setting aside the sale by one of the judgment-debtors was dismissed on the 30th May, 1925, and the sale was confirmed on that date. An appeal was afterwards filed against the order dismissing the application for setting aside the sale, and the appeal was dismissed on the 25th July, 1927. The appellant's application for delivery of possession was made on the 18th January, 1929. It was held that the application, being governed by Art. 180, Sch. I of the Limitation Act was in time: that the three years ran from the 25th July, 1927, when there was a final, conclusive, and definite order confirming the sale, and not from the 30th May, 1925. The

Madras Full Bench. *Madras Full Bench* decision in *Muthu Korakkai v. Madar Ammal*,² was distinguished on the ground that there was no

question of any suspension of cause of action during the pendency of proceedings for setting aside the sale for an application for delivery of possession to which Art. 180, Sch. I, of the Limitation Act, applies. According to the **Madras Full Bench**, the period of limitation for an application under this article would begin to run from the date of the order disallowing the petition to set aside the sale, and not from the date of the first confirmation, because the sale does not become absolute within the meaning of this article until the application to set aside the sale has been disallowed and the sale upheld, though the order confirming the sale had been passed before the application to set aside the sale was made.³ The **Privy Council** decision in *Baijnath Sahai v. Ramgut Singh*,⁴ may also be noticed

49. *Chandramoni v. Anarjan*, 61 Cal. 945=38 C.W.N. 901=1934 Cal. 134=150 I. C. 11=67 M. L. J. 79 (P. C.); Reversed *Anarjan Bibi v. Chandramani Shah*, 134 I.C. 1188=56 C.L.J. 574=1932 Cal. 75.

50. 1930 Cal. 86=56 Cal. 608=120 I.C. 107 (*Held*, that the period of 3 years provided for in Art. 180, Limitation Act, 1908, for an auction-purchaser's application for delivery of possession should be reckoned from the date of the confirmation of the sale under O. 21, R. 92, and not from that of the final disposal of the judgment-debtor's application under O. 21, R. 10).

1. 1933 Cal. 311=56 C.L.J. 520=147 I.C. 881.

2. 1920 M.W.N. 42=54 I.C. 66=43 Mad. 185=26 M.L.T. 459=38 M.L.J. 11 (F.B.).

3. 43 Mad. 185 (197, 198) (F.B.) (This practically overrules *Arunagiri v. Uthando*, 12 M.L.T. 311=17 I.C. 242); cf. *Neckbar v. Prakash*, 56 Cal. 608=1930 Cal. 86 (89)=120 I.C. 107 (Took a different view from Madras Full Bench). But, this has been overruled by the Privy Council decision in *Chandramani v. Anarjan*, 61 Cal. 945=1934 P.C. 134 (136)=150 I.C. 11 (P.C.).

4. 23 Cal. 775=23 I.A. 45 (P.C.).

in support of the view that sale-confirmation means “a final, conclusive and definitive order confirming the sale”; while the question whether the sale should be confirmed, is not such confirmation as long as the matter is under litigation and not disposed of by a definitive and operative final judgment of the Court of appeal. In computing the period of limitation under this article, the time during which an *application* under O. 21, R. 90, for setting aside the sale will be deducted, as the sale will be deemed to be absolute when such application is disallowed, but there is no provision of law for excluding in favour of the auction-purchaser the period of the pendency of a suit filed by the judgment-debtor to set aside the Court-sale.⁵ A recent Full Bench decision of

the Madras High Court has examined the question closely. It has held that the meaning of Art. 180 is plain because the word “purchaser” in this article includes cases of a decree-holder-purchaser and a purchaser who is not a decree-holder.⁶ Where a decree-holder-purchaser seeks delivery of possession of an item of property, and the judgment-debtor obstructs, the decree-holder should make a complaint under O. 21, R. 97, Civil Procedure Code, and the matter must be disposed of in execution. If a judgment-debtor and a third party both obstruct, the decree-holder-purchaser has to explain against the judgment-debtor and, if he chooses, against the third party also under O. 21, R. 97, and the complaint can then be disposed of. But if the judgment-debtor is quiescent, raises no objection and makes no opposition either before the Amin or before the Court, but a third party objects and on account of the third party’s objection physical possession of the property cannot be given, it is the duty of the Court to note the fact and to order delivery of such possession as the matter may then be capable of so far as the judgment-debtor is concerned.⁷

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
181.	Applications for which no period of limitation is provided elsewhere in this Schedule or by S. 48 of the Code of Civil Procedure, 1908.	Three years.	When the right to apply accrues.

5. *Sornam Pillai v. Tiruvashiperumal*, (1926) 96 I.C. 657=23 L. W. 744=51 M.L.J. 126=1926 M.W.N. 563=1926 Mad. 857.

6. *Abdul Azis v. Chokkan Chettiar*, 1935 Mad. 803=(1935) M.W.N. 926=42 M.L.W. 375=58 Mad. 893=159 I. C. 279=60 M. L. J. 821 (F. B.); cf. *Muthia v. Appasami*, (1890) 13 Mad. 504; *Lakshmanan Chettiar v. Kannammal*, (1901) 24 Mad. 185; and *Sultan Sahib v. Chidambaram*, (1903) 32 Mad. 136=1 I.C. 998.

7. *Abdul Azis Sahib v. Chokkan Chettiar*, 1935 Mad. 803 (F.B.).

SYNOPSIS.

- 2455. Previous History.
- 2456. **Scope and application.**
- 2456. Residuary article.
- 2457. **I. Applications under Civil Procedure Code.**
- 2458. Theory of *ejusdem generis*.
- 2459. Judicial decisions.
- 2460. Applications not authorised by Civil Procedure Code.
- 2461. Applications for the ascertainment of mesne profits.
- 2462. Proceedings under Bhagdari Act.
- 2463. Applications under High Court Original Side Rules.
- 2464. Applications under Provincial Insolvency Act.
- 2465. Execution of a decision of a Revenue Court.
- 2466. Applications under Transfer of Property Act.
- 2467. Applications in mortgage suits.
- 2468. Applications for final decrees for sales.
 - (1) Under Transfer of Property Act.
 - (2) Under Civil Procedure Code, O. 34, R. 5.
- 2469. Starting point.
- 2470. Application for supplementary decree—O. 34, R. 6.
- 2471. Accrual of right—Starting point.
 - (i) Date of sale confirmation.
- 2472. (ii) Date of suit.
 - (iii) Date of refund of purchase-money.
- 2473. Sale under decree of same mortgagee.
- 2474. Applications under O. 34, R. 8.
- 2475. Applications in a pending suit.
- 2476. Application to do acts of ministerial character.
- 2477. Court's power not restricted.
- 2478. Applications under S. 47, Civil Procedure Code.
- 2479. Applications under S. 144, Civil Procedure Code.
- 2480. Other applications for restoration.
- 2481. **Applications for execution, not falling under Art. 182, Limitation Act.**
 - (i) Decree incapable of execution.
- 2482. (ii) Revival or continuation of proceedings.
- 2483. (iii) Illustrative cases.
- 2484. (iv) Removal of obstacle.
- 2485. (v) What is not an obstacle to execution.
- 2486-2489. **Other applications.**
 - 2487. (1) Applications for representation.
 - 2488. (2) Applications by the Crown.
 - 2489. (3) Applications by minor.
- 2490. **Section 48, Civil Procedure Code.**

NOTES.

2455. PREVIOUS HISTORY.—There was no corresponding provision in the Acts XIV of 1859 and IX of 1871; and, consequently, no bar of limitation applied, if any application did not fall within any of the articles making special provisions. An application asking the Court to ascertain and determine how much a judgment-creditor had been overpaid,⁸ or an application to the Court which executed the decree, for an order for the repayment

8. *Muthoora Pershad Singh v. Shumboo Gir*, (1874) 22 W.R. 211.

of the amount overdrawn,⁹ was not barred by any provision of the Limitation Act, IX of 1871.

The corresponding general article providing a limitation for applications not coming under a specific provision, was first introduced in Act XV of 1877, as its Art. 178. This article is now re-enacted by the present Art. 181, with the change of words "or by S. 48 of the Code of Civil Procedure, 1908" in place of the words "only the Code of Civil Procedure, S. 230," which referred to the corresponding provision in the Code of 1882.

2456. SCOPE AND APPLICATION.—Art. 181 of the Act IX of 1908 (*see* Art. 178 of the old Limitation Act, 1877) is a residuary article, worded generally as applicable to "*applications for which no period of limitation is provided elsewhere*" in this Schedule.¹⁰ But, it must be noticed that it held **limited in its operation** to (1) applications made under the Civil Procedure Code, which were *ejusdem generis* with the applications mentioned in the preceding articles of the schedule. (2) It was taken as confined to applications relating to judicial acts or functions of the Court, and which sought to move the Court in matters which the Court could not have done *suo motu*.

2457. APPLICATIONS UNDER CIVIL PROCEDURE CODE.—The third division of applications is limited in its operation to applications under the Code of Civil Procedure. This division contains 26 articles, out of which Arts. 158, 159, 160, 165, 166, 171, 172, 174, 176, 177, 178 and 179 are expressly limited in their operation to applications made under the Code of Civil Procedure. A close examination of other articles will show that they are also articles relating to matters coming under Civil Procedure Code. For instance, Art. 161 speaks of review of *judgment* by a Provincial Small Cause Court, etc., the procedure in which, so far as the chapters and sections of the Civil Procedure Code are *applicable*, shall be the procedure prescribed therein, *viz.*, O. 47, R. 1, Civil Procedure Code. Art. 162 speaks of applications for a review of *judgment* by certain High Courts in the exercise of their original jurisdiction, which can only be made under the Civil Procedure Code. Art. 163 prescribes a period of limitation for applications by a plaintiff to set aside a dismissal for default, which are dealt with under Orders 9, 17 and 25 of the Code of Civil Procedure.

9. *Sheikh Alliji v. Sheikh Mushur*, 4 C.L.R. 577.

10. *Vadrezu Viswasundara v. Vannamu Paidigadu*, 50 M. L. J. 72 (Art. 181 is a residuary article applicable to cases not provided for elsewhere in the schedule); also see *Paramasiva v. Pulukaruppa*, 1924 Mad. 137=45 M.L.J. 829 (Art. 181 is a residuary article, which can only be applied, if no other article dealing with applications under the Civil Procedure Code is applicable).

Art. 164 deals with applications for setting aside a *decree* passed *ex parte*, and would seem confined to applications under the Civil Procedure Code, and the case of decrees on Original Side of High Court is no real exception as under the rules, no decree is passed *ex parte* within the meaning of O. 9, R. 13, Civil Procedure Code. Art. 167 has reference to O. 21, Rr. 97 to 99, Civil Procedure Code. Art. 169 refers to O. 41, R. 21, Civil Procedure Code; and Art. 170 refers to O. 44, Civil Procedure Code. Applications under Art. 175 refer to O. 20, R. 11 (2), Civil Procedure Code; and, Art. 180 has reference to applications under O. 21, Rr. 95 and 96. Art. 173 does not refer to Civil Procedure Code in express terms, but Art. 171 uses the expression "*under the same Code*," which means the "Code of Civil Procedure", referred to in Art. 171. Similarly, no Code is mentioned in Art. 175, but, the expression "*under the same Code*" is again used with respect to Arts. 176, 177 and 178. Thus, throughout the Third Division Applications, the Legislature seems to have had the same Code of Civil Procedure in mind.¹¹

2458. The **Calcutta High Court** observed in *Ishan Chander Roy's* case,¹² that the preamble to the Act distinctly showed that it was not intended to apply to all, but to *certain* applications to Courts; and, an examination of the Third Division of Sch. II of Act XV of 1877, which dealt with applications showed, that every article therein contained, No. 178 (now 181) only excepted, specifically related to some case pending or already decided. Art. 178 (now 181) was construed, therefore, with reference to the wording of other articles in the Schedule, under the head "applications" and it was held that it could relate only to applications *ejusdem generis*, and, therefore, not to an application for probate, which were not governed by any period of limitation under the previous Limitation Acts XIV of 1859 and IX of 1871. Previous to the passing of the Limitation Act, IX of 1908, and the Civil Procedure Code, 1908, there was no rule of limitation applicable to an application for order absolute of a decree *nisi* made under S. 86, Transfer of Property Act, 1882.¹³

2459. A long course of judicial decisions has tended to show that the articles in the Third Division of the First Schedule to the Limitation Act, IX of 1908, apply only to applications under the Civil Procedure Code. The **Allahabad** decisions in *Queen-Empress v. Ajudhia*

11. See Dr. Pal's Limitation Act: "Introduction" to 3rd Division, pp. 1112-1114.

12. (1881) 6 Cal. 707; also see *Queen-Empress v. Ajudhia Singh*, 10 All. 350.

13. *Tiluck Singh v. Parsotem*, (1895) 22 Cal. 924 and *Rahmat Karim v. Abdul Karim*, (1907) 34 Cal. 672; Relied in *Madhab Moni Das v. Lambert*, (1910) 37 Cal. 796=12 C.L.J. 328=16 C.W.N. 337=6 I.C. 537.

*Singh*¹⁴ and *Ranbir Singh v. Drigpal*,¹⁵ also, *Shiamlal v. Official Liquidators*,¹⁶ and the **Bombay** decisions in *Bai Manekbai v. Manekji*,¹⁷ *Wadia v. Purshotam*¹⁸ and *Thana Zalagi v. Dhana Jawhrji*,¹⁹ have held that the applications specifically described in the Third Division of the First Schedule of the Indian Limitation Act are all applications under the Civil Procedure Code, and under those Art. 181 must be so limited. The **Calcutta High Court** has taken a similar view in *Tiluck Singh v. Parsotam*²⁰ *Rahmat Karim v. Abdul Karim*²¹ and *Madhab Moni v. Lambert*²² and this opinion has been shared by the **Madras High Court** in *Janaki v. Kesavalu*²³ and *Gnanamuthu v. Vana Koilpillai*²⁴ and by the **Patna High Court** in *Jagdip v. Holloway*.²⁵ It has thus been consistently held in several High Courts that Art. 178, Act XV of 1877 (now Art. 181, Act IX of 1908), though not mentioning the Civil Procedure Code, in express terms, is on the theory of *ejusdem generis*, taken as referring only to applications made under the Code of Civil Procedure. The residuary article is limited in its operation to all such applications as are maintainable under the Civil Procedure Code. The only High Court inclined to take a contrary view is the **Rangoon High Court**,²⁶ which holds that this article is not restricted to applications under Civil Procedure Code, and has applied Art. 181, Limitation Act, to applications under S. 8 (1) of the Presidency Towns Insolvency Act.

2460. Article 181, Limitation Act, refers to all applications for the making of which the Civil Procedure Code gives authority.²⁷ But, it does not apply to an application by which a miscellaneous proceeding, as opposed to a regular suit is initiated; and it would not cover applications not authorised by the Civil Procedure Code.²⁸ This article would not apply to

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14. (1888) 10 All. 350.
 15. (1893) 16 All. 23.
 16. (1933) 55 All. 912=145 I.C. 893=1933 All. 789=1933 A. L. J. 1203 (F.B.).
 17. (1880) 7 Bom. 213.
 18. (1907) 32 Bom. 1.
 19. (1923) 77 I.C. 497=1923 Bom. 268.
 20. (1895) 22 Cal. 924; Followed 7 Bom. 213.
 21. (1907) 34 Cal. 672.
 22. (1910) 37 Cal. 796.
 23. (1884) 8 Mad. 207.
 24. (1893) 17 Mad. 379.
 25. (1917) 2 P.L.J. 206=39 I.C. 653 (Pat.).
 26. *Jhan Bahadur v. Bailiff*, (1927) 5 Rang. 384=104 I.C. 816=1927 Rang. 263 (264); also see and cf. *In re Nasse*, (1929) 7 Rang. 201=1929 Rang. 229 (232)=118 I.C. 615.
 27. *The Hindustan Bank, Ltd. v. Mehraj Din*, (1920) 55 I.C. 820=1 Lah. 187 (Order under S. 150, Companies Act, *ex parte* held governed by Art. 181, Limitation Act).
 28. *Bai Manekbai v. Manekji Kavasji*, (1880) 7 Bom. 213; *Nagar v. Soudagar*, 57 P.R. 1908=3 P.W.R. 387.

applications for Probate, Letters or Certificates of Administration²⁹; nor would it apply to applications under Act XXXVII of 1860, for certificate to collect debts.³⁰ Applications for the custody of minors under Act IX of 1861, or applications to the District Court for the purpose of foreclosing a mortgage under Bengal Regulation XVII of 1806, would not come under Art. 181, Limitation Act.³¹ An application by a creditor to prove his debt in Insolvency proceedings,³² or an application by a Receiver in insolvency to avoid a transfer,³³ would not be governed by this article. An Official Receiver can make an application requesting the Court to take action under S. 37 of the Provincial Insolvency Act, 1907, at any time during the pendency of the Insolvency proceeding.³⁴ An application by a creditor under S. 37 of the Provincial Insolvency Act for a declaration that a sale made by the insolvent within 3 months prior to the application for adjudication is null and void as against the Official Receiver held governed by this article.³⁵ but this view is doubtful.³⁶ An application under S. 214 of the Indian Companies Act, VI of 1882, was not governed by old Art. 178, but S. 235 of the Companies Act (VII of 1913), now prescribes a period of limitation for such applications as a suit (*see* Art. 36, and Art. 120). In some cases, Art. 181 has been applied to an application to set aside a sale under S. 173, of the Bengal Tenancy Act as such application is not provided for by any other article of the Limitation Act, or by Sch. III of the Bengal Tenancy Act.³⁷

29. *Bai Manekbai v. Manekji Kavasji*, (1880) 7 Bom. 213; *Janaki v. Kesavalu*, (1884) 8 Mad. 207 (An application under Religious Endowment Act); also see *Gnananantha v. Vanakoil Pillai*, (1893) 17 Mad. 379; In the matter of *Ishan Chunder Roy*, (1881) 6 Cal. 707; *Kashi Chander v. Gopi Krishna*, (1891) 19 Cal. 48; *Indar Narain v. Onkarlal*, 10 I.C. 130; also see *Shyamlal v. Rameshri*, 33 I.C. 273 (Cal.) (Application for revocation of probate).

30. *Janaki v. Kesavalu*, (1884) 8 Mad. 207.

31. *Nagar v. Soudagar*, 57 P.R. 1908=3 P.W.R. 387.

32. *Sivasubramania v. Theethiappa*, (1923) 45 M.L.J. 166=1924 Mad. 163; cf. *Parshadilal v. Chunilal*, 6 All. 142 (144).

33. *Pirthinath v. Bisheshwar*, (1922) 69 I.C. 403=1924 Lah. 331; *Daryai v. Kunjlal*, 1924 Lah. 553=75 I.C. 995; also see *Ramasamiah v. Subramania*, 1925 Mad. 172=79 I.C. 443; Followed *Doraiya v. Venkatarama*, 60 I. C. 123=12 L. W. 535; and *Ratnabai v. Official Assignee*, 29 I. C. 168 (Mad.); and cf. *Mirafzal v. Miramam*, 23 I.C. 397=41 P.L.R. 1914; and cf. *Nikkamal v. Marwar Bank*, 52 I.C. 188=151 P.R. 1919.

34. *Daryai v. Kunjlal*, *supra*.

35. *Nikkamal v. Marwar Bank*, 151 P.R. 1919=52 I.C. 188.

36. *Pirthi v. Basheswar*, 69 I.C. 403=1924 Lah. 331.

37. *Chand Monee v. Santo Monee*, 24 Cal. 707; *Gopal Saran v. Muhd. Siddiq*, (1914) 24 I.C. 366 (Cal.); *Chandrama v. Maharaja of Damraon*, 38 I.C. 209 (Pat.); *Ananta Charan v. Nimai*, 6 Pat. 366=1927 Pat. 177=101 I.C. 564; also see *Saktisaran v. Radha Raman*, 38 C.W.N. 50 (Application under S. 26-J, Bengal Tenancy Act) and *Ramkinkar Tewari v.*

2461. Article 181, Limitation Act is construed as referring *ejusdem generis* to preceding articles which refer to applications under Civil Procedure Code.³⁸ Thus, an application for mesne profits to be ascertained under the inquiry under O. 20, R. 12 (1) (c), is not an application made under Civil Procedure Code as in execution of a decree. It is an application to the Court to proceed from the stage of preliminary decree to a final decree and Art. 181, Limitation Act does not apply.³⁹ The Code does not require that a party should make an application for the ascertainment of mesne profits, and therefore Art. 181, Limitation Act cannot apply to such an application when made.⁴⁰ But, the **Lahore High Court** takes the view that limitation for ascertainment and realization of mesne profits is governed by Art. 181, and the period of limitation runs from the date on which possession is delivered.⁴¹ The **Bombay** and **Madras** Courts have held that the application for mesne profits would be governed by Art. 182 (old Art. 179).⁴² But a Full Bench of the **Calcutta High Court**, held in *Purnachand v. Roy Radhakishen*,⁴³ that applications for the ascertainment of mesne profits were governed by neither Art. 178 (now Art. 181), nor by Art. 179 (now Art. 182). It being the duty of Court to ascertain the mesne profits awarded by a decree, no application need be made, and Art. 181 was inapplicable. Article 182 was not applicable because the proceedings for determining the amount of mesne profits were not proceedings in execution of a decree in regard to any fixed sum, but merely a continuation of the Original Suit, and carried on in the same way as if a single suit were brought for mesne profits by itself.⁴⁴ The **Allahabad High Court** took a similar view in cases under the old Act XV of 1877⁴⁵;

Stethi Ram, (1918) 46 I.C. 221 (Cal.); cf. *Jagdhār v. Dhorai*, 57 I.C. 404 (Pat.).

38. *Thana v. Dhana*, 1923 Bom. 268=77 I.C. 497.

39. *Ibid.*, 1923 Bom. 268; also see *Rudra Pratap v. Mahesh Prashad*, 47 All. 543.

40. *Narain Das v. Bhagwati Prasad*, 151 I.C. 755=1934 A.L.J. 86=1934 All. 465.

41. *Mt. Karam Bibi v. Mehr Ali Khan*, (1933) 144 I.C. 553=1933 Lah. 876.

42. *Gangadhar Manika v. Balakrishna*, 45 Bom. 819; *Ramanna v. Babu*, 37 Mad. 186; also see *Yusaf Ali v. Papa Miya*, 47 Bom. 778=25 Bom. L. R. 810=73 I.C. 233=1923 Bom. 366.

43. 19 Cal. 132 (F.B.); O.R. *Anando Kishore v. Anando Kishore*, 14 Cal. 50.

44. *Ibid.*, 19 Cal. 132 (F.B.); also see *Rudra Pratap v. Sardar Mahesh*, 47 All. 543; *Shankar Appaji v. Gangaram*, 52 Bom. 360; *Janki Nath v. Nirode*, 1925 Cal. 175; *Bhattu Ram v. Faga Ram*, 5 Pat. 223; *Lachayya v. Suryaprakash*, 1928 Mad. 1165.

45. *Waliyabibi v. Nasar Hassan*, 1904 A.W.N. 146=26 All. 623; also see *Md. Umar Jan v. Zinet*, 25 All. 385.

and limitation for execution would begin to run *after* the amount was ascertained.⁴⁶ The **Judicial Committee** held in *Kedarnath v. Anant Prosad*,⁴⁷ that an application for ascertainment of mesne profits under the Code of 1882 was a *proceeding in execution* of that decree, and not a proceeding in the suit.⁴⁸ The present Civil Procedure Code (*see* O. 20, R. 12), makes the ascertainment of mesne profits a part of the suit, and in continuation thereof⁴⁹; and the right to apply for ascertainment of *future* mesne profits arises not on the date of the decree directing an inquiry as to such profits but on the happening of any one (whichever first occurs) of the three events specified in O. 20, R. 12.⁵⁰ The **Patna High Court** has held that an application for ascertainment of mesne profits being an application in the suit itself is not governed by any provisions of the Limitation Act. The Court cannot dismiss at any stage a claim already decreed, and the law of limitation has no application as long as the suit is a pending suit.¹ Where the preliminary decree omits to direct an inquiry into mesne profits the final decree cannot award mesne profits or direct an inquiry.²

2462. Proceedings under the Bhagdari Act (Bombay Act V of 1862) are not within Art. 181; and it is doubted whether any provision of limitation applies to such applications under the Bhagdari Act.³

2463. When an application by an attorney for realisation of costs is made under the High Court Original Side Rules, this article does not apply to cover applications of the kind.⁴

46. *Walia Bibi v. Nazar Hassan*, 26 All. 623; also see *Fatima Bibi v. Abdul Majid*, 14 All. 531.

47. 4 Pat. 507=52 I.A. 188 (P.C.).

48. *Ramanna v. Babu*, 37 Mad. 186; *Gangadhar v. Balkrishna*, 45 Bom. 819=23 Bom. L. R. 263.

49. *Harakhpan v. Jagdeo*, 4 Pat. 57=5 Pat. L. T. 626=1924 Pat. 781=84 I.C. 272.

50. *Ibid.*

1. *Bhatu Ram v. Fogal Ram*, 5 Pat. 223=7 P.L.T. 340=1926 Pat. 141 (143)=92 I.C. 629; also see *Kamakhyia Narayan v. Akloo*, 8 Pat. 482=10 P.L.T. 762=117 I.C. 647=1929 Pat. 368 and *Shankar v. Gangaram*, 52 Bom. 360=109 I.C. 734=1928 Bom. 236.

2. *Ghulam Bivi v. Ahmadsa Rowther*, 42 Mad. 296.

3. *Collector of Broach v. Desai Raghunath*, (1883) 7 Bom. 546 (551).

4. *Wadia, Gandhi & Co. v. Purshotam Sivji*, (1907) 32 Bom. 1; *Folld.* 1 Bom. 253; also see *Lakhimani v. Dwijendra*, (1918) 46 Cal. 249=23 C.W.N. 473 and *Narendralal v. Tarubala*, (1920) 48 Cal. 817=66 I.C. 209.

Applications under Provincial Insolvency Act.

2464. This article does not govern an application under the Provincial Insolvency Act which is a complete Code in itself.

2465. Article 166 of Act IX of 1871 expressly referred to an application for the execution of a decision of the *Revenue Court*. There is no corresponding provision in later Acts. If Art. 182 were inapplicable to such cases, Art. 181 would have to be considered, if such applications come under Civil Procedure Code; but not otherwise⁵; *e.g.*, where the decision of a Civil Court has the force of a *decree* in a civil suit,⁶ or the Revenue Court is deemed to be a Civil Court for certain specified purposes.⁷

2466. The provisions of the Transfer of Property Act, Ss. 85-90; 92-94; have been re-enacted in Civil Procedure Code, 1908, as Rr. 1 to 10 under its O. 34 which sets at rest the conflict of view prevailing before that as to whether a decree passed under the provisions of the Transfer of Property Act was interlocutory or final, and applications in respect thereof were applications under the Code of Civil Procedure to which Art. 181 was applicable or not. It will serve no useful purpose to enter into this controversy at this stage. It would be sufficient to notice that according to one set of rulings, of **Calcutta High Court**, applications in respect of decrees in mortgage suits for foreclosure, redemption or sale, were held interlocutory and not final, and they were not regarded as applications made under the Code of Civil Procedure.⁸ The opposite view held by **Allahabad, Bombay and Madras High Courts**, that the decree made under the provisions of the Transfer of Property Act in mortgage suits was a final decree, and orders made in connection with it were *orders made in execution* of an ordinary decree subject accordingly to the provisions of the Civil Procedure Code⁹; and of the Limitation Act for such applica-

5. *Sambasiva v. Panchananda*, (1907) 31 Mad. 24; *Duraiyya v. Venkatarama*, (1920) 60 I.C. 123 (Mad.); cf. *Lakhmoni v. Dwijendra*, (1918) 46 Cal. 249=23 C.W.N. 473.

6. *Durgacharnlal v. Hateem Mandal*, 29 Cal. 252; *Sheo Narain v. Parmeshar*, 18 All. 270 (F.B.); *Kalka Prasad v. Manmohanlal*, 38 All. 302 (F.B.).

7. See notes under Art. 182, *post*; also see 14 L.L.T. 15.

8. See Dr. Pal's Limitation Act, p. 1167, citing *Tiluck Singh v. Parsotem*, (1895) 22 Cal. 924; *Akikunnissa v. Rooplal*, (1897) 25 Cal. 133; *Pramatha v. Khetra*, (1902) 29 Cal. 651; *Rahmat v. Abdul*, (1907) 34 Cal. 672; also *Ajudhia v. Baldeo*, 21 Cal. 818 (824).

9. See Dr. Pal's Limitation Act, p. 1167, citing *Oudh Behari v. Nageshwar*, (1890) 13 All. 278; *Chunnilal v. Harnam Das*, (1898) 20 All. 302; *Hakim v. Ram Singh*, (1908) 30 All. 248; *Bhagwan v. Gannu*, (1899) 23 Bom. 644; *Maruti v. Krishna*, (1899) 23 Bom. 592; *Jehangir v. Hope*

tions regarded as applications for execution of decree.¹⁰ Under the present Code, Arts. 181 and 182 have been held to govern applications under the provisions of O. 34 of the Code of Civil Procedure. In *Amlook Chand v. Sarat Chander*,¹¹ Jenkins, C.J., observed as follows:—

“One object in view when the present Code (Civil Procedure Code) was passed was to end, as far as possible, the conflict of decisions which embarrassed the Courts, and among these conflicting decisions was those which dealt with two points:—First, whether an application for an order under S. 89 of the Transfer of Property Act was an application in execution or not; and secondly, whether, if it was not application in execution, Art. 181 constituted a bar on the ground that the application was one not contemplated by the Code of Civil Procedure. And so it is now provided that the application which follows a preliminary *decree* for sale, is not for an order for sale, but for a *decree for sale*. And with the the same end in view the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code.”¹²

2467. According to the rulings of the Allahabad High Court an application for an order under S. 87 of the Transfer of Property Act was an application in execution.¹³ See *Kedarnath v. Lalji Sahai*¹⁴ and *Oudh Beharilal v. Nagesharlal*.¹⁵ Following the principle of these rulings and of the decision in *Chunni Lal v. Harnamdas*,¹⁶ it was held in *Parmeshrilal v. Mohanlal*,¹⁷ that an application for an order under S. 87 of the Transfer of Property Act is an application in execution to which the provisions of the Limitation Act apply. This view was so far concurred in by the decision in *Ali Ahmad v. Naziran Bibi*.¹⁸ But, it was held further that the decree or order referred to in Art. 179 (1) must be a decree or order which, on the date of it, is capable of execution, and that the *terminus a quo* under that paragraph cannot be a date

Mills Co., (1908) 33 Bom. 273; *Mallikarjunadu v. Lingamurti*, (1900) 25 Mad. 244; *Vaidinadhasamy v. Somasundaram*, (1904) 28 Mad. 473; *Etyati v. Matalakat*, (1904) 28 Mad. 211; *Ramayyan v. Kadir*, (1907) 31 Mad. 68.

10. *Ali Ahmed v. Naziran*, (1902) 24 All. 542.

11. (1911) 38 Cal. 913.

12. *Ibid.*, (1911) 38 Cal. 913=11 I.C. 943; Affd. in *Munnalal v. Sarat Chandra*, (1914) 42 I.A. 88 (P.C.); cf. *Madhabmani Dasi v. Lambert*, (1910) 37 Cal. 796=15 C.W.N. 337=6 I.C. 537 (*Held*, that Art. 181 does not govern an application for an order absolute, under O. 34, R. 3, Civil Procedure Code); also see *Pell v. Gregory*, 52 Cal. 828 (F.B.).

13. *Kedarnath v. Lalji Sahai*, (1889) 12 All. 61 (F.B.); *Oudh Beharilal v. Nageshlal*, 13 All. 278 (F.B.).

14. *Ibid.*

15. 13 All. 278 (F.B.).

16. (1898) 20 All. 302.

17. (1898) 20 All. 357.

18. (1902) 24 All. 542.

on which the decree or order is not executable.¹⁹ Consequently, Art. 179 (1) could not refer to an application under S. 87; and the application was, therefore, held governed by Art. 178, Limitation Act (now Art. 181 of Act of 1908).²⁰ In *Sham Sundar v. Muhammad Ihtishan*,²¹ where plaintiff sued for foreclosure, and obtained a decree for part of the mortgaged property, but he did not ask for an order absolute for foreclosure in respect of this decree, and his appeal against the dismissal of part of the suit failed: and, no part of the mortgage money being paid, the decree-holder applied under S. 87 of the Transfer of Property Act, 1882, for an order absolute for foreclosure, it was held that the decree-holder's application was not barred by limitation; but it was not decided whether Art. 181 or 182 was applicable. Time ran not from the date fixed in the preliminary decree for payment of the mortgage-money but from the date of the decree of the High Court, being the final decision as to the property to be foreclosed. The **Calcutta High Court** held in *Madhabmani Dasi v. Lambert*,²² that Art. 181, Limitation Act, 1908, does not govern an application for order absolute under O. 34, R. 3, Civil Procedure Code, and that Limitation Act is not applicable to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant, or for the convenience of the Court.²³ Even if Art. 181 applies, the right to apply may be deemed to accrue from day to day, as it is made in a *pending suit*.²⁴ The **Patna High Court** has held in *Bala Ram v. Kanhai*,²⁵ disagreeing with the **Calcutta** decision in *Madhabmani Dasi v. Lambert*,²⁶ and following the later decision of same High Court in *Amolak Chand Palak v. Sarat Chander Mukerji*,²⁷ that an application for a final decree for foreclosure or sale is an application under the Code of Civil Procedure,²⁸

19. *Ali Ahmed v. Naziran Bibi*, 24 All. 542 (545); Reld. on *Muhammad Suleman Khan v. Muhammad Yar Khan*, (1894) 17 All. 39 and *Chhedi v. Lalu*, W.N. (1902), 60.

20. *Ali Ahmed v. Naziran Bibi*, (1902) 24 All. 542; Reld. on *Ranbir Singh v. Drigpal*, (1893) 16 All. 23 and *Ram Sarup v. Ghaurani*, (1899) 21 All. 453.

21. (1905) 27 All. 501 (F.B.) [*Oudh Beharilal v. Nagesharlal*, 13 All. 278 (F.B.) was discussed and doubted].

22. (1910) 37 Cal. 796; cf. *Beni Singh v. Barhamdeo Singh*, (1915) 28 I.C. 211=19 C.W.N. 473=22 C.L.J. 66 (Art. 181 applied to an application under S. 89 of Act IV of 1882 [Applications under O. 34, R. 5 (2) come within the scope of Art. 181]).

23. *Ibid.*, (1910) 37 Cal. 796; Followed 30 Cal. 609 and 8 Cal. 420.

24. *Ibid.*

25. (1917) 38 I.C. 385=1 P.L.J. 364 (366).

26. (1910) 37 Cal. 796=15 C.W.N. 337=12 C.L.J. 328=6 I.C. 537.

27. (1911) 38 Cal. 913=11 I.C. 943=16 C.W.N. 49; Affirmed 27 I.C. 683=42 Cal. 776=42 I.A. 88 (P.C.).

28. *Bala Ram v. Kanhai*, (1917) 38 I.C. 385=1 P.L.J. 364 (366);

for it is made under O. 34, R. 3 or R. 5, which expressly requires an application; and such an application for a final decree presented after the passing of the Code of Civil Procedure, 1908, and of the Limitation Act, 1908, is governed by Art. 181 of the present Limitation Act.²⁹ Reliance was placed on a similar view taken by the **Madras High Court** in *Thathara v. Kuppal Krishnammal*.³⁰ Again, it has been held in *Narain Singh v. Kedarnath Singh*,³¹ that an application to make a foreclosure decree final is governed in matter of limitation by Art. 181 of the Limitation Act. Where a preliminary decree for foreclosure was passed by the High Court on 3rd of July, 1913; but the mortgagor preferred an appeal to His Majesty in Council which was ultimately dismissed for non-prosecution on 9th October, 1916, it was held that the limitation for applying for making the decree final began to run from the date of High Court's preliminary decree.³² The **Nagpur Judicial Commissioner's Court** takes the view that the words "the day fixed" in sub-R. (2) of R. 3 of O. 34 of the Civil Procedure Code, refer to the day fixed under the preceding rule, and if the rule had intended to refer also to the day to which the payment was postponed under the proviso which comes later, it would have done so expressly. Art. 181, Limitation Act, applied to the application under O. 34, R. 3, and the application was deemed to have remained pending for final orders, and the postponement of the day fixed did not amount to a dismissal of the application, requiring a fresh application.³³

2468. A Full Bench of the Madras High Court in *Mallikarjunadu v. Lingamurti*,³⁴ held that an application made under S. 89 of the

Application for final decree for sale.

(i) Under Transfer of Property Act.

Transfer of Property Act was, in effect, an application for execution of the decree passed under S. 88. Thus an application for an order absolute for sale of the mortgaged property was governed by the rule of limitation prescribed by Art. 182, and not by Art. 181, which was limited to applications under the Civil Procedure Code. Similarly, it was held in *Muhammad Husain Sahib v. Abdul Karim Sahib*,³⁵ that according to the view of the majority of the Full Bench, the preliminary decree in a mortgage suit was

Relied on *Krishna Bar v. Ranamoyi Debi*, 29 I.C. 120=19 C.W.N. 470 and 649.

29. *Bala Ram v. Kanhai*, (1917) 38 I.C. 385.

30. 16 I.C. 799=14 M.L.T. 194.

31. (1922) 66 I.C. 97=1922 Pat. 201=1 Pat. 435.

32. *Ibid.*, 66 I.C. 97 (Pat.).

33. *Chinna Ji v. Sona Ji*, (1925) 88 I.C. 901=1925 Nag. 291=21 N.L.R. 47.

34. (1900) 25 Mad. 244 (F.B.).

35. (1915) 39 Mad. 544.

executable and the process for obtaining the order absolute was by way of execution. The Full Bench ruling was explained in *Rangiah Goundan & Co. v. Nanjappa Row*.³⁶ It was suggested in that case that ordinarily an application for an order absolute will be one to which Art. 179 (now Art. 182) would apply, and in certain cases, Art. 178 (present Art. 181) will apply. The Privy Council decision in *Ashfaq Husain v. Gauri Sahai*³⁷ laid down that time began to run against the decree-holder after the passing of the final decree, i.e., "from the date when it was made absolute". In *Abdul Majid v. Jawahir Lal*³⁸ their Lordships laid down distinctly that the article applicable to an application for obtaining an order absolute was Art. 179, Limitation Act, 1877 (now Art. 182, Limitation Act, 1908). This pronouncement was taken to overrule the Madras decisions which held that the preliminary decree was not executable. Another Privy Council decision in *Munna Lal v. Sarat Chunder*,³⁹ held that an application for an order absolute regarding a preliminary decree passed on the original side of the High Court was governed by Art. 183 of the Limitation Act. This view makes it clear that the process by which a preliminary decree was to be made final was by execution. The result of these Privy Council decisions was thus summed up in *Hussain v. Karim*, supra.⁴⁰

"(1) The preliminary decree passed under S. 88 of the Transfer of Property Act is executable. (2) In order to obtain the order absolute under S. 89 steps have to be taken in execution. (3) To such application Art. 182 or 183 will apply as the decree happens to be of a mofussil Court or of the original side of the High Court. (4) There is a fresh starting point given to the decree-holder after the preliminary decree ripens into a final decree. (5) It would follow from the above that a decree-holder will have twelve years under S. 48 of the Code of Civil Procedure to perfect the preliminary decree, and another twelve years under the same section if he gets the order absolute within the first twelve years. This view is in consonance with the earlier Madras view in *Mallikarjunudu v. Lingamurti Pantulu*⁴¹ and in *Rangiah Goundan & Co. v. Nanjappa Row*.⁴²"

All these difficulties are now avoided by the enactment of O. 34 of the Code of Civil Procedure. Accordingly, it was held that as the application for an order absolute was made within 12 years of the passing of the preliminary decree, and as the decree had been kept alive by the steps taken under Art. 179, that application was not barred by limitation.⁴³ Article 179 of Sch. II to the Limitation Act,

36. (1903) 26 Mad. 780.

37. (1911) 33 All. 264 (P.C.).

38. (1914) 36 All. 350 (P.C.).

39. (1915) 21 C.L.J. 118 (P.C.).

40. (1915) 39 Mad. 544.

41. (1902) 25 Mad. 244 (F.B.).

42. (1903) 26 Mad. 780.

43. *Hussain v. Karim*, (1915) 39 Mad. 544.

thus applied to applications under S. 89 of the Transfer of Property Act, and agreements filed under S. 44 of the Dekkan Agriculturists' Relief Act, if relating to the sale of mortgaged property, were subject to the provisions of S. 89 of the Transfer of Property Act, (IV of 1882).⁴⁴ According to **Allahabad** view also an application for an order absolute for sale under S. 89 of the Transfer of Property Act, 1882, was an application to which Art. 179 of the Second Schedule to the Limitation Act, 1877, applied.⁴⁵ Where the decree *nisi* was an instalment decree containing a provision that the whole amount of the decree may be demanded on the occurrence of three consecutive defaults, it was difficult to hold that any of the provisions of the third column of Art. 182 of the present Act could be applied, and the article applied was No. 181 corresponding with Art. 178 of the Act of 1877, which had been held in many cases to govern applications in execution proceedings to which for one reason or another Art. 179 of that Act could not be applied. Under Art. 181, the right to apply for an order absolute accrued to the decree-holder on the occurrence of the third consecutive default.⁴⁶ The Bombay High Court held under the Act of 1877, that an application under S. 89 of the Transfer of Property Act to have a mortgage-decree for sale made absolute was not governed by Art. 178, Sch. II, Limitation Act, 1877.⁴⁷ Following the Privy Council view in *Batuk Nath v. Munni Dei*,⁴⁸ and in *Abdul Majid v. Jowahir Lal*,⁴⁹ the **Calcutta High Court** held that an application for an order absolute for sale in a mortgage suit is a proceeding in execution and must be made within the time prescribed by the Limitation Act.⁵⁰ Thus, before Ss. 85-90 of the Transfer of Property Act were incorporated into the Civil Procedure Code, an application for an order absolute was generally treated as an application for execution governed by Art. 182, and not by Art. 181, which was limited to applications under Civil Procedure Code but instances occurred where Art. 181, rather than Art. 182 was applied.¹ And in some cases either Art. 181 or Art. 182 was held applicable²; whereas, in

44. *Bhagwan Ram Marwadi v. Ganu*, (1899) 23 Bom. 644.

45. *Chunni Lal v. Harnamdas*, (1898) 20 All. 302 (F.B.); Reld. on *Oudh Behari v. Nagesharlal*, 13 All. 278 and *O.R. Ranbir Singh v. Drigpal Sing*, 16 All. 23.

46. *Badri Narain v. Kunj Bihari Lal*, (1913) 35 All. 178.

47. *Bai Manekbai v. Manekji Kavasji*, (1883) 7 Bom. 213; Folld. in *Tiluck Singh v. Parsotam*, (1925) 22 Cal. 925 and *Ranbir Singh v. Drigpal*, (1893) 16 All. 23.

48. 23 I.C. 644=36 All. 284=27 M.L.J. 1 (P.C.).

49. 23 I.C. 649=36 All. 350=27 M.L.J. 17 (P.C.).

50. *Krishna Bar v. Ranamoyi Debi*, (1915) 29 I.C. 120=19 C.W.N. 649.

1. *Rungiah v. Nanjappa*, 26 Mad. 780 (789).

2. *Ramayyan v. Kadir Bacha*, 31 Mad. 68 (69); *Baldeo v. Ibn Haider*, 27 All. 625 (627, 628).

some Calcutta cases, neither Art. 181 nor Art. 182 was applied.³

(2) The view now taken after Ss. 85 to 90 have been incorporated into the Civil Procedure Code is that

(ii) Under O. 34, R. 5, an application for a final decree for sale in a mortgage suit (O. 34, R. 5), is not one for

execution of a preliminary decree, which could be governed by Art. 182 of the present Limitation Act, but being an application under the Civil Procedure Code, and not coming in under any other specific provision, it is governed by the residuary Art. 181. An application for a final decree is not an application to enforce the preliminary decree, and it is governed, therefore, by Art. 181, and not by Art. 183, Limitation Act.⁴ As pointed out by Jenkins, C.J., in *Amolak Chand v. Sarat Chunder*,⁵ under the Transfer of Property Act, an application for an order absolute for sale, under S. 89 was an application to "enforce the decree", that had been passed under S. 88, because no further decree was requisite. All that was required was an order for sale, under S. 89, Transfer of Property Act. But,

"when the Civil Procedure Code was enacted in 1908, Ss. 88 and 89, among other sections of the Transfer of Property Act were remodelled, and embodied in O. 34 of the Code, and instead of there being one decree to be enforced in case of default by an application for an order absolute for sale there were substituted two decrees, a preliminary mortgage decree to be followed in case of default by a final decree for sale" "Under S. 88, Transfer of Property Act, the decree directed that the property should be sold on default being made by the mortgagor, but under O. 34, R. 3 of the Code, the preliminary decree does not direct that in case of default the property shall be sold, nor does any right of sale thereunder accrue to the mortgagee. The right that is given under the preliminary decree to the mortgagee is a right, subject to any order that may be made in respect of redemption, to apply to the Court for a final decree for sale of the property."⁶

An application for a final decree for foreclosure and sale, or redemption is not an application for execution, as held in several cases by

Allahabad.	the Allahabad High Court. ⁷ In <i>Datto Atmaram v. Shankar Dattatraya</i> , ⁸ the
Bombay.	Bombay High Court, held that an applica-

3. *Tiluck v. Parshotam*, 22 Cal. 924; *Pramatha v. Khettra Mohan*, 29 Cal. 651 and *Ajudhia Pershad v. Baldeo*, 21 Cal. 818.

4. *M. L. A. M. Chettyar Firm v. Mg. Po Hmyin*, 1935 Rang. 239=13 Rang. 325=157 I.C. 784.

5. (1911) 38 Cal. 913=11 I.C. 943; Reld. on *Harendralal v. Maharani Dasi*, (1901) 28 Cal. 557=28 I.A. 89 (P.C.).

6. *Per Page*, C.J., in *M. A. L. M. Chettyar Firm v. Maung Po Hmyin*, 1935 Rang. 239=13 Rang. 325=157 I.C. 784.

7. *Madhoram v. Nihal Singh*, 38 All. 21; *Gajadhar Singh v. Kishan Jivannal*, 39 All. 641 (F.B.); *Ahmad Khan v. Mt. Gaura*, 40 All. 235; *Nizamuddin Shah v. Bohra Bhim Sain*, 40 All. 203; *Maqbul Ahmad v. Pateshri*, 1929 All. 677=27 A.L.J. 976=118 I.C. 670; also see *Ranjilal v. Karan Singh*, 39 All. 532=40 I.C. 424.

8. (1913) 38 Bom. 32=21 I.C. 318=15 Bom. L. R. 841.

tion for a decree absolute for sale of a mortgage charge under the terms of a consent decree, which provided for satisfaction of the decretal debt by instalments, is an application under the Civil Procedure Code, 1908, O. 34, and is governed by Art. 181, Limitation Act. The Bombay High Court has directed that in drawing up preliminary decrees under Rr. 2, 4 and 7, the heading should say

"Preliminary decree, which requires to be made final within the prescribed period of limitation before it can be executed".⁹

According to **Calcutta High Court** also Art. 181, Limitation Act applied to an application under S. 89 of Act IV of 1882, and an application under the corresponding O. 34, R. 5, cl. (2) comes within the scope of Art. 181, Limitation Act.¹⁰ A Full Bench has held in *Pell v. Gregory*,¹¹ that

"in the case of an application for a final decree for sale, if it is made within the specified time, it may be said that the Court is bound, as a matter of course to make the final decree for sale, if the payment, which has been directed by the preliminary decree is not made, and that the Court is merely giving effect to the order contained in the preliminary decree".

The **Madras High Court** also holds that Art. 181, applies to an application for final decree in a mortgage suit.¹² The time specified under Art. 181, may be extended by an acknowledgment under S. 19 of the Limitation Act.¹³ It has been held by the **Patna High Court** that an application for a final decree for foreclosure or sale is an application under the Code of Civil Procedure, 1908, for it is made under O. 34, R. 3, or R. 5, which expressly requires an application; and, that an application for such a final decree presented after the passing of the Code

9. *Harjivan Devraj v. Gajanan Kashinath*, 1923 Bom. 420=25 Bom. L.R. 459=73 I.C. 187.

10. *Beni Singh v. Barhamdeo Singh*, (1915) 28 I.C. 211=19 C.W.N. 473=22 C.L.J. 66; Followed *Batuknath v. Mt. Munni Dei*, 23 I.C. 644=36 All. 284 (P.C.); and *Abdul Majid v. Jawahirlal*, 23 I.C. 649=36 All. 350 (P.C.).

11. 1925 Cal. 834=52 Cal. 828 (F.B.); also see *Munnalal v. Sarai Chunder*, 42 Cal. 776=42 I.A. 88=28 M.L.J. 470 (P.C.).

12. *Subbalakshmi Ammal v. Ramanujan*, (1918) 42 Mad. 52; *Thathara v. Kuppal*, (1912) 16 I.C. 799 (Mad.); *Mummadi Venkatiah v. Boganathan*, 1922 Mad. 65=42 M.L.J. 51; and *Rama Venkata Subba Iyer v. Shanmugam*, 21 I.C. 530 (M.); *Jayanti Venkayya v. Damisethi*, (1921) 44 Mad. 714; Applied *Bhup Indar v. Bijai Bahadur*, (1901) 23 All. 152 (P.C.); also see *Gulsam Bibi v. Ahmadsa Rowther*, (1919) 42 Mad. 296=51 I.C. 140=1919 M.W.N. 284.

13. *Mummadi v. Boganathan*, 1922 Mad. 65=42 M.L.J. 51, *supra*.

of Civil Procedure, 1908, and the Limitation Act, 1908, is governed by Art. 181, of the Limitation Act.¹⁴

2469. Time, under Art. 181, is an application under O. 34, R. 5, C. P. Code, begins to run after the expiry of the period fixed by the preliminary decree for payment of money (if there is no appeal from the preliminary decree).¹⁵ The **Privy Council** have held that where there has been an appeal from a preliminary mortgage decree under O. 34, R. 4 (1), and the appellate Court has not extended the time for payment, the period of 3 years within which, under Art. 181, an application for a final decree, under O. 34, R. 5, sub-R. (2), must be made, runs from the date of the decree of the appellate Court, not from the expiry of the time for payment, fixed by the preliminary decree, even when the appellate Court has confirmed the decree of the lower Court.¹⁶ This affirms the view taken by the **Lahore High Court**,¹⁷ which adopts the **Allahabad view**,¹⁸ that a preliminary decree passed by a trial Court merges in the decree of the appellate Court on appeal, and the only decree which can be made final is the appellate Court's decree; and the limitation for making an application for passing the final decree runs from the date of the decree of the appellate Court. According to the **Allahabad High Court** in a suit for sale on a mortgage, if an appeal has been preferred against the preliminary decree, and the decree has been confirmed, the starting point of limitation for an application for a final decree is the date of the appellate decree.¹⁹ In *Tularam v. Bhup Singh*,²⁰ where a mortgage decree was contested by the sons, impleaded as defendants in the suit, and an appeal was preferred by the sons, on behalf of the whole family but without impleading their father as a party to the appeal, it was held that the limitation for an application by the decree-holder for a final decree began to run from the date of the appellate order dismissing the appeal. Where in a preliminary decree for sale, the amount payable by the judgment-debtor is by mistake wrongly en-

14. *Balaram Naik v. Kanhai Bharam*, (1917) 38 I.C. 385=1 P.L.J. 364 (366); Followed 29 I.C. 120=19 C.W.N. 470 and 649.

15. *Ahmed v. Gaura*, 40 All. 235 (237); *Rajbehari v. Juman*, 4 P.L.J. 523 (524)=50 I.C. 544; and *Nanhe Lal v. Gulshan*, (1922) 68 I.C. 919=18 N.L.R. 58=1922 Nag. 217.

16. *Fitzholmes v. Bank of Upper India, Ltd.*, 1927 P.C. 25=100 I.C. 22=54 I.A. 52=8 Lah. 253=52 M.L.J. 366 (P.C.).

17. *Fitzholmes v. Bank of Upper India, Ltd.*, (1924) 5 Lah. 257=1924 Lah. 582=81 I.C. 649.

18. *Mahabir Prasad v. Kanhaiyalal*, (1923) 74 I.C. 372=21 A.L.J. 526; Relied on *Nizamuddin v. Bohra*, 43 I.C. 870=40 All. 203=16 A.L.J. 85; and *Gajadhar v. Kishen*, 42 I.C. 93=39 All. 641=15 A.L.J. 734.

19. *Ibid.*, 74 I.C. 372=21 A.L.J. 526.

20. (1925) 89 I.C. 214=47 All. 913=1925 All. 691.

tered, and the decree is subsequently amended, there is no fresh accrual of the right to apply for a final decree under Art. 181, Limitation Act.²¹ If the preliminary decree purporting to be one under O. 34, R. 4, Civil Procedure Code, was passed on the basis of a compromise between the parties fixing payment in instalments, the right to apply for a final decree accrues on the date of default in payment of the promised instalments.²² The **Madras High Court**

Madras.

has held in *Jayanti v. Damiseti*,²³ that the starting point in cases where there has been an appeal from the preliminary decree is the date of the appellate decree whether the latter confirmed or varied the preliminary decree. If an appeal against the preliminary decree is withdrawn, and dismissed with costs in consequence, the preliminary decree becomes merged in the appellate decree. The Allahabad, and the

Calcutta.

Madras view is followed by the **Calcutta High Court**. In *Uma Charn v. Niharan Chandra*,²⁴ it has been held that when a preliminary decree in a mortgage suit is affirmed on appeal, an application made within 3 years of the date of the affirmance in order that a final decree might be passed is within the period prescribed by Art. 181, Limitation Act. The **Patna High Court** takes a like view in *Jowad Hussain v. Gendan Singh*²⁵; and, according to Oudh Judicial Commissioner's Court, if there has been an appeal, the date of the appellate decree, which finally determines the right of the parties, is taken to be the starting point of limitation within Art. 181, Limitation Act.²⁶

2470. A Full Bench of the **Calcutta High Court** has held that an application for a personal decree against a mortgagor under O. 34, R. 6, Civil Procedure Code, is governed by Art. 181, Limitation Act.²⁷ This view is

Application for supplementary decree—
O. 34, R. 6.

21. *Ram Chander v. Jaimal*, (1922) 69 I.C. 199=20 A.L.J. 640=1923 All. 22; cf. *Gyan Singh v. Ata Hussein*, 43 All. 320 (323, 324) (Where some only of the defendants had appealed, and the appeal was not an appeal against the whole decree).

22. *Nanku Singh v. Parmanand Singh*, (1931) 130 I.C. 487=1931 All. 340.

23. (1921) 44 Mad. 714; Applied 23 All. 152 (P.C.); also see *Subbarayulu v. Sundararajulu*, 48 I.C. 185 (Mad.); cf. *Thathara v. Kuppal*, 16 I.C. 799=14 M.L.T. 194.

24. (1923) 75 I.C. 2=37 C.L.J. 452=1923 Cal. 389; Followed 42 I.C. 93=39 All. 641; 43 I.C. 870=40 All. 203; and 64 I.C. 470=44 Mad. 714; also see and cf. *Hukm Chand v. Pirthichandlal*, 50 I.C. 444=46 Cal. 670=4 I.A. 52 (P.C.).

25. (1922) 66 I.C. 790=1922 Pat. 205=1 Pat. 444.

26. *Lallu Ram v. Jotsingh*, (1918) 47 I.C. 206 (Oudh); (Appellate decree, if it does not extend the time originally fixed, or if the time so fixed has not expired); cf. 1927 P.C. 25, *supra*.

27. *Pell v. Gregory*, (1925) 89 I.C. 1=52 Cal. 828=29 C.W.N. 678=1925 Cal. 834 (F.B.).

supported by a decision of the Allahabad High Court in *Ilfat Hussein v. Alimunnissa*,²⁸ where it was observed that an application for a decree under the provisions of O. 34, R. 6, Civil Procedure Code is not an application for the execution of the original decree for sale, but is an application in the original suit for a new decree. Such an application is governed as to limitation by Art. 181, of the Limitation Act. To the same effect was the decision in *Ram Sarup v. Ghourain*,²⁹ under the corresponding S. 90 of the Transfer of Property Act which held that

"neither in substance nor in form does such an application ask for execution of that decree. What it does ask is that, certain events being ascertained to have occurred, a subsidiary decree for money may be passed, in execution of which the amount still remaining due on the principal decree under S. 88 may be recovered".

The **Madras High Court** has taken the same view, that an application to make a personal decree against the mortgagor is not an application for the execution of a decree, and Art. 181, and not Art. 182 of the Limitation Act, therefore, applies to such an application.³⁰ The **Nagpur decision** in *Chunnilal v. Tikamdas*,³¹ is to the same effect. The **Rangoon High Court** has held that an application for personal decree against a mortgagor is not a mode of enforcing a preliminary decree, or the final decree in the mortgage suit, but is an application for a new decree imposing liability upon the mortgagor personally; therefore, such an application is governed by Art. 181, and not by Art. 183, Limitation Act.³² The Amendment, by Act XXI of 1929, which introduces the words, "*an application by the plaintiff*" in R. 6, of O. 34, is aimed at bringing such applications under Art. 181 of the Limitation Act.

2471. According to the ordinary view taken by several High Courts an application under O. 34, R. 6, (i) **Starting point—** for a supplementary decree must be **Accrual of right.** brought within 3 years from the date when the right to apply accrues.³³ This date is generally taken to be the **date of confirmation of the sale**,³⁴ when it is found

28. (1918) 40 All. 551 (552)=47 I.C. 562; Relied on *Biharilal v. Bisheshar Dayal*, (1912) 9 A.L.J. 569.

29. (1890) 21 All. 453.

30. *Rama Venkata Subba Iyer v. Shanmukam Pillai*, (1913) 21 I.C. 530 =1913 M.W.N. 867.

31. (1917) 39 I.C. 854 (Nag.); Not followed 42 Cal. 294=30 I.C. 719; cf. 34 Cal. 672=11 C.W.N. 674=6 C.L.J. 119.

32. *A. S. L. M. Chokalingam Chettiar v. Mg. Tun Yin*, 13 Rang. 305=156 I.C. 701=1935 Rang. 187.

33. *Mohd. Ilfat Hossein v. Alimunnissa*, (1910) 40 All. 551 (552)=47 I.C. 562.

34. *Rama Venkatasubba Iyer v. Shanmukam Pillai*, (1913) 21 I.C. 530=1913 M.W.N. 867.

that the sale-proceeds are insufficient to satisfy the debt.³⁵ The right to a personal decree under S. 90 of Transfer of Property Act, or under O. 34, R. 6, arises when the proceeds of the sale are found insufficient to pay the amount to the mortgagor, that is, where after the sale of the mortgage property, there is still a balance due to the mortgagee and the amount is legally recoverable from the mortgagor. The mortgagee may then apply for and obtain a decree under O. 34, R. 6, Civil Procedure Code, against the mortgagor personally which he may execute against the person of the mortgagor or by attachment and sale of his other properties.³⁶ The opening words of the rule, and the forms in Appendix D, point to the same practice being regular and correct, that a personal decree for the balance should not be passed until after the mortgaged property had been sold and the proceeds found insufficient.³⁷ Under Art. 181, Limitation Act, the right to apply does not accrue until the sale confirmation under O. 21, R. 92,³⁸ and the time once beginning to run would not be suspended by an appeal or other proceeding; whether the decree-holder's costs have been taxed or not.³⁹ The Judicial Commissioner's Court, N.-W. Frontier Province has held that there can be no presumption that when a decree for sale is made under R. 5, O. 34, a decree for balance under R. 6, is passed at the same time. In fact the presumption is to the contrary, namely that a decree under R. 6, would not be passed until the property has been sold under R. 5.⁴⁰ However, the practice of a **composite** decree, for sale and personal liability, has been more or less recognised, and in *Jenna Bahu v. Parmeshwar Narain*,⁴¹ the Judicial Committee held that a decree for sale and S. 88, Transfer of Property Act can validly provide that if the proceeds of sale are not sufficient to pay the mortgage-debt, the mortgagor should pay the balance personally though

35. *Gajadhar v. Alliance Bank*, 28 All. 660 (664); *Rajnarain v. Santilal*, 1923 All. 203=79 I.C. 85=21 A.L.J. 37.

36. *Sonatun Shah v. Ali Newaz*, (1889) 16 Cal. 423.

37. *Mangatrai v. Babu Singh*, 9 L.L.J. 301; and *Bulkee Bee v. Kaka Hajee Mohd*, 50 M.L.J. 39; also see *Lal Behary Singh v. Habibur Rahman*, (1899) 26 Cal. 166; *Ram Ranjan v. Indra Narain*, (1906) 33 Cal. 890; *Damodar v. Vyanku*, (1907) 31 Bom. 244; *Badridas v. Inayat Khan*, (1902) 22 All. 404; *Aiyasamier v. Venkatachela*, (1917) 40 Mad. 989 (996)=37 I.C. 741; *Janardhan v. Krishnaji*, (1920) 22 Bom. L. R. 953=58 I.C. 377; also see *Kamalamma v. Narasimha*, 30 Mad. 464.

38. *Krishnabandhu Ghatak v. Panchkari*, 1931 Cal. 166=130 I.C. 815=58 Cal. 741=52 C.L.J. 531=35 C.W.N. 231; Followed *Pell v. Gregory*, 1925 Cal. 834=89 I.C. 1=52 Cal. 828 (F.B.).

39. *Krishnabandhu Ghatak v. Panchkari*, 1931 Cal. 166; Expl. *Hari Mohan Dalal v. Parmeshwar Saha*, 1928 Cal. 646=117 I.C. 543=56 Cal. 661 (F.B.); also see *Prodyumna Kumar v. Gopendra*, 1933 Cal. 251=60 Cal. 19.

40. *Dhian Singh v. Shivdas*, 1936 Pesh. 71.

41. 47 Cal. 370=46 I.A. 294=36 M.L.J. 215 (P.C.).

the personal decree could not be executed until after the property was sold and the net sale proceeds were found to be insufficient to satisfy the debt.⁴² The principle of this ruling has been extended in the Calcutta case of *Adhar Chandra v. Sarnamoyi*,⁴³ where it is explained that, according to the Privy Council decision, on a reasonable construction of the statute a decree may be passed under S. 90, Transfer of Property Act (O. 34, R. 6), even before the condition contemplated by the section has been followed; that is, before it has been ascertained that the proceeds of the sale of the mortgaged properties are insufficient to pay the mortgage-debt.

"In this view of the decision of the Judicial Committee the rulings of the Calcutta and Allahabad High Courts which held a contrary view must be deemed to have been overruled."⁴⁴

This principle would apply to the case where instead of a combined decree under Rr. 5, and 6, there are **two decrees, one under R. 5, and another under R. 6**, which taken together would have the effect of a combined decree.⁴⁵ Accordingly, where a second mortgagee brought a suit against the mortgagor and obtained a final decree, but before he applied for execution the prior mortgagee brought a suit on his mortgage making both the mortgagor and the second mortgagee parties, and sold the property in execution of his decree, and the sale proceeds satisfied only the decretal debt of the prior mortgagee, it was held that the Court will not compel the second mortgagee to make a fruitless attempt to sell the property which was already sold, in order to enable him to apply under R. 6, read with S. 68, Transfer of Property Act. In order that the application for personal decree should be held to be untenable, there must be something which the mortgagee should be able to recover by such sale.⁴⁶

2472. We have noticed above the view that application under O. 34, R. 6, should be made within
 (ii) **Date of suit.** 3 years of the date of the confirmation of the mortgage sale. Another view is that it is the date of the *suit*, and not the date of the application which must be looked to. No decree can be passed for the balance under this rule unless the balance is *legally recoverable*. Apart from the question of an acknowledgment under S. 19 of the Limitation Act, or of a part-payment under S. 20 of the Limitation Act, the balance is not legally

42. *Dinabandhu v. Mashuda Khatun*, 16 C.L.J. 318; *The Raja of Kalahasti v. Varadachariar*, 21 M.L.J. 1036; *Abbaki v. Krishnayya*, 32 Mad. 534; and *Ralia Ram v. Hiralal*, 1928 Lah. 653; *Karimullah Shah v. Muhd. Raza*, 48 I.C. 608 (Pat.) (Composite decrees passed in practice).

43. 1929 Cal. 121=32 C.W.N. 1160=117 I.C. 530.

44. *Ibid.*, 1929 Cal. 121=117 I.C. 530.

45. *Ibid.*, 1929 Cal. 121=117 I.C. 530.

46. *Ibid.*, 1929 Cal. 121=117 I.C. 530.

recoverable if the right to recover the mortgage-debt from the mortgagor personally is barred by the three or six years' rule, at the date of the suit for sale, according as the document entitling the decree-holder to a personal decree is unregistered or registered, respectively.⁴⁷ It is to be noticed that the question whether the applicant is entitled to a personal decree may arise, although the application itself is within time.⁴⁸ On the other hand, a personal decree may be passed for the balance on the basis of a covenant to pay implied by a deposit of title-deeds, though the application itself is made more than six years after the due date of payment.⁴⁹

Where after sale of mortgaged property in execution of mortgage-decree, the sale is set aside and
 (iii) Date of refund of purchase-money. and mortgagee is required to refund the proceeds to the purchaser, he can apply under R. 6, as the proceeds in such a case are nil, and therefore insufficient⁵⁰; and the time for making such application is 3 years from the date on which the mortgagee refunded the purchase-money to the purchaser.¹

2473. It has been held in some **Allahabad** cases that a personal decree can only follow a mortgage-decree for sale held by the same decree-holder and that S. 90, Transfer of Property Act (O. 34, R. 6, Civil Procedure Code) does not apply where the mortgaged property has been sold under a decree held by some other person.² Where a second mortgagee sued on his mortgage and obtained a final decree for sale of the mortgaged property, and he did not put his decree into execution and made no attempt

47. *Musaheb Zaman v. Inayetullah*, (1892) 14 All. 513 (518); *Ramdin v. Kalka*, (1885) 7 All. 502=12 I.A. 12 (P.C.); *Miller v. Runganath*, (1886) 12 Cal. 389; *Golam Hussein v. Mahamadali*, (1910) 34 Bom. 540=7 I.C. 455; *Makrand v. Kallu*, (1919) 41 All. 581=50 I.C. 640; *Ganesh Lal v. Khetromohan*, (1926) 53 I.A. 134=5 Pat. 585=95 I.C. 839=1926 P.C. 56.

48. *Chunilal v. Tikamdas*, (1917) 39 I.C. 854 (Nag.); cf. *Rahmat Karim v. Abdul Karim*, 34 Cal. 672=11 C.W.N. 674=6 C.L.J. 119.

49. *Hamid-ud-din v. Kedarnath*, 20 All. 386; *Chattarmal v. Thakuri*, 20 All. 512; *Rahmat Karim v. Abdul Karim*, 34 Cal. 672; *Janji Singh v. Chandar Mal*, 30 All. 388; *Rahmet v. Ramrattan*, (1929) 4 Luck. 237=114 I.C. 769=1929 Oudh 59; *Sheo Charan v. Lalji*, 18 All. 371 (372).

50. *Badal Singh v. Debi Saran Dhar Dube*, 1927 All. 395=25 A.L.J. 485=100 I.C. 775=49 All. 506; Not Foll. *Pirbhu Narain Singh v. Baldeo Misra*, 29 All. 260=1907 A.W.N. 69=4 A.L.J. 157; Foll. *Kedarnath v. Chandumal*, (1903) 26 All. 25 (27)=1903 A.W.N. 179; also see *Ram Raghubir v. Imami Begam*, (1911) 14 O.C. 217=9 I.C. 403 and *Sheodin v. Bhawani Baksh*, (1911) 14 O.C. 62=9 I.C. 752.

1. *Ibid.*, 1927 All. 395=100 I.C. 75=49 All. 506; also see *Ramineedi Venkata v. Lakhoju*, 30 Mad. 209 (212).

2. *Badri Das v. Inayat*, (1900) 22 All. 404.

to get the property sold; but, subsequently, the first mortgagee obtained a decree for sale of the property, and the property was sold in satisfaction of that decree, it was held that the second mortgagee was not entitled to apply for a decree over under O. 34, R. 6 of the Code of Civil Procedure, as the mortgaged property had not been put to sale in execution of his decree.³ Where a person held two mortgages over the same property, brought two separate suits on those mortgages, and obtained two decrees; and the first decree being made absolute, the decree-holder himself purchased the property in execution thereof; and the sale proceeds having discharged the second decree only in part, he then applied for a decree to realise the balance due under the second decree, it was held that no decree under S. 90, Transfer of Property Act (O. 34, R. 6) could be passed, as the second decree had not been made absolute and no sale had taken place in execution thereof, the proceeds of which had proved insufficient to discharge the second mortgage.⁴ However where in a suit on a second mortgage in which the first mortgagee was impleaded as a defendant, a decree was passed whereby both the second and the first mortgagee were declared entitled to apply for sale of the mortgage property it was held competent for the first mortgagee, though a defendant to apply for a personal decree, under O. 34, R. 6, Civil Procedure Code, against the mortgagor. The intention of the Court which passed the decree was to treat both mortgagees as plaintiffs and to enable them to obtain all the further reliefs, consequent upon the mortgage-decree, in that capacity.⁵

Under **Amendment by Act XXI of 1929**, a new clause (8-A) has been introduced in O. 34, Civil Procedure Code. An application by the defendant is expressly required under this rule, and so, it will come under this article. The rule is, however, not clear whether the date of the mortgagor's suit, or the date of the application is to be referred as the date on which the mortgagor's claim must be shown to be subsisting. Mitra, is of opinion that the more satisfactory view is that the rights of the parties should be adjusted as on the date of suit whoever institutes it.⁶

3. *Darbari Mal v. Mula Singh*, (1920) 42 All. 519.

4. *Kamta Prasad v. Saiyed Ahmad*, (1909) 31 All. 373; Folld. 22 All. 404.

5. *Thirumalai Kandama v. E. D. Corporation, Ltd.*, (1917) 42 I.C. 953=33 M.L.J. 382=22 M.L.T. 257=1918 M.W.N. 4.

6. Mitra's Limitation Act, p. 1929:—["The plaintiff mortgagor must be taken to have elected to be bound by the procedure allowed by the Code to adjust the rights of all the parties in that very suit, such as they are at the date of suit."]]

2474. Where a preliminary decree for redemption is passed, but the mortgagor fails to deposit the decretal amount on or before the fixed date, it is open to the mortgagee to apply for a final decree debarring the mortgagor from all rights to redeem it. If the mortgagee does not so apply, and the Court extends the time for payment by the mortgagor, and the payment is made within that extended time, the mortgagor must be taken to have paid into Court the amount declared due on the day fixed within the meaning of O. 34, R. 8 (1) and (2). If any application is necessary by the plaintiff, the period of limitation for that application would begin to run from the time the right to apply accrues under Art. 181 of the Limitation Act, which would mean the date on which the payment is properly made under the decree, *i.e.*, on the date originally fixed under the proviso to R. 8 of O. 34.⁷ Where a mortgagor applied for a final decree in a redemption suit, and the preliminary decree had been taken on appeal, through first and second appeals, and the second appeal was dismissed with costs, there being no question of law, it was held that the decision of the High Court was a decision after hearing the merits of the case, and its decree, therefore, superseded the decree of the lower appellate Court; and that the application for final decree was within time when filed within 3 years of the High Court's decree under Art. 181, Limitation Act.⁸ The Oudh Chief Court has held in *Mohd. Baqarkhan v. Jagat Narainlal*,⁹ that Art. 181 would only apply to an application where it is required by law to be made. The mortgagor is not required by any rule of procedure to make an application and obtain an order thereon before he can pay the amount fixed by the decree for redemption of mortgage. It is the mortgagee who is required by law to make an application, under O. 34, R. 8 (4), for obtaining a decree for the sale of the mortgaged property. An application for extension of time for payment of the mortgage-debt made either by the mortgagor who has obtained a redemption decree or by a person to whom the decree has been assigned by the mortgagor is not provided for elsewhere, and falls under this article; the right to apply accrues on the date of the decree or at the latest on the expiry of the period fixed for the payment of the mortgage-debt.¹⁰

2475. It has been held that the legislature did not intend to include in the Limitation Act every application to a Court with reference to its own list of causes, such as applications to

7. *Moru Narushet Gujar v. Gangabai Ramchandra Lilachand*, 1927 Bom. 32=50 Bom. 730=28 Bom. L. R. 1325=98 I.C. 943.

8. *Duvoor Venkatarama v. Gomatam Doddachariar*, 1930 Mad. 353=38 M.L.J. 207=31 L.W. 207=125 I.C. 95=1930 M.W.N. 104.

9. (1924) 80 I.C. 706=10 O. & A. L. R. 1149.

10. *Vasudev v. Gopal*, 43 Bom. 689 (699, 700).

transfer a case from one board to another, to transfer a case to the bottom of the board, change of attorneys, and so forth.¹¹ Accordingly, **applications praying that the original suit might be revived and restored** to the Board was not barred under provisions of Art. 178 of Sch. II, to the Limitation Act of 1877 (now Art. 181).¹² When an **application by an attorney for realisation of costs** under the High Court Original Side Rules, involves an enquiry, it should not be dealt with in a summary manner,¹³ but Art. 181 does not cover every application of this kind, as held in the Bombay case of *Wadia, Gandhi & Co. v. Purshotam Sivji*.¹⁴ The right to apply in a pending suit, is a right which accrues from day to day, and therefore the period of limitation prescribed under clauses (171), (171-A), (171-B), or (178) of the Limitation Act did not apply to bar a suit for partition in which a decree for partition was made, and the usual **commission for partition** was directed and issued.¹⁵ Proceedings for the purpose of effecting a partition are proceedings in the suit itself and not proceedings in execution of the decree; and no formal application for effecting partition is necessary, the Court being bound to proceed with the suit and to make a final decree.¹⁶ So long as proceedings initiated by the decree-holder are *pending* his right to apply for their continuance accrues from day to day, *i.e.*, on every day on which the Court does not *suo motu* continue them. The right to apply will not be barred till three years have elapsed after the proceedings have ceased to be pending.¹⁷ Similarly, on directions to take an account in a suit the suit is still "pending", until the final order on the taking of the account is made; and the right to apply in such a suit to have the death of a certain defendant recorded, and the names of his heirs substituted on the record, accrues from day to day, and is not barred by Art. 181 (old Art. 178), Limitation Act.¹⁸ **The right of an**

11. *Gobind Chunder Goswami v. Rungun Money*, (1880) 6 Cal. 60; also see *Sital Proshat v. Abdul Rashid*, (1908) 11 Oudh Cas. 208; *Ramanathan v. Alagappa*, 53 Mad. 378=1930 Mad. 528; *Kristokamini Devi v. Girishchandra*, 39 C.W.N. 1030.

12. *Ibid.*

13. *Lakhmani Dasi v. Dwijendranath Mukerjee*, (1918) 46 Cal. 249 (Art. 84, Limitation Act applied).

14. (1907) 32 Bom. 1; Folld. *Abba Haji Ishmail v. Abba Thara*, (1876) 1 Bom. 253.

15. *Kedarnath Dutt v. Hara Chand Datt*, (1882) 8 Cal. 420; Folld. in *Ramnath Bhattacharjee v. Uma Charn*, (1899) 3 C.W.N. 756.

16. *Dwarkanath v. Barindanath*, (1895) 22 Cal. 425.

17. *Chalavadi v. Poloori*, 31 Mad. 71 (76); Folld. *Kedar v. Harra*, 8 Cal. 420; also see *Subba Chariar v. Muthuveeran Pillai*, 36 Mad. 553; *Pattamayya v. Patayya*, 50 M.L.J. 215 and *Prem Narain v. Gangaram*, 1931 A.L.J. 436.

18. *Surendra Keshub Roy v. Khetter Krishto Mitter*, (1903) 30 Cal. 609; Reld. upon 5 Cal. 726; 8 Cal. 420 and 3 C.W.N. 756.

assignee to apply for substitution in a pending suit, is a right which accrues from day to day, and is not barred by limitation.¹⁹ An application in a partition suit for the appointment of a Commissioner to effect an actual division of the property, is not an application of the description contemplated by Art. 181 (old Art. 178), Limitation Act.²⁰ Such an application for the appointment of a Commissioner to work out the shares recoverable under a compromise decree for partition is not an application for execution, but a step in the suit and is not barred by any limitation.²¹ A Court is bound to dispose of a pending suit, whether any application is made to it or not asking it to proceed to judgment.²² The proceedings which take place between preliminary decree and final decree are in the nature of a continuation of the suit for the purpose of carrying out the directions contained in the preliminary decree.²³ An application in a pending case is not governed by Art. 181, and is in fact not subject to any rule of limitation.²⁴ So long as a preliminary partition decree has not been completed by a final decree, the Court is bound, on the application of either party to proceed with the suit and to pass a final decree, and such an application is not an application in execution.²⁵ Under the old Code, a preliminary decree passed in a suit for partition, accounts, or a dissolution of partnership, was not a decree within the meaning of S. 206 (O. 20, R. 6), Civil Procedure Code. A decree as explained in S. 206, and the following sections of the Code clearly meant the final decree in the suit, for under S. 206, it was stated that the decree shall set out the particulars of claim in the suit and shall specify the relief granted or other determination of the suit.²⁶ But now a decree means something which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It may be either preliminary,

19. *Prasanna Kumar v. Asutosh Roy*, (1913) 20 I.C. 685=18 C.W.N. 450; Folld. *Puranchand v. Roy Radha Kishen*, 19 Cal. 132 (F.B.).

20. *Latchmanan Chetty v. Ramanathan Chetty*, (1904) 28 Mad. 127.

21. *Srinivasa Mudali v. Ramasamy Mudali*, (1915) 30 I.C. 380=2 L.W. 693=18 M.L.T. 145=1915 M.W.N. 725; Folld. *Latchman Chetty v. Ramanathan*, 28 Mad. 127=14 M.L.J. 436 and *Appadu v. Venkata Ranga Rau*, 18 M.L.J. 23.

22. *Beni Singh v. Barhamdeo Singh*, (1915) 28 I.C. 211=19 C.W.N. 473=22 C.L.J. 66.

23. *Ramanathan Chetty v. Alagappa Chetty*, 1930 Mad. 528=53 Mad. 378=59 M.L.J. 102=32 L.W. 329=131 I.C. 160;; Approved 30 I.C. 380 (Mad.); 8 Cal. 420; 30 Cal. 609; 19 Cal. 132 (F.B.) and 22 Cal. 425 (434).

24. *Ibid.*, 1930 Mad. 528=53 Mad. 378=131 I.C. 160; Approved 30 I.C. 380 (Mad.).

25. *Sethurama Sahib v. Chotta Raja Sahib*, (1917) 40 I.C. 820=1917 M.W.N. 327; also see *Dwarkanath v. Kesho*, 9 All. 364 (365).

26. *Khadem Hossein v. Emdad Hossein*, (1901) 29 Cal. 758 (764).

when further proceedings have to be taken before the suit can be completely disposed of, or it may be final. It may also be partly preliminary and partly final.²⁷ The suit is supposed to be pending till the stage of a final decree is reached. After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have on the making of the decree, acquired rights, or incurred liabilities which are fixed unless or until the decree is varied or set aside.²⁸ And the parties are entitled to have these enforced.²⁹ A trial Court is quite competent to deal with as much of the suit as has not already been dealt with in the final decree, and to make a supplementary final decree.³⁰ Accordingly, the provisions of the Limitation Act cannot be held to apply to an application to the Court to terminate a pending proceeding, the final order in which had been postponed for the benefit of the defendant or for the convenience of the Court.³¹ Where in a suit respecting a will, there was a decree that a scheme was settled, and no final orders made, the suit was treated as *pending* within the meaning of S. 372 (O. 22, R. 10), of the Code.³²

2476. In this connection, it may also be noticed here that Art. 181, would only apply to an application where it is required by law to be made.³³ The Act certainly does not apply to applications to the Court to do what the Court has no discretion to refuse.³⁴ The operation of Art. 178 of the Limitation Act, 1877 (Art. 181, Act IX of 1908), was limited to applications for the exercise by the authority to which the application was addressed, of powers which it would not be bound to exercise without such application, and not to applications to the Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character.³⁵ Article

Applications to do acts of a ministerial character.

27. *Mattapalli Venkataratnam v. Veppu Sitaramayya*, (1926) 92 I.C. 314=1926 Mad. 305.

28. *Lachmi Narayan Marwary v. Balmakund*, (1924) 81 I.C. 747=4 Pat. 61=47 M.L.J. 441=1924 P.C. 198 (P.C.); also see *Perumal v. Perumal*, 51 Mad. 701 (F.B.); *Bhatu Ram v. Fogul Ram*, 5 Pat. 223.

29. *Chandra Shekhar v. Amir Begam*, 1927 All. 439=25 A.L.J. 437=101 I.C. 676=49 All. 592.

30. *Jashode Dassce v. Upendranath*, (1918) 64 I.C. 671 (Cal.).

31. *Puranchand v. Roy Radha Kishen*, (1891) 19 Cal. 132 (F.B.); also see *Surendra v. Khetter*, 30 Cal. 609.

32. *Gocool Chunder v. The Administrator-General*, 5 Cal. 726.

33. *Mohammad Baqar Khan v. Jagat Narain Lal*, (1924) 80 I.C. 706 (Oudh) and *Iqbal Narain v. Mt. Jagrani*, (1925) 85 I.C. 450 (Oudh).

34. *Kylasa Goundan v. Ramaswami*, (1881) 4 Mad. 172; *Balaji v. Kushoba*, (1906) 30 Bom. 415; also see *Vithal Janardan v. Vithojirao*, 6 Bom. 586; Reld. upon in *Chalavadi v. Poloori*, (1907) 31 Mad. 71 (75).

35. *Kylasa Goundan v. Ramasami Ayyar*, (1881) 4 Mad. 172; also see *Faqir Chand v. Muhammad Akbar*, 1933 Pesh. 101 (2) and *Darbo v.*

178, Limitation Act, of 1877, (now Art. 181), was therefore not applied to **applications for certificates for sales**³⁶; or to an application to bring the attached property to sale³⁷; or to an application to pass judgment according to an award as soon as it was ordered to be filed, as such an application, though as a matter of practice usual, was not within the contemplation of the Limitation Act.³⁸

2477. Under a proper interpretation of the preamble, and S. 4 of the Limitation Act, the rule of limitation is confined to the litigants, and is inapplicable to acts which the Courts may or has to perform *suo motu*.³⁹ Thus, S. 206 of the Civil Procedure Code, 1882, (now O. 20, R. 6, Civil Procedure Code, 1908), empowered a Court of its own motion to amend its decree, and the mere fact that one of the parties had made an application asking the Court to exercise that power did not render the action of the Court subject to the rule of limitation.⁴⁰ Article 181, Limitation Act, does not restrict the Court's power to add a party defendant, under S. 32, (Act XIV of 1882), now O. 1, R. 10, Civil Procedure.⁴¹ The Limitation Act relates to actions of parties, but not to the action of the Court.⁴² The power of an appellate Court to make a person a respondent in appeal is not affected by the Limitation Act.⁴³ Accordingly **applications to Court for amendment of its decree**, and to bring it into conformity with judgment, are not governed by the Limitation Act.⁴⁴ However, where the decree of the appellate Court supersedes the decree of the first Court, by affirming, reversing, or modifying it, the only decree which can be amended is the decree to be executed, *viz.*, that of the appellate Court, and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the

Kishorai, 9 All. 364; *Latchmanan Chetty v. Ramanathan*, 28 Mad. 127 (Application for appointment of a Commissioner to effect division of property by metes and bounds not contemplated by Art. 181); cf. *Moola Cassim v. Moola Abdul Rahim*, (1916) 35 I.C. 950=9 Bur. L. T. 148.

36. *Vithal Janardan v. Vithojirav*, (1882) 6 Bom. 586; also see *Devindas v. Pirjada*, 8 Bom. 377 (380).

37. *Phiraya v. Adu Ram*, 179 P.R. 1882.

38. *Ishvardas Jagjivandas v. Bai Avabai*, (1882) 7 Bom. 316.

39. *Dhan Singh v. Basant Singh*, (1886) 8 All. 519; also see *Raghunath v. Raj Kumar*, (1884) 7 All. 276 (280); also see *Hatton v. Harris*, 1892 A.C. 547 (564); *Shipwright v. Clements*, 38 W.R. 746=63 L.T. 160.

40. *Ibid.*

41. *The Oriental Bank Corporation v. Charriol*, (1886) 12 Cal. 642.

42. *Raghunath v. Raj Kumar*, (1884) 7 All. 276 (280).

43. *Sohna v. Khalak Singh*, 13 All. 78 (85).

44. *Jivraji v. Pragji*, (1886) 10 Mad. 51; *Kalu v. Latu*, (1893) 21 Cal. 259.

purpose of executing the appellate decree.⁴⁵ The High Courts of **Allahabad**,⁴⁶ **Calcutta**,⁴⁷ and **Madras**,⁴⁸ hold that the appellate Court alone can amend the decree, but this view is not shared by the **Bombay High Court**.⁴⁹ A Court is competent to entertain successive applications for amendment of a clerical or arithmetical mistake in a decree, or of error arising therein from any accidental slip or omission, because this power is inherent in every Court and may be exercised at any time the error is discovered, provided there has been no adjudication on the merits upon a previous application either because of the default of the petitioner or because the Court thought that an amendment was needless.⁵⁰ Where plaintiff's right to mesne profits was found in the judgment but there was no direction in the decree, and on plaintiff's application for the assessment of mesne profits the Court decreed the amount of mesne profits, the action of the Court in assessing the mesne profits, as if an order was distinctly made in the decree in terms of O. 20, R. 12, was held right.¹ A decision given under S. 152, Civil Procedure Code, granting an application for amendment of a decree is governed by Art. 181, and not by Art. 164, Limitation Act.² A decree in favour of plaintiff can be rectified on the application of the defendant.³ The Act of an arbitrator in handing in an award to the proper officer of the Court under S. 516 (Sch. 2, para. 107 of the Civil Procedure Code, 1882) was held not to be an *application*.⁴ On the *ejusdem* theory, applications for sanction of a criminal prosecution were held not governed by Art. 178 (present Art. 181), and there was no fixed period of limitation for making applications under S. 195 of the Criminal Procedure Code.⁵ The decree-holder may certify a

Certification of payment.

payment or adjustment under the provisions of O. 21, R. 2 (1), Civil Procedure Code, at any time inasmuch as no period of limitation is prescribed

45. *Muhammad Sulaiman Khan v. Muhammad Yar Khan*, (1888) 11 All. 267 (F.B.).

46. *Asma Bibi v. Ahmad Husain*, 30 All. 290.

47. *Uma Sundari v. Bindu Bashini*, 24 Cal. 759.

48. *Munisami Naidu v. Munisami Reddi*, 22 Mad. 293.

49. *Bapu v. Vajir*, 21 Bom. 548.

50. *Langat Singh v. Janki Kuer*, (1911) 12 I.C. 151=14 C.L.J. 481.

1. *Manmatha Nath Dutt v. Motilal Mitra*, 1929 Cal. 719=33 C.W.N. 614=122 I.C. 220.

2. *Laxerence v. Diwan Singh*, 1933 Rang. 264=145 I.C. 823.

3. *Karim Mahomed Jamal v. Rajoom*, (1887) 12 Bom. 174.

4. *Roberts v. Harrison*, 7 Cal. 333.

5. *Queen-Empress v. Ajudhia Singh*, (1888) 10 All. 350; also see *Shah Namo v. Emperor*, 7 O.W.N. 663=1930 Cr. C. 941 (Art. 181 not applicable to criminal revisions) and *Bapu v. Bapu*, 39 Mad. 750=22 M.L.J. 419 (F.B.).

therefor.⁶ The word "*application*", in Art. 181, Limitation Act, means an application *ejusdem generis*, in other words, an application on which the Court has to decide judicially. A certification by a decree-holder does not raise any point on which the Court has to decide judicially and is, therefore, not in any circumstances an application within the meaning of Art. 181, Limitation Act.⁷

2478. An application under S. 47 of the Code of Civil Procedure is an application *in the execution proceeding*: and it is not an application for execution within the meaning of Art. 182 of the Limitation Act. An application under S. 47, Civil Procedure Code, to fall under Art. 181, must not be provided for elsewhere. An application by an auction-purchaser to have a sale in contravention of the provisions of O. 34, R. 14, set aside, would fall under Art. 166 of the Limitation Act.⁸ Where the defendant had acquired certain property at a sale in execution of a decree obtained by him as mortgagee against the judgment-debtor, and he was put in possession under his certificate of sale, which was unregistered, and the plaintiff, a subsequent purchaser of same property in execution of a subsequent decree, brought a suit against the defendant to recover possession, but the defendant subsequently obtained another certificate which was registered, and the plaintiff's sale was taken to be subject to the interest acquired by the defendant, but a contention was raised that the defendant took nothing by his purchase, as he was the holder of the decree in execution of which the property was sold, it was held that the objection was barred by time under Art. 181, long before the suit was brought.⁹

If the application is made while the execution proceeding is still pending, there is no period of limitation applicable; but, if an application falling under S. 47, Civil Procedure Code, is made after the disposal of the execution, the question would be if it is for

6. *Prakash Singh v. The Allahabad Bank, Ltd.*, (1926) 98 I.C. 353 = 3 O.W.N. 829 = 29 O.C. 358 = 1927 Oudh 7 = 1 Luck. 428; *Sheikh Ilahi v. Nawab Ali*, 4 P.L.J. 159 (161) = 50 I.C. 364; *Balai v. Aijanmal*, 1922 Cal. 30; also see *Esufzeman v. Sanchia*, 43 Cal. 207 (210); *Haji Abdul Rahman v. Khoja Khaki*, 11 Bom. 6 (34); *Tukaram v. Babaji*, 21 Bom. 122 (124); *Jalim Chand v. Yusuf*, 54 Cal. 143 = 1925 Cal. 1012 = 86 I.C. 1051.

7. *Ibid.*, 98 I.C. 353 = 1927 Oudh 7; also see s.c. on appeal 1929 P.C. 19 = 56 I.A. 30 = 114 I.C. 581 = 3 Luck. 684 (P.C.); *Madan Singh v. Kamakhya*, 1934 Pat. 380 = 15 P.L.T. 457; also see *Joli Prasad v. Sri Chand*, 51 All. 237 = 1928 All. 629 (633) (F.B.) and *Gangayya v. Seshagiri Rao*, 1935 Mad. 922 = 159 I.C. 38.

8. *Bhaichand Kirparam v. Ranchhoddas Manchharam*, 1921 Bom. 285 = 22 Bom. L. R. 670.

9. *Chintamanrao Nattu v. Vithabai*, 11 Bom. 588.

revival of the proceedings. An application asking the Court to ascertain and determine how much a judgment-creditor has been overpaid is not barred by the lapse of the time allowed for execution of a decree.¹⁰ In *Ram Golam Sahu v. Barsati Singh*,¹¹ where the High Court had treated the application as coming under S. 244, Civil Procedure Code, 1882 (S. 47, present Code), and not under S. 311, Civil Procedure Code, the Judicial Committee reversed the decision of the High Court on another point, without saying anything about the question. Where a decree-holder entitled under the decree to possession of a plot of land only, fraudulently obtained in execution, by misleading the Court, possession of the house also standing thereon: and the heirs of the judgment-debtor applied to the Court under S. 47, Civil Procedure Code, to recover possession of the house, the application made more than three years after the possession had been taken by the decree-holder, was held barred by time under Art. 181 of the Limitation Act.¹² An application by a judgment-debtor for restoration of immoveable property seized by the decree-holder in excess of what has been decreed, is one under S. 47, Civil Procedure Code, and is governed by Art. 181 of the Limitation Act.¹³ The Madras view in *Ratnam Ayyar v. Krishna Doss*,¹⁴ to the contrary, gives no reasons for its decision: and it has been overruled since, in *Vachali Rohini v. Pathalathum*,¹⁵ where the Full Bench has held that Art. 181, and not Art. 165 of Sch. I, to the Limitation Act, governs an application made by a judgment-debtor for restoration of immoveable property delivered to the decree-holder in execution proceedings in excess of what had been decreed. The Bombay High Court has taken the same view in *Rasul v. Amina*,¹⁶ where it has been held that Art. 165 of the Limitation Schedule makes it absolutely clear that it was intended to apply to an application provided for by O. 21, R. 100 of the Civil Procedure Code, and no other. Where a suit is filed under circumstances in which the proper remedy is an application under S. 47, Civil Procedure Code (old S. 244), and the Court in the exercise of its discretion treats the plaint in the suit as an application under S. 47, Civil Procedure Code, the rule of limitation applicable will be that appropriate to applications under S. 47, Civil Procedure Code,

10. *Muthoor Perashad v. Shumboo Geer*, (1874) 22 W.R. 211.

11. 36 Cal. 336=36 I.A. 27 (P.C.).

12. *Kashi Ram v. Mt. Pragi*, (1913) 20 I.C. 538 (Oudh).

13. *Abdul Karim v. Islamunnissa*, (1916) 38 All. 339=14 A.L.J. 401; Reld. on *Arjun Singh v. Machchal Singh*, (1906) 3 A.L.J. 601 and *Lalmandas v. Jagannath Singh*, (1900) 22 All. 376.

14. (1898) 21 Mad. 494; Diss. from in 38 All. 339, *supra*.

15. (1919) 42 Mad. 753 (F.B.); Overruled 21 Mad. 494 and Folld. 38 All. 339.

16. 1922 Bom. 271=46 Bom. 1031 (1036); also see *Gangadhar v. Jagmohandas*, 1931 Bom. 446=133 I.C. 858.

namely, Art. 181 (old Art. 178) of the Limitation Act.¹⁷ An application to set aside a sale on the ground of fraud, would come under S. 47 (old S. 244), Civil Procedure Code, notwithstanding that the purchase was made by a person who was a third party: and such an application is governed by Art. 181 (old Art. 178), Limitation Act.¹⁸ Even when an execution sale is a nullity because the property sold is in excess of the property mortgaged an application to have it set aside under S. 47, Civil Procedure Code, is governed by Art. 181, and not Art. 166, Limitation Act.¹⁹ Where an execution sale is void as against a party, and he applies for relief under S. 47, Civil Procedure Code, or otherwise, the article applicable is Art. 181, and not Art. 166, Limitation Act.²⁰ Limitation in lodging objections under S. 47, Civil Procedure Code, is governed by Art. 181, and not by Art. 166; hence, the limitation of thirty days prescribed for objections under O. 21, R. 90, Civil Procedure Code, does not apply in a case where objections are lodged under S. 47, Civil Procedure Code.²¹ If a party wants a sale to be set aside for any of the reasons given in R. 90, O. 21, then the application must be made within thirty days as enacted by Art. 166, Limitation Act, but where a void sale is sought to be set aside, then the application would not be under R. 90, O. 21, Civil Procedure Code, but will be deemed to be an application made in execution governed by S. 47 and to which Art. 181, Limitation Act, would be applicable.²² Where in a decree awarding maintenance a charge was created on the shares of some of the defendants in lands belonging jointly to them and the appellants, but the shares of the latter were expressly exonerated; however, the execution sale included a share of the appellants therein, it was held that Art. 181, and not Art. 166 of the Limitation Act, applied.²³ The words of S. 47 are wide, and under that section even persons against whom no decrees have been passed, but who are parties to the suit have to come in, if any of their rights be infringed in execu-

17. *Lalman Das v. Jagannath Singh*, (1900) 22 All. 376.

18. *Buhbon Mohan Pal v. Nundaldal Dey*, (1899) 26 Cal. 324; *Reld. on Nemai Chand v. Deno Nath Kanji*, (1898) 2 C.W.N. 691; also see *Ram Kinkar Tewari v. Stithi Ram*, (1918) 27 C.L.J. 528=46 I.C. 221.

19. *Sundar Das v. Nikka*, 1931 Lah. 586 (2)=132 I.C. 493=32 P.L. R. 440.

20. *Rajagopala Aiyar v. Ramanujachariyar*, 1924 Mad. 431=47 Mad. 288=46 M.L.J. 104=80 I.C. 92=19 L.W. 179=34 M.L.T. 37=1924 M.W.N. 182 (F.B.).

21. *Hans Raj v. Karam Chand*, 1933 Lah. 570=145 I.C. 113.

22. *Narotamdas v. Bhagwandas*, 1934 All. 314=3 A.W.R. 545=1934 A.L.J. 859=151 I.C. 244; cf. *Gulzarilal v. Sheocharnlal*, 156 I.C. 389=1935 All. 889=1935 A.L.J. 940=1935 A.W.R. 1006 (Art. 166 applied to application by auction-purchaser: O. 21, R. 91).

23. *Seshagiri Rao v. Srinivasa Rao*, (1919) 43 Mad. 313=38 M.L.J. 62=56 I.C. 260=1920 M.W.N. 127.

tion proceedings by the decree-holder. The right to apply would accrue within the meaning of Art. 181, Limitation Act, as soon as he is aggrieved by disturbance to his possession of land; and so long as he is in possession, it does not matter to him what orders of excess sales or excess deliveries are passed behind his back.²⁴ Where a decree-holder became purchaser at an auction-sale in execution of *ex parte* decree, which was subsequently set aside, and on re-trial of case a second decree was passed in plaintiff's favour, whereupon the defendant applied to set aside sale under the first decree, it was held that the application was governed not by Art. 166, but it came under Art. 181, Limitation Act, the starting point being the date on which the *ex parte* decree was set aside.²⁵ An application for refund of money which had been recovered in execution by the decree-holder in excess of what was actually due under the decree was held to fall under Art. 181 (old Art. 178), Limitation Act, and the right to apply for the refund of the excess amount paid in execution accrued at the time when the account was taken, and stated on the application of the judgment-debtors in the course of the proceedings in execution.²⁶ Where an application for refund was properly made to the executing Court under S. 47, Civil Procedure Code, the time taken in prosecuting the application in a Court not having jurisdiction was held liable to deduction under S. 14 of the Limitation Act.²⁷

2479. An application for restitution, under S. 144, Civil Procedure Code, 1908, is to be made to "the Court of first instance". Such an application will therefore be one in the suit and not in execution proceedings. But such an application was, with reference to the terms of S. 583 of the Code of Civil Procedure, 1882, an application for execution of a decree.²⁸ The present Code avoids all reference to execution and makes an application in the suit necessary.²⁹ The **Allahabad High Court** has held that proceedings under S. 144 of the Code of Civil Procedure not being proceedings in execution, the provisions of S. 141, Civil Procedure Code apply to them.³⁰ On the language of

24. *Chengalraya Reddi v. Kollapuri Reddi*, 1929 M.W.N. 811=1930 Mad. 12=123 I.C. 24.

25. *Shivbai v. Yesso*, (1918) 43 Bom. 235.

26. *Mula Raj v. Debi Dihal*, (1885) 7 All. 371.

27. *Ganpatrao v. Anandarao*, (1919) 44 Bom. 97=22 Bom. L. R. 238=55 I.C. 967.

28. *Prag Narain v. Kamakhia Singh*, (1909) 36 I.A. 197=31 All. 551=3 I.C. 798=19 M.L.J. 599 (P.C.); also see *Venkayya v. Ragavacharlu*, 20 Mad. 448; *Nandram v. Sitaram*, 8 All. 545.

29. *Sarojbhushan Ghosh v. Debendranath*, (1931) 35 C.W.N. 1294=54 C.L.J. 506=1932 Cal. 308=59 Cal. 337=137 I.C. 302.

30. *Jirwa Ram v. Nand Ram*, (1922) 44 All. 407; Diss. from *Somasundaram v. Chokkalingam*, 40 Mad. 780.

S. 583, Civil Procedure Code, 1882, it seemed fairly clear that the proceedings for obtaining restitution were, under the old Code, proceedings in execution; however, the language of S. 144, Civil Procedure Code, 1908, is very different,

“and we now find no mention regarding any application to be made for the purpose of executing the decree of the appellate Court, nor do we find any direction laying down that such proceedings are to be regulated by the rules prescribed for the execution of decrees in suits”.³¹

In *Brijlal v. Damodar Das*,³² it was held that an application under S. 144, Civil Procedure Code, to recover mesne profits which became payable to the applicant in consequence of a decree of the High Court having been reversed by the Privy Council, though not a proceeding in execution, yet, being an application to enforce a decree of His Majesty in Council, was governed as to limitation by Art. 183 of the First Schedule to the Indian Limitation Act, 1908. An application under S. 144, Civil Procedure Code, is no doubt one which carries out the intention of the appellate Court's decree, but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below.³³ According to the **Calcutta High Court**, an application for restitution under S. 144, Civil Procedure Code, is not an application for execution. Such an application is governed by Art. 181, Limitation Act, and not by Art. 182, and time begins to run from the decree which for the first time gave the applicant the right to restitution.³⁴ Where a decree is passed by the trial Court, but reversed in appeal and the reversal is confirmed in second appeal, the time for an application under S. 144, Civil Procedure Code, runs from the date of the first appellate decree and the period taken up in second appeal cannot be deducted.³⁵ The right to apply for restitution accrues really on the date when for the first time a decision is given which entitles the party asking for restitution, to have restitution.³⁶ Where in execution of a decree for rent, the holding was sold by auction and the

31. *Jiwa Ram v. Nand Ram*, 44 All. 407 (411)=1922 All. 223.

32. (1922) 44 All. 555=1922 All. 238; also see *Sohan Bibi v. Baijnath*, 50 All. 767; *Madhusudandas v. Brijlal*, 61 I.C. 806 (All.).

33. *Baijnath Das v. Balmukand*, 1925 All. 137=47 All. 98=22 A.L.J. 881=82 I.C. 321; also see *Parmeshwar Singh v. Sitla Din Dube*, 1934 All. 626=150 I.C. 1096=1934 A.L.J. 503=3 A.W.R. 740 (F.B.) (Art. 182 not applicable: Time under Art. 181 begins to run from date of lower appellate Court's decree, when right to apply for restitution first accrued: and as regard mesne profits, when possession has been restored to successful party).

34. *Saroj Bhushan Ghosh v. Debendranath*, (1931) 35 C.W.N. 1294=54 C.L.J. 506=1932 Cal. 308=59 Cal. 377=137 I.C. 302; also see *Hari Mohan v. Parmeshwar*, 56 Cal. 61.

35. *Dhapo v. Bakridi*, 1932 A.L.J. 724=1932 All. 609; also see *Chanda Singh v. Bishan Singh*, (1923) 76 I.C. 501=1924 Lah. 166.

36. *Ashutosh Choudhury v. Kumed Kamini Dassi*, 1933 Cal. 422=144 I.C. 150.

auction-purchaser deposited the amount which was in excess over the decree amount in Court, and the decree-holder withdrew the amount due to him and the balance due to the judgment-debtor was kept in Court; later, on an application to have the sale set aside, it was set aside and the auction-purchaser's money was ordered to be paid, and the auction-purchaser having withdrawn the amount in Court deposit, the decree-holder filed an appeal against the order, and the sale was confirmed; it was held that the suit by the plaintiff for restitution of the amount withdrawn by the auction-purchaser, three years after the order confirming the sale was barred by time, and that the appeal in High Court did not concern him as he had not appealed.³⁷ According to **Patna High Court**, in *Basanta Kumari v. Balmukand*,³⁸ an application for restitution is an application for execution under the present Civil Procedure Code, just as it was under the Old Procedure Code, and Art. 182 of the Limitation Act applies to such applications. The view was reversed on appeal, by the majority opinion of Dass and K. Sahay, JJ., against the dissenting opinion of Ross, J.,³⁹ but a **Full Bench decision** in *Bhaunath Singh v. Kedarnath Singh*,⁴⁰ has overruled the earlier decision in 3 Pat. 371 (F.B.); and has held that an application for restitution and for mesne profits under S. 144 of the Civil Procedure Code is an application in execution and is therefore governed by Art. 182, and not by Art. 181, Limitation Act; and what is to be executed is the decree of the Court which, by reversing or varying a decree under appeal, entitles a party to be restored to the position which he occupied prior to the decree reversed or varied.⁴¹ This agrees with the view taken by the **Madras High Court** in *Somasundaram v. Chhokalingam*,⁴² and the **Bombay High Court** is of the same opinion. See *Kurgodi Gowda v. Ningam Godwa*,⁴³ and *Sayad Hamid Ali v. Ahmed Ali*.⁴⁴ The **Rangoon High Court** has also held that in the case of an application under S. 144, Civil Procedure Code, Art. 182, and not Art. 181 applies. Even if Art. 181 is applied, time begins to run from the date of the final decree.⁴⁵ The

37. *Ashutosh Choudhary v. Kumed Kamini Dassi*, 1933 Cal. 422=144 I.C. 150.

38. *Basanta Kumari Dasi v. Balmukand*, 1923 Pat. 371=2 Pat. 277; also see *Krupasindhu v. Balbhadra Das*, (1917) 3 P.L.J. 367.

39. (Revised on appeal) 3 Pat. 371=1925 Pat. 1 (*Balmakund Marwari v. Basanta Kumari Dasi*). But see 13 Pat. 411.

40. 13 Pat. 411=148 I.C. 1180=1934 Pat. 246 (2).

41. *Lokenath Singh v. Mahabir Singh*, 152 I.C. 944=15 Pat. L. T. 745=1934 Pat. 646.

42. (1916) 40 Mad. 780 (782); also see *Unnamalai v. Nathan*, 42 I.C. 530=33 M.L.J. 413; *Panchapakesa v. Natesan*, 98 I.C. 587=51 M.L.J. 161; *Sudalai Muthu v. Sudalai Muthu*, 17 L.W. 623.

43. (1917) 41 Bom. 625 (630).

44. (1921) 45 Bom. 1137.

45. *Muthukarappan v. Annamalai*, 1933 Rang. 180=11 Rang. 275.

Oudh Chief Court has likewise held that an application under S. 144, Civil Procedure Code, is an application for execution of a decree passed in appeal when that decree varies or reverses the decree of the Court of first instance, it being in substance an application made for seeking the aid of the Court in working out the final decree, and is governed by Art. 182, Limitation Act.⁴⁶ But the **Chief Court, Lahore** took a different view.⁴⁷

2480. The power of Courts to grant restitution is not confined to provisions of the Civil Procedure Code, S. 144 (Act V of 1908), or S. 583 of the Civil Procedure Code, 1882.⁴⁸ According to the **Calcutta High Court** an application made to Court for refund of money realised in execution of an *ex parte* decree subsequently set aside, would be governed by Art. 181, Limitation Act.⁴⁹ An application by a purchaser for refund of purchase-money, where the sale has been set aside as void upon a suit brought by the judgment-debtor falls under this article, and time runs from the date of the final order (passed by the High Court in second appeal) setting aside the sale⁵⁰; so also, an application by an auction-purchaser, who has failed to obtain possession of the property purchased owing to the judgment-debtor having no saleable interest in the property, for refund of the purchase-money after setting aside the sale, is governed by Art. 166 so far as the setting aside of the sale is concerned, and by Art. 181 in respect of refund of purchase-money.¹ Where an *ex parte* decree on a mortgage was passed in favour of plaintiffs, who had obtained an injunction restraining the defendants from realising certain money deposited in Court to their credit; and after this decree was passed, they withdrew some money out of this amount; and later, the decree being set aside, the suit was re-tried, and the Court passed a decree for a lesser amount, which was affirmed by the High Court, whereupon the defendants applied for a refund of the difference between the sum realized by the

46. *Chandika Singh v. Bithaldas*, 1931 Oudh 51=130 I.C. 78=7 O.W. N. 1153 (Decree modified in appeal—Starting point is date of final order); also see *Santa Sahai v. Chhutai Kurma*, 92 I.C. 23 (Oudh).

47. *Ram Singh v. Sham Parshad*, 67 P.R. 1918; also see *Chanda Singh v. Bishen Singh*, (1923) 76 I.C. 501=1924 Lah. 166=5 L.L.J. 389; cf. *Gujar Mal v. Narain Singh*, 1931 Lah. 504=134 I.C. 206=32 P.L.R. 395 (Application for restitution, on setting aside of *ex parte* decree—Starting point).

48. *Rodger v. Comptoir d'Escompte de Paris*, L.R. 3 P.C. 465 (475) (Held, per Lord Cairns, L.J.—“One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors.”)

49. *Harish Chandra v. Chandra Mohan*, 28 Cal. 113; also *Masirunnissa v. Joychand*, (1912) 16 I.C. 238 (Cal.).

50. *Girdhari v. Sital Prasad*, 11 All. 372 (374).

1. *Makar v. Sarfuddin*, 50 Cal. 115.

plaintiffs, and the sum finally decreed, it was held that the plaintiffs were at liberty to proceed either by application or by suit, and that the application made within 3 years of the final decision of the suit was not barred by limitation.² According to the **Madras High Court**, the words "*an application for execution of a decree*" occurring in Art. 182, of the Limitation Act mean an application to enforce the decree, and in the case of applications for restitution on reversal of a decree, the legal obligation arising from the appellate decree itself is sought to be enforced, and not any independent obligation. Consequently, an application for restitution under the Civil Procedure Code is an application for execution of a decree, and is governed by Art. 182, and not by Art. 181, Limitation Act.³ Where a **decree for sale on a mortgage** was amended so as greatly to reduce the rate of interest, and the judgment-debtor applied for refund of money realized in execution, it was held that limitation applicable was that prescribed by Art. 178, Limitation Act, 1877 (present Art. 181), and time began to run from the date of the amendment of the decree.⁴ Where a sale in execution of *Sir* land, was set aside on the suit of judgment-debtor, decreed on appeal by the High Court, an application by the auction-purchaser for refund of the purchase-money was held governed by Art. 181, Limitation Act, and the right to apply accrued on the passing of the High Court's decree.⁵ In a pre-emption case, where a decree was passed conditionally upon payment by the decree-holder of a certain amount, which he duly deposited in Court, but the amount was *increased* by the appellate Court, and the plaintiff-decree-holder allowed the appellate decree to lapse by non-payment of the additional amount ordered to be paid by a given date, it was held that the decree-holder was entitled to a refund of the smaller amount already paid by him, and his application was maintainable under S. 583 of the old Code as an execution of the appellate decree in his favour.⁶ An **application by judgment-debtor for refund of excess payment to decree-holder**, or recovery in execution by the decree-holders in excess of what was actually due under the decree, comes under Art. 181, (old Art. 178), Limitation Act, and the right to apply for the refund of the excess amount accrues at the time when the account is taken and stated in the application of the judgment-debtors in the course of the proceedings in execution.⁷ An appli-

2. *Vithaldas v. Jamna Prasad*, (1908) 30 All. 476.

3. *Unnamalai v. Nathan*, (1917) 42 I.C. 530=6 L.W. 359=33 M.L.J. 413.

4. *Harnam Chander v. Muhammad Yar Khan*, (1905) 27 All. 485; Dist. *Daya Kishan v. Nanhi Begam*, 20 All. 304.

5. *Girdhari v. Sital Prasad*, (1889) 11 All. 372. See *Tirumalaisami v. Subramanian*, 40 Mad. 1009 (1015) (Effect of new Code on right to apply barred under old Code) and *Makar Ali v. Sarfuddin*, 50 Cal. 115=1923 Cal. 85 (Remedy by application under Art. 166, Limitation Act).

6. *Nandram v. Sitaram*, 8 All. 545.

7. *Mul Raj v. Debi Dihal*, (1885) 7 All. 371.

cation by a judgment-debtor for restoration of immoveable property seized by the decree-holder in excess of what has been decreed is governed by this article and not by Art. 165, because that article does not apply to an application by a judgment-debtor.⁸ Time runs when the property claimed by the judgment-debtor has been wrongly delivered to the other party.⁹ Where property was sold in execution of an *ex parte* decree, and the decree-holder became the purchaser, and the decree was subsequently set aside, an application made by the defendant to set aside sale, upon payment of the amount due under the second decree, was held governed by Art. 181, and not by Art. 166, Limitation Act, the cause of action having accrued upon the setting aside the *ex parte* decree.¹⁰ When a preliminary decree for partition is set aside on appeal, no effect remains in the final decree which may have been passed pending the appeal from the preliminary decree. Consequently, a party from whom any money has been levied under the final decree so rendered inoperative, is entitled to restitution of the amount from the party who levied it on the basis of the final decree.¹¹ In such a case time begins to run against the party claiming restitution from the date when the final pronouncement is made in the proceedings instituted to test the property of the preliminary decree.¹² An application for compensation for the period during which the judgment-debtor were kept out of possession of land sold in execution, of which they were restored to possession under S. 144, Civil Procedure Code, lies under S. 151, Civil Procedure Code, and would be governed by Art. 181, Limitation Act.¹³

2481. APPLICATIONS FOR EXECUTION NOT FALLING UNDER Art. 182.—Art. 182 of the Limitation Act, which applies to applications for execution of decree, has been held to be not exhaustive of applications for execution of decree, and Art. 181, the residuary article in the schedule would apply to such applications as are not covered by Art. 182, and when the various points of time enumerated therein will not apply to a particular application. As observed by the Madras High Court in *Rungiah Goundan & Co. v. Nanjappa Row*,¹⁴

“in construing Art. 179 (Sch. II, Act XV of 1877), (now Art. 182, Limitation Act, 1908), one must not lay undue stress upon the entry in the first column, ignoring the entries in the third column. If the various starting

8. *Abdul Karim v. Islamunnissa*, 38 All. 339.

9. *Jilan v. Abdul Rahman*, 4 Luck. 209=1929 Oudh 76 (79)=115 I.C. 444.

10. *Shivbai v. Yesoo*, (1918) 43 Bom. 235.

11. *Atul Chandra Singha v. Kunja Behari Singha*, (1918) 43 I.C. 775 =27 C.L.J. 451.

12. *Ibid.*

13. *Jagdish Narain v. Holloway*, (1917) 39 I.C. 653 (Pat.).

14. (1903) 26 Mad. 780 (784).

points fixed in the third column of any article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described in the first column, it will be impossible to hold that the article in question is exhaustive of the class. If the article is inapplicable to certain cases comprised in the class those cases will be governed, in the case of suits, by the residuary Art. 120, and in the case of applications by the residuary Art. 178" (now Art. 181).

It has been held in several reported cases that Art. 179 of old Act, or Art. 182 of the present Act, is inapplicable to certain applications for execution of decrees and that the appropriate article applicable thereto is Art. 178 of old Act, or Art. 181 of the present Act.¹⁵

"Whether Art. 179 (present Art. 182) or Art. 178 (Art. 181) is applicable to a particular application will depend upon the nature and portion of the decree sought to be executed and whether the application that is made is the first application or a subsequent application. **The true criterion** in determining whether Art. 179 (present Art. 182) or 178 (present Art. 181) applies to a particular application is to ascertain whether any one of the six points of time specified in column 3 of Art. 179 (present Art. 182), is applicable to it, and if none of them is applicable, it is only then that Art. 178 (Art. 181, Act IX of 1908), will apply."¹⁶

In *Muhammad Suleman Khan v. Muhammad Yar Khan*,¹⁷ in which the decree as originally drawn was incapable of execution, it was held that an application made within three years from the time when it was amended (about twelve years after the date of the decree), was governed not by Art. 182 (old Art. 179), but by Art. 181 (old Art. 178), Limitation Act. In order to make the provisions of the Limitation Act apply, the decree sought to be enforced must be in such form as to render it capable, in the circumstances, of being enforced.¹⁸ An application by the plaintiff mortgagee for an order absolute under S. 87 of the Transfer of Property Act foreclosing the defendant's right of redemption is an application for execution of the decree passed under S. 86 of the Act, and is governed by Art. 181 (old Art. 178) and not by Art. 182 (old Art. 179), Limitation Act, the time being reckoned from the date fixed by the decree for payment of the mortgage-money by

15. *Muhammad Suleman Khan v. Muhammad Yar Khan*, 17 All. 39; *Muhammad Islam v. Muhammad Ahsan*, 16 All. 237; *Chhedi v. Lalu*, 24 All. 300; *Maruti v. Krishna*, 23 Bom. 592; *Rajaratnam v. Shevalayamma*, 11 Mad. 103; *Thakur Das v. Shadilal*, 8 All. 56; *Ali Ahmad v. Naziran Bibi*, 24 All. 542; *Ashrafuddin Ahmed v. Bepin Behari Mullick*, 30 Cal. 407; *Debi Baksh v. Shambu Dial*, 48 All. 281=1926 All. 384.

16. *Rungiah Goundan & Co. v. Nanjappa Rowe*, (1903) 26 Mad. 780.

17. 17 All. 39; Folld. in *Debi Baksh v. Shambhu Dyal*, 48 All. 281.

18. *Rameshwar Singh v. Homeshwar Singh*, 1921 P.C. 31=48 I.A. 17=40 M.L.J. 1 (P.C.); Folld. *Bhaik Kamaruddin Ahmed v. Jawahir Lal*, (1905) 27 All. 334=32 I.A. 102=15 M.L.J. 258 (P.C.) (Revival of pending execution proceedings suspended not by act or default of decree-holder).

the defendant-mortgagor.¹⁹ Where the original decree against the assets of *A. B.* in the hands of "*Joti Prasad*" was not incapable of execution in spite of the error in orthography, the application for execution could not date from its amendment to decree against the assets of *A. B.* in the hands of "*Jwala Prasad*," which occurred some years later.²⁰ Where a decree provided for delivery of property subject to payment by plaintiff of certain amount for improvements to defendants, application for execution of the decree would be governed by Art. 181, Limitation Act, and the right to apply for the execution could accrue only from the date on which the amounts were finally settled by the Court.²¹ Where a decree is one for a payment of a certain sum of money composed of a number of items, one of which has to be ascertained, limitation for execution of the whole decree runs (under this article) from the date of ascertainment of the unspecified sum.²² If the decree is not immediately executable, and the right to apply for execution depends upon the fulfilment of certain contingencies provided for in the decree, Art. 182 is inapplicable and the only article governing the execution is the residuary Art. 181, Limitation Act.²³ Where the decree was for recovery of possession of immoveable property, but only on default being made by the judgment-debtor in payment year by year of a certain annuity to the decree-holder, it was held that Art. 181 (old Art. 178) governed the application for the recovery of the property on default, in execution of such decree.²⁴ In *Chhedi v. Lalu*,²⁵ it was held that a decree in a pre-emption suit conditional on payment of the pre-emption price did not fall under Art. 179 (old Act), but by Art. 178 (now Art. 181), and limitation commenced to run against the decree-holder from the time when the price was paid. But, in *Maruti v. Krishna*,²⁶ where the decree

19. *Ali Ahmad v. Naziran Bibi*, 24 All. 542 (545).

20. *Mt. Maharani v. Debidas*, (1929) 115 I.C. 118 (119); cf. *Debi Baksh v. Shambu Dial*, 48 All. 281=1926 All. 384 (Decree incapable of execution without amendment).

21. *Deivasikamani v. Raju Pillai*, 1930 Mad. 995=59 M.L.J. 579=128 I.C. 713=54 Mad. 306.

22. *Vydianatha v. Subramania*, 36 Mad. 104 (107).

23. *Narain Tewari v. Narain Rai*, 1931 All. 326=1931 A.L.J. 319=131 I.C. 559; Reld. on *Rukmina Kuer v. Sheo Dat Rai*, 51 I.C. 576 and *Rameshwar Singh v. Homeshwar Singh*, 1921 P.C. 31=6 P.L.J. 132 (P.C.); cf. *Dada v. Ganpatrao*, (1931) 130 I.C. 148 (Nag.) (Decree for possession on condition of payment of money to judgment-debtor is governed by Art. 182, Limitation Act).

24. *Muhammad Islam v. Muhammad Ahsan*, 16 All. 237.

25. 24 All. 300.

26. 23 Bom. 592; cf. *Krishnan v. Nilakandan*, 8 Mad. 137 (139) (Decree for redemption subject to payment of improvements to be determined in execution).

provided for redemption by the plaintiff within a month, it was held that as it was enforceable from its date, it being open to the plaintiff to pay the decree amount on its date, the application was governed by Art. 183 (Art. 179, old Act), and not by Art. 181 (old Art. 178). Where the decree provided that if the judgment-debt was not paid within four months, the decree-holder should have the power to recover it by sale of the mortgaged property, it was held that inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the first application made after the expiry of four months, and within three years thereafter, though more than three years from the date of the decree, was governed by Art. 178 (present Art. 181), and not by Art. 179 (now Art. 183), Limitation Act.²⁷ In the case of a decree for perpetual injunction, there may be nothing enforceable at the date of the decree and the disobedience itself may take place more than three years after the date of the decree. Such an application will be governed by Art. 181, Limitation Act.²⁸ Where a perpetual injunction has been granted, on each successive breach of it the decree may be enforced by an application made within three years of such breach, under Art. 181, Limitation Act.²⁹ The remedy in the case of decrees for injunction lies by way of execution, under O. 21, R. 32,³⁰ and according to **Allahabad High Court**, an application to enforce the injunction is not governed by Art. 179 (now Art. 182) and apparently that no period of limitation is prescribed, as no reference is made to Art. 178 (now Art. 181).³¹ The **Madras High Court** takes the view that under Art. 181, an application to enforce an injunction must be made within three years of the particular breach or disobedience which is the occasion for the application.³² The **Allahabad** view was followed by the **Lahore High Court** in *Udmi v. Sohanlal*.³³

The same principle would apply where the decree is not in existence which can be executed. Where pending a suit to set

27. *Thakur Das v. Shadi Lal*, 8 All. 56; Folld. in *Rungiah Goundan & Co. v. Nanjappa Rao*, 26 Mad. 780 (787).

28. 11 Mad. 103; Folld. in 26 Mad. 780 (786); also see and cf. *Sadagopachari v. Krishnamachari*, 12 Mad. 356 (364) and *Gordhan v. Makunda*, 40 All. 648 (651) (Application for execution of a decree for injunction is to be brought within three years).

29. *Venkatachallam v. Veerappa Pillai*, (1905) 29 Mad. 314.

30. *Sachi Prasad v. Amarnath Roy*, (1918) 46 Cal. 103 (108)=45 I.C. 864.

31. *Ram Saran v. Chatar Singh*, (1901) 23 All. 465; Folld. in *Bhagwan v. Sukhdei*, (1905) 28 All. 300; also see *Gordhan v. Maksudan*, 40 All. 648 (651).

32. See 29 Mad. 314 and 26 Mad. 780, *supra*.

33. (1922) 66 I.C. 166 (Lah.).

aside the decree, an injunction was granted restraining execution and no application for execution could be filed until the order setting aside the decree had been reversed, the application made within three years of the date was not barred.³⁴

2482. It is now an established rule of law that if the application is to initiate a *fresh execution*, Art. 182 (iii) Revival or continuation of proceedings would govern the same; but an application merely intended to *revive* or carry through a pending execution would come under Art. 181 of the Limitation Act.³⁵ Where execution of a decree has been suspended through no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been suspended. This doctrine of *revival* has not been swept away by the amendment to S. 15 of the Limitation Act.³⁶ Section 15 of the Limitation Act, 1908, has been so framed as to be applicable not only to suits but also to applications for execution of decree.³⁷ An application for revival is one for which no period of limitation is expressly provided for, and, therefore, falls within Art. 181 of the Limitation Act, requiring to be made within three years of the date on which the right to make it accrued.³⁸ Where an application for execution has been made and granted, but the right to execute has been subsequently suspended by an injunction, or other obstacles, the decree-holder may apply for a revival of the proceedings within three years from the date on which the right to supply accrues, *i.e.*, the date on which the injunction or other obstacle is removed.³⁹ An application to execute the decree may in

34. *Ram Ghulam v. Raj Kumar*, 6 Pat. 635=102 I.C. 327=1928 Pat. 86.

35. *Raghubans v. Sheosaran*, 5 All. 243 (245); *Akshay v. Abdul Kader*, 57 Cal. 860=34 C.W.N. 102 (105); *Chalavadi v. Poloori*, 31 Mad. 71 and *Subba Chariar v. Muthuveeran*, 36 Mad. 553 (556).

36. *Chattar Singh v. Kamal Singh*, (1927) 100 I.C. 692=1927 All. 16=49 All. 276=25 A.L.J. 201 (F.B.); *Qamaruddin v. Jawahir Lal*, (1905) 27 All. 334 (P.C.); *Majibullah v. Umad Bibi*, 30 All. 499 (504); *Rajani Bandhu v. Kali Prasanna*, 74 I.C. 279=1924 Cal. 419; also see *Madho Prasad v. Draupadi*, (1921) 43 All. 383 (385); *Bhagwanta v. Zamir Ahmad*, 3 Pat. 596=1924 Pat. 576.

37. *Amulya Rattan v. Preonath*, (1910) 7 I.C. 886 (Cal.).

38. See foot-note 36, *supra*.

39. *Kallianbhai Dipchand v. Ghanashamlal*, (1880) 5 Bom. 29; Reld. upon in *Lakhmi Chand v. Ballamdas*, 17 All. 425 (427); *Chintaman v. Balshastri*, 16 Bom. 294; *Narayan Govind v. Sonosadashiv*, 24 Bom. 345; also see *Buti v. Nehal*, 5 All. 459 (460); *Paras Ram v. Gardner*, 1 All. 355 (F.B.); *Basantlal v. Batul Bibi*, 6 All. 23; *Rahim Ali Khan v. Phul Chand*, 18 All. 482 (F.B.); *Beni Prasad v. Sarju Prasad*, 26 All. 140; *Nand Kishore v. Sipatri Singh*, 26 All. 608; *Balwant Singh v. Budh Singh*, 18 A.L.J. 642; *Rudra Narain v. Pachu*, 23 Cal. 437; *Baikuntanath v. Aghorenath*, 21 Cal. 387; *Rameshwar Singh v. Tirpit Singh*, 13 I.C. 140 (Cal.); *Sheikh Mahomed v. Thomas*, 11 I.C. 972 (Cal.); *Tilakdhari v. Bikram Singh*, 20 I.C. 244 (Cal.); *Kartick v. Nilmani*, 32 I.C. 931 (Cal.);

reality be simply an application to the Court to continue the proceedings already commenced by an earlier application and, therefore, the right to execute the decree will not be barred by limitation.⁴⁰ When an application is as a matter of fact pending, the decree-holder has a right every moment to ask for the further progress in the matter of the application.⁴¹ A renewed application for execution is not a fresh application, but a continuance or revival of the previous application which had been interrupted owing to a cause for which the applicant was not responsible.⁴² Art. 181 cannot apply where difficulty has been created by the decree-holder himself.⁴³ An application for execution of a decree may be treated as one in continuation or revival of a previous application, *similar in scope and character*, the consideration of which has been interrupted by intervention of objections and claims subsequently proved to be groundless, or has been suspended by reason of an injunction or like obstruction.⁴⁴ Even where the previous application is similar in scope and character to the subsequent application, the Court may find from the conduct of the decree-holder, that the decree-holder had abandoned the previous application.⁴⁵ However, a second application for execution may be treated as a continuation of the previous application, even though such application was formally dismissed as the result of an order adverse to the decree-holders in a claim case, and the consequent necessity for a suit by him which ultimately succeeded.⁴⁶ The cases establish the position that, when execution has been stopped by the interposition of some obstacle, the proceedings may be "revived" or "continued" by an application made within three years of the removal of the obstruction, and so long as proceedings initiated by the decree-holder are pending, his

Suppa Reddiar v. Avudai Ammal, 28 Mad. 50 (F.B.); cf. *Bibi Hajo v. Harsahay*, 1926 Pat. 62; *Satnarain v. Gangajal*, 1926 All. 409; *Basanti v. Sardar*, 100 I.C. 790 (All.); *Chhattar Singh v. Kamal Singh*, 49 All. 276 (F.B.); *Balwant v. Budh Singh*, 42 All. 564.

40. *Issuree Dassee v. Abdool Khalak*, (1878) 4 Cal. 415; Reld. on *Boobo v. Nazir Hossein*, 23 W.R. 183.

41. *Ikbal Narain v. Jagrani*, 28 O.C. 158=85 I.C. 450=1925 Oudh 552.

42. *Lakhmichand v. Ballandas*, (1895) 17 All. 425; Reld. on *Paras Ram v. Gardner*, 1 All. 355 (F.B.); also see *Lakimiya v. Mazharunnissa*, 95 I.C. 718=1926 Mad. 698.

43. *Rajani v. Kali*, 74 I.C. 279=1924 Cal. 419.

44. *Madhabmani Dassi v. Lambert*, (1910) 37 Cal. 796; Reld. upon *Qumaruddin Ahmad v. Jawahir Lal*, 27 All. 334=32 I.A. 102 (P.C.); *Rudra Narain v. Pachu Maity*, (1896) 23 Cal. 439; *Rahimullah Khan v. Phul Chand*, (1896) 18 All. 482; Folld. in *Ajodhya Nath v. Srinath*, (1922) 68 I.C. 207 (Cal.); also see *Rameshwar Singh v. Hameshwar Singh*, 59 I.C. 636=48 I.A. 17=40 M.L.J. 1 (P.C.); *Narain v. Oudh Behari*, 71 I.C. 332; *Ibrahim Hussain v. Sheo Partap*, 89 I.C. 886 (Pat.).

45. *Maharaja Bahadur v. Forbes*, 57 M.L.J. 184 (P.C.).

46. *Suppa Reddiar v. Avudai Ammal*, (1904) 28 Mad. 50 (F.B.).

right to apply for their continuation accrues from day to day, *i.e.*, on every day on which the Court does not *suo motu continue* them.⁴⁷ The right to apply will then not be barred till three years have elapsed after the proceedings have ceased to be pending.⁴⁸ An

Dismissal or striking off an execution application.

application for execution which has been finally and properly dismissed cannot be revived at all.⁴⁹ But striking off an execution order from the file is an act which might admit of different interpretations according to the circumstances of the case and is not conclusive proof that such execution proceedings were intended to be abandoned.⁵⁰ There is no provision of law by which the executing Court can lodge the petition or record it or strike it off for what is commonly called statistical purposes. If instead of following the procedure laid down by the Code, the executing Court passes an order not one sanctioned by the Code, it only amounts to this: petition is adjourned *sine die*.¹ An application dismissed without notice to the parties on the ground that the execution has been stayed, should be construed as pending.² Whether the application is one for revival or not depends upon the substance of the application, and not its form.³ The question is

47. *Chalavadi v. Poloori*, (1907) 31 Mad. 71 (74); *Folld. Kedarnath v. Harrachand*, 8 Cal. 420.

48. *Ibid.*

49. *Khairunnissa v. Gauri Shankar*, 3 All. 484; *Langtu v. Baijnath*, 28 All. 387; *Ibrahimji v. Hassanuddin Khan*, 28 I.C. 381 (All.); *Mahadeo v. Ramchander*, 35 I.C. 579 (Pat.); *Rati Ram v. Niadar*, 41 All. 435=49 I.C. 990; *Shivram v. Sarasvati*, 20 Bom. 175; *Kadumbini v. Koylash Chunder*, 6 Cal. 554; *Srihary Mundul v. Murari*, 13 Cal. 257; *Bissesswar v. Jasoda*, 40 Cal. 704; *Midnapore Zamindary Co. v. Dinanath Sahu*, 45 I.C. 712 (Cal.); *Balodev Sarma v. Sonti Bordoloi*, 84 I.C. 983 (Cal.); *Yellamalli Venkatappa v. Nanjappa*, 35 I.C. 594 (Mad.); *Suryanarayan v. Gurunatha*, 21 Mad. 257.

50. *Manorath v. Ambika*, 1 I.C. 57=13 C.W.N. 533 (540); *Prem Narain v. Ganga Ram*, 1931 All. 458=133 I.C. 316; *Hurronath Bhunjo v. Chunnilal*, (1878) 4 Cal. 877; also see *Chhattar Singh v. Kamal Singh*, (1927) 100 I.C. 692=1927 All. 16=49 All. 276 (F.B.) (Legal effect of striking off an application).

1. *Pattamayya v. Pattayya*, (1926) 92 I.C. 782=1926 Mad. 453=50 M.L.J. 215; also see *Ayissa Umma v. Abdulla*, 1923 M.W.N. 670=1924 Mad. 178; *Chhattar Singh v. Kamal Singh*, 49 All. 276 (F.B.); *Baijnath v. Ram Bharos*, 49 All. 509 (F.B.); *Mt. Bittee v. Kanhaiyalal*, 1926 All. 510=94 I.C. 869.

2. *Chalavadi v. Poloori*, 31 Mad. 71; also see *Chattar Singh v. Kamal Singh*, 49 All. 276=1927 All. 16 (F.B.); *Qamaruddin Ahmed v. Jawahir Lal*, (1905) 27 All. 334 (P.C.).

3. *Chattar Singh v. Kamal Singh*, 100 I.C. 692=1927 All. 16=49 All. 276=25 A.L.J. 201 (F.B.); also see *Buti Begam v. Nihal Chand*, 5 All. 459; *Lakhmi Chand v. Ballamdas*, 17 All. 425; *Jitmal v. Jwalā Pershad*, 21 All. 155; *Ali Hussain v. Rafiullah*, 7 I.C. 707 (All.); *Santlal v. Srinivas*, 32 I.C. 1005 (All.); *Bittee v. Kanhaiyalal*, 94 I.C. 869 (All.); *Qamaruddin v. Jawahirlal*, 32 I.A. 102=27 All. 334 (P.C.); *Narayan*

one of fact to be decided with reference to all the circumstances of the case.⁴

2483. (iii) ILLUSTRATIVE CASES.—

Litigation under O. 21, R. 99. (1) When litigation under O. 21, R. 99 (S. 331, Civil Procedure Code, 1882) is pending, the proceedings in execution are suspended during that litigation.⁵

Petition for insolvency. (2) Where plaintiff could not take out execution of decree until the final disposal of **petition for insolvency** made by the defendant, it was held that under Art. 181 (old Art. 178), the application for execution had to be made within three years of the order granting the petition for insolvency when the right to make the application first accrued.⁶

Execution sale stayed by injunction. (3) In case of an **execution sale** of a portion of property being **stayed by injunction**, where the application is renewed for sale of the entire property on the withdrawal of an objection claim by the judgment-debtor's son, it must be treated as a continuation of the former application, and not barred by limitation.⁷ Where an execution was stayed by reason of an injunction for more than three years, a second application for execution was regarded as an application to renew the proceedings commenced by the former application which had been suspended by the Act of the Court and not by anything for which the decree-holder was responsible.⁸

Order of dismissal when not final. (4) In *Ayodhyanath v. Srinath Chandra*,⁹ an **order for dismissal** was treated as equivalent to an order striking off the case or removing it from the file for the convenience of the Court. Where an application for execution was dismissed neither on its merits nor

Govind v. Sono Sadashiv, 24 Bom. 345; *Golook Money v. Mohesh Chander*, 3 Cal. 547; *Issurree Dassi v. Abdool Khalak*, 4 Cal. 415; *Baikuntanath v. Aghorenath*, 21 Cal. 387; *Madhabmani v. Lambert*, 37 Cal. 796; *Rameshwar v. Tirpit Singh*, 13 I.C. 140 (Cal.); *Chattarpot v. Joy Mongola*, 16 I.C. 541 (Cal.); *Sasi Varna v. Arulanandam*, 21 Mad. 261; *Karatari v. Narayanaswami*, 38 I.C. 300; *Subbayya v. Venkataramayya*, 43 I.C. 155 (Mad.); also *Kanis Zohra v. Syam Kishen*, 39 I.C. 89 (Pat.); *Deenarayan v. Ram Pershad*, 90 I.C. 799 (Pat.).

4. See foot-note (3), *supra*.

5. *Narayan Govind v. Sono Sadashiv*, (1899) 24 Bom. 345; Relied upon in *Madhab Mani v. Lambert*, (1910) 37 Cal. 796 (804).

6. *Ashrafuddin v. Bepin Beharee*, (1902) 30 Cal. 407; Relied upon *Mohd. Islam v. Muhd. Akram*, (1894) 16 All. 237.

7. *Gurudeo Narayan v. Amrit Narayan*, (1906) 33 Cal. 689.

8. *Lakhmi Chand v. Ballamdas*, (1895) 17 All. 425; Relied on *Paras Ram v. Gardner*, 1 All. 355 (F.B.).

9. (1922) 68 I.C. 207=35 C.L.J. 84=26 C.W.N. 338; Relied on *Kishenlal v. Charat Singh*, 23 All. 414=A.W.N. (1900) 214; *Puddomonee v. Muthaoranath*, 20 W.R. 133; *Pearylal v. Chandni Charan*, 11 C.W.N. 163=5 C.L.J. 80; *Daud Ali Shah v. Ram Prasad*, 30 I.C. 787=37 All. 542=13 A.L.J. 750; *Yakub Ali v. Durga Prasad*, 30 I.C. 877=37 All. 518=13 A.L.J. 760.

for any fault or default on the part of the decree-holder, the order, though in form final, was held to be in substance merely suspensory.¹⁰

(5) It has been observed by Chamier, C.J., in *Kaniz Zohra v. Syam Kisen*,¹¹ that "it may often happen that proceedings taken upon an application for execution remain pending in an original Court or Court of appeal for several years and may result in an order setting aside a sale of immoveable property many years after the application for execution was presented, and many years after any of the dates indicated in the third column of the first schedule of the Limitation Act. This has often been pointed out by the Courts and in order to get over the difficulty, some Courts have held that a subsequent application should be treated as an application made in continuation of the application made before the sale, and other Courts have held that such an application is governed by Art. 181, Limitation Act".

(6) Where in a decree for arrears of rent, execution application was first made to attach and sell patni, and the sale being subsequently set aside, the second application for execution was to convert decree into money decree; and the third application was to attach personal property of judgment-debtor, and another application was made also against personal property of the purchaser of patni, and the last application was to attach patni, made 26 years after the passing of the decree, it was held that the application was barred not being a continuation of the first application for execution made within 12 years of the decree.¹²

(7) Where a prior application for execution had been dismissed *before* the issue of the injunction after the dissolution of which a fresh application was made, it was held that the period of limitation could not be computed from the date of removal of the injunction.¹³

(8) Where, after the removal of the bar or obstacle, the decree-holder neglected to proceed with the execution and the case was struck off, a subsequent application for execution cannot be looked upon as a continuation of the previous application.¹⁴

(9) If, as a result of execution a decree has been satisfied, but the decree-holder is compelled to refund or restore the property as a result of proceedings taken subsequently by the judgment-debtor or by a third party, the satisfied decree revives on the refund or the restoration of the property and an application to execute the revived decree would be competent within three years from the time when the right to

10. *Lal Gobind v. Bhikar Sahu*, (1913) 20 I.C. 439 (Cal.); Relied upon *Raghunath Sahai v. Lalji Singh*, 23 Cal. 397; *Suppa Peddiar v. Arudai Ammal*, 28 Mad. 50 (F.B.).

11. (1917) 2 P.L.J. 115=39 I.C. 89 (Pat.); also see *Rami Reddi Venkata Appa Rao v. Lekkoju*, (1906) 30 Mad. 209; Followed *Issurre Dassee v. Abdool Khalak*, 4 Cal. 415 and *Kalyanbhai v. Ghansham*, 5 Bom. 29.

12. *Maharaj Bahadur Singh v. Forbes*, 1929 P.C. 209=57 M.L.J. 184=118 I.C. 268=10 P.L.T. 807 (P.C.).

13. *Sarup Ganjan v. Robert Watson*, 6 C.W.N. 735.

14. *Dukhiram v. Jogendra*, 5 C.W.N. 347.

apply accrued to the decree-holder.¹⁵ Execution cannot be taken out for a satisfied decree unless the proceedings which resulted in the record of satisfaction are set aside, and the decree-holder cannot get over Art. 166, Limitation Act by merely putting in an application for execution.¹⁶

(10) When a Court suspends proceedings in any pending execution for some reason, then the application has not been judicially disposed of. When therefore the executing Court receives an **injunction order from the other Court** and the former postpones the execution proceedings indefinitely till the dispute between the parties is decided, then the execution proceedings would continue and it is open to the decree-holder to apply for the continuation of the execution-proceedings within a period of three years from the date on which the injunction order **becomes ineffective**, i.e., the date on which the suit issuing the injunction is dismissed and not the date of the decision of appeal when no stay is applied for.¹⁷

(11) An application for the attachment of immoveable property cannot be held to be in continuation of an application for the attachment of decrees. So the time for an application with the former relief is not extended by a prior application for the attachment of decrees.¹⁸

(12) Where in execution of a final decree in a mortgage suit an order to proclaim and sell was passed, but before the final hearing an **appeal was filed**, and an **order staying execution** was passed, the execution application being kept pending in the Court with the order "await final order", an application filed after the disposal of the appeal would not be a fresh one, but one merely to continue the previous execution proceedings.¹⁹

(13) In a **mortgage suit**, pending an application for a final decree, the defendant became insane and the matter was **adjournment sine adjourned sine die**. It was held that the adjournment did not amount to a discontinuance of the suit, and the subsequent application, after the heir of the deceased defendant was substituted in a suit for setting aside

15. *Akbar Ali v. Mehr Ali*, 158 I.C. 5=1935 Lah. 166; *Mangamma v. Narayanappa*, 145 I.C. 930=1933 Mad. 785; also see and cf. *Virasami v. Athi*, 7 Mad. 595; *Balodev v. Sonti*, 84 I.C. 983=40 C.L.J. 246; *Krishnaji Raghunath v. Annandray*, 7 Bom. 293; *Sunderlal v. Banarsidas*, 45 I.C. 531; *Keshaw-Sarindra v. Debendra*, 48 I.C. 245=4 P.L.J. 213 (Where an execution sale is set aside on account of the fraud of a judgment-debtor in collusion with auction-purchaser the decree-holder has 3 years under Art. 181 to execute the decree).

16. *Kumarasamia Pillai v. Muthuswami*, 52 M.L.J. 148.

17. *Mt. Nabhan Begam v. Mt. Moti Begam*, 148 I.C. 525=1934 A.L.J. 363=1934 All. 294.

18. *Tulshi Pershad v. Gulzarilal*, 14 L.R. 71 (Rev.)=17 R.D. 59; also see *Lahimiya v. Mazur*, (1926) 95 I.C. 718=1926 Mad. 698=1926 M.W.N. 317; *Goberdhandas v. Dan Dayal*, 54 All. 573=138 I.C. 583 (2)=1932 All. 273 (F.B.).

19. *Bayya Naik v. Desetti Krupa*, 142 I.C. 534=1933 Mad. 325.

the preliminary mortgage-decree, was treated as a continuation of the earlier one.²⁰

(14) Where an *ex parte* decree was passed in December, 1922; and in January, 1923, the judgment-debtor applied for setting aside the decree, and when the decree-holder applied for execution in April, an order was passed staying execution until further orders; however, later it was "struck-off", on the ground that it was useless to keep it pending and after termination of some appeal proceedings taken by the judgment-debtor, the decree-holder filed an application for execution, it was held that the decree-holders were entitled to wait till the proceedings relating to the re-hearing were finally disposed of on appeal and the execution application filed in 1929, within 3 years of the order dismissing judgment-debtor's appeal, was held within time.²¹

(15) Where the *sale* of attached property is suspended pending the decision of a suit brought by an unsuccessful objector under O. 21, R. 63 (S. 283, Civil Procedure Code, 1882), an application to revive the suspended proceedings (after the dismissal of the objector's suit) should be regarded as an application in a *pending* proceeding, the right to which would accrue from day to day. An application under Art. 181, would be within time if brought within 3 years of the dismissal of the objector's suit.²²

(16) Where properties are attached in pursuance of an execution petition, if any obstacle is placed in the way of the properties being sold and assets realised for the purpose of meeting the decree-debt, by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceeding or bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is in the nature of a revival of the original execution-petition.²³

(17) Proceedings in execution of a transferred decree, though stayed by injunction must be presumed to be pending unless they are shown to have been terminated by an *ex parte* order or by an order for re-transfer of the decree.²⁴

2484. We have noticed in the preceding note on revival or continuance of a pending application, that where a pending execution is suspended by an order of Court, or the issue of an injunction, and not by any act or default of the decree-holder, a

20. *Menaka Bala Dasi v. Hiralal Gobindalal*, 37 C.W.N. 583=1933 Cal. 816.

21. *Radha Ballav Khan v. Peary Lal Ghosh*, 58 Cal. 1113=134 I.C. 939=35 C.W.N. 540.

22. *Phiraza Mal v. Adu Ram*, 179 P.R. 1882; also see *Ambica Pershad v. Sardharilal*, 10 Cal. 851; *Chowdhry Paroosh Ram v. Kali Puddo*, 17 Cal. 53.

23. *Surayya v. Venkataratnam*, 45 Mad. 176=45 M.L.J. 822.

24. *Chandra Nath Nag v. Bhudar Chandra*, 2 C.W.N. 271.

second application does not *initiate* a new execution, but is one merely praying the Court to revive the suspended proceedings, and to continue the same.²⁵ The doctrine of revival has force only when the right to execute had been subsequently suspended by an **injunction or other obstacle not within the control of, or caused by the decree-holder.**²⁶ A long chain of rulings has uniformly maintained that a decree-holder's proceedings could only be held to be legally continued when the interruption to the execution of the decree was not occasioned by any fault or laches of his own, but either by the successful objection of a judgment-debtor or a third party which interrupted the execution proceedings, or by some obstacle interposed by the Court.²⁷ Where execution of a decree is stayed at the instance of a stranger and a pending execution proceeding is consequently struck off, the right of the decree-holder to continue the proceeding struck off is revived from the date on which the stay order is cancelled or becomes inoperative.²⁸

Where execution proceedings are stayed till the decision of another case, no sooner the latter case is decided it is the duty of the decree-holder to take out execution proceedings notwithstanding the fact that the judgment-debtor may have in the interval filed an appeal, and if the decree-holder fails to do so within three years, execution of the decree would be barred.²⁹ Where a decree-holder is prevented from proceeding with an application for execution of his decree owing to objections filed by the judgment-debtor and an assignee of the decree, limitation for a fresh application for

25. *Qamaruddin v. Jawahirlal*, 32 I.A. 102=27 All. 334=15 M.L.J. 258 (P.C.); also see *Nand Ram v. Sitaram*, 8 All. 545; *Mujibullah v. Umed Bibi*, 30 All. 499; *Ram Sarup v. Dasrath*, 33 All. 517 (F.B.); *Amjad Ali v. Muhd. Usman*, 71 I.C. 963 (All.); *Gangaji v. Satnarain*, 87 I.C. 205 (All.); *Madho Prasad v. Draupadi*, 19 A.L.J. 174; and *Chhatrapal v. Joy Mongala*, 16 I.C. 541 (Cal.); *Madhusudan v. Girindra Narain*, 87 I.C. 561 (Cal.); *Nandar Subbayya v. Venkataramayya*, 43 I.C. 155 (Mad.); *Kanis Zohra v. Syam Kishen*, 39 I.C. 89 (Pat.); *Sakina Bibi v. Ganesh Prasad*, 44 I.C. 560 (Pat.); *Deonarain v. Rampershad*, 90 I.C. 799 (Pat.).

26. *Thakur Prasad v. Abdul Hasan*, (1900) 23 All. 13 (16).

27. *Ibid.*, (1900) 23 All. 13 (16, 17); Relied on *Parasram v. Gardner*, (1877) 1 All. 355 (F.B.); *Raghunath v. Lalji*, (1895) 23 Cal. 397; also see and cf. *Ahmad Khan v. Gaura*, 40 All. 235 (237); *Langtu v. Baij Nath*, 28 All. 389; *Kartik v. Nilmani*, 32 I.C. 931 (933)=20 C.W.N. 686 and *Fateh Bahadur v. Parmeshwar*, 6 Pat. 694=1928 Pat. 145=108 I.C. 430.

28. *Mahammad Hadi v. Debi Prasad*, (1923) 77 I.C. 871=1923 All. 600; Relied on 27 All. 334 (P.C.).

29. *Sat Narain v. Gangajal*, (1926) 94 I.C. 1005=1926 All. 409; Relied on *Desraj Singh v. Karam Khan*, 19 All. 71=A.W.N. (1896) 188 and *Ruddar Singh v. Dhanpal Singh*, 26 All. 156=A.W.N. (1903) 221; cf. *Sheo Parshad v. Indar*, 30 All. 179 (Where objector's suit was dismissed by Court of first instance, but decreed on appeal, and was finally dismissed by High Court in second appeal. It was held that the final decision of the High Court had the effect of reviving the previous application).

execution begins to run from the date on which the objections are dismissed. The mere fact that the assignee files an appeal against the order of dismissal does not operate as a bar to the decree-holder taking out fresh execution and does not, therefore, furnish him with a fresh period of limitation.³⁰ The decree-holder cannot take advantage of the appeal by the auction-purchaser, and count the period from the date of the appellate order, inasmuch as the appeal by a third party cannot prevent the decree-holder from making a fresh application for execution of his decree.³¹ The principle underlying the Privy Council decisions in *Ranee Surnomoyee v. Shooshee Mokhee*,³² and in *Rameshwar Singh v. Homeshwar Singh*,³³ does not apply to such cases. The **Madras High Court** has held in *Chalavadi v. Poloori*,³⁴ that where a bar to execution proceedings is removed by the order of a lower Court, the fact that an appeal is preferred against such order will not, when execution is not stayed in consequence of such appeal, prevent limitation from running against the execution creditor until the disposal of the appeal. According to **Patna High Court**, the only period which the decree-holder is entitled to exclude on account of an injunction restraining execution, is the period on which the injunction was dissolved.³⁵ The mere fact that an appeal is preferred against the order passed in such proceeding does not, in the absence of a fresh injunction issued by the appellate Court, operate to restrain the decree-holder from applying for execution. When the operation of the injunction comes to an end, it is the decree-holder's duty to put the law again in motion by making an application for execution, and under Art. 181, the decree-holder has only three years, from the date when the right to apply accrues, *i.e.*, from the date on which the injunction ceased to operate.³⁶ Obstruction to execution may be caused by an order of Court holding that the transfer of decree is for the benefit of the judgment-debtor, and rejecting an application for execution made by a transferee of the decree. This obstacle may be removed by the petitioner bringing a suit to establish the claim based on the assignment being for the benefit of the transferee.³⁷ Where an application

30. *Ibrahim Hussain Khan v. Sheopratap Narain*, (1925) 89 I.C. 886 (Pat.).

31. *Akshoy Kumar Roy v. Abdul Kadir Khan*, 1930 Cal. 329=34 C. W.N. 102=57 Cal. 860=126 I.C. 268.

32. (1867-69) 12 M.I.A. 244=11 W.R. 5 (P.C.).

33. 1921 P.C. 31=48 I.A. 17 (P.C.).

34. (1907) 31 Mad. 71.

35. *Lal Pasi v. Ramsaranlal*, (1924) 78 I.C. 478=1925 Pat. 298.

36. *Bibi Haji v. Harsahaylal*, (1925) 89 I.C. 992=1926 Pat. 62.

37. *Suppa Reddiar v. Avudai Ammal*, (1904) 28 Mad. 50=14 M.L.J. 401 (F.B.).

for execution of a decree for sale on a mortgage, was suspended pending the decision of the suit filed by the minor son of the judgment-debtor, and the suit being decreed in the trial Court was dismissed on appeal, the period counted against the decree-holder from that date to the date when on further appeal the High Court set aside the decree of the lower appellate Court, and remanded the record for trial on the merits. And, period again ran against him from the date when the son's suit was dismissed, to the date of decree-holder presenting an application praying the Court to take up and proceed with the application.³⁸ Where a decree-holder himself purchased the property of the judgment-debtor in execution of the decree, but he lost possession of the same as the result of a suit brought by a third party, his next application for satisfaction of the decree might be treated as a revival of the prior execution proceeding.³⁹ Where a final decree for sale was made on 7th June, 1913; and an application for execution made within 3 years of this date, was sent to collector for execution, but the decree-holder was enjoined from proceeding with the same pending a suit for declaration that the property was not liable to sale in execution of the decree-holder's decree, and this suit was dismissed in the trial Court, but was decreed in appeal; and on second appeal, the decree of the Court of first instance was restored, it was held that the obstacle to the execution was removed on the date of the dismissal of the suit by the High Court in July, 1920, and, therefore, an application for revival of the execution proceedings filed within three years of this date was within time.⁴⁰ An application for revival of former proceedings in execution must be made within three years from the date on which those proceedings were suspended.⁴¹ A common instance of suspension of execution proceedings is where the judgment-debtor has applied for setting aside the decree *ex parte*. The decree-holder's right to execute his decree and continue the proceedings arises when the application for rehearing is rejected.⁴² Where an *ex parte* decree has been set aside subsequent to the confirmation of sale in execution of that decree, the proper article governing the application for restitution of property sold under the decree is Art. 181, Limitation Act, and the time

38. *Beni Prasad v. Sarju Prasad*, (1903) 26 All. 140.

39. *Salig Ram v. Lachhman*, 50 All. 211=107 I.C. 42=1928 All. 46 (49).

40. *Chhattar Singh v. Kamal Singh*, 1927 All. 16=49 All. 276=25 A. L.J. 201=100 I.C. 692 (F.B.).

41. *Basanti v. Sirdarmal*, 100 I.C. 790 (All.).

42. *Balwant v. Budh*, 42 All. 564; *Satnarain v. Ganga Jal*, 94 I.C. 1005 (All.); *Ruddar Singh v. Dhanpal*, 26 All. 156; *Chundra v. Gopi*, 14 Cal. 385; *Baikunta v. Aghore*, 21 Cal. 387 (391); *Tilak Dhari v. Bikram*, 20 I.C. 244 (Cal.); also see *Chintaman v. Balshastri*, 16 Bom. 294 and *Mt. Eshar v. Ghasita*, 168 P.R. 1883.

begins to run from the date of the order setting aside the *ex parte* decree, and the subsequent dismissal of suit would not operate to give a fresh start.⁴³

2485. Where the interruption has been created by the decree-holder himself, the second application cannot be regarded as a revival or continuation of the former application.⁴⁴

(v) What is not an obstacle to execution.

A dismissal of an application for non-payment of *batta*, is on account of default of the decree-holder, and it cannot be treated as pending during the interval when the decree-holder's right to attach the property is contested in a suit by a third party.⁴⁵ Unless there is a suspension of the execution proceedings without any default on the part of the decree-holder, the principle of the revival of a former execution petition cannot be utilised in favour of the decree-holder.⁴⁶ The mere pendency of a suit by an unsuccessful claimant to the property which has been attached in execution of a decree, will not, in the absence of an injunction restraining further execution proceedings, operate to extend the period of limitation for execution of the decree.⁴⁷ The pendency of an intervenor suit relating only to specific property of the judgment-debtor is no bar to an application for execution against other property, or against the person of the judgment-debtor.⁴⁸ An appeal by the judgment-debtor against an order in execution, is not an obstacle to the further execution of the decree.⁴⁹ Where execution of decree had been arrested at the instance of a claimant who was subsequently unsuccessful, it was ruled that when the decree-holder applied to execute the decree after the claim had proved unfounded, he was entitled to treat his application as one made in continuation of the previous application for execution which had been suspended by reason of the objection of the claimant.⁵⁰ On the other hand, if the claim is subsequently successful, the decree-holder is not entitled to contend that the second application for execution was one in continuation of the previous application for execution, because it was open to him, during the pendency of the suit of the

43. *Gujar Mal v. Narain Singh*, 1931 Lah. 504.

44. *Rajani Bandhu v. Kali Prasanna*, 74 I.C. 279 (Cal.).

45. *Yellampalle v. Matam Nanjappa*, (1916) 35 I.C. 594 (Mad.).

46. *Lahimiya v. Mazur Hannissa*, (1926) 95 I.C. 718=1926 Mad. 698= (1926) M.W.N. 317.

47. *Ibid.*, 95 I.C. 718=1926 Mad. 698; also see and cf. *Kedarnath v. Prodyot*, (1911) 11 I.C. 48 (Cal.).

48. *Mihr Jang Khan v. Faizullah Khan*, 154 P.R. 1890.

49. *Wazidunnessa v. Jogendra*, 5 C.W.N. 232.

50. *Rudranarain Guria v. Pachu Maity*, 23 Cal. 437 and *Gurudeo Narain Sinha v. Amrit Narain Sinha*, 33 Cal. 689; also see *Lakhmichand v. Ballam Das*, 17 All. 425; *Ruddar Singh v. Dhanpal Singh*, 26 All. 156 and *Abdul Khayar v. Reajuddin Ahmed*, 1 I.C. 341=13 C.W.N. 521.

claimant, to take proceedings in the same manner as he had adopted after the termination of the suit.¹ The distinction between the two classes of cases is pointedly brought out in *Shioram v. Saraswati Bai*,² where it was observed that no authority had been shown that where the decree-holder had not succeeded but failed to remove the bar, the subsequent application could be rightly treated as a revival or continuation of the first. A creditor whose debt has not been included in the scheduled debts of an insolvent debtor, is entitled to proceed with the execution of his decree against the insolvent's property notwithstanding his discharge.³ Where under terms of a decree the right of the decree-holder to recover possession of some property in the hands of the defendants is contingent upon the decree-holder paying certain sum of money to the defendants, but no date is specified, the decree-holder is entitled to pay the money forthwith, and he is not entitled to prolong the date of the payment by his inaction or laches.⁴ Where the reliefs claimed in two successive applications for execution are different, the subsequent application cannot be regarded as a revival of the other application.⁵ An execution application asking for a new relief cannot be treated as an application for the revival or continuation of the previous execution proceedings. When the character of the application is different from that of the previous application, it cannot be treated as a continuation.⁶ An application for the attachment of immoveable property cannot be held to be in continuation of an application for attachment of decrees. So the time for an application with the former relief is not extended by a prior application for the attachment of decrees.⁷

2486-2489. OTHER APPLICATIONS.—

2487. (1) Article 181, Limitation Act, has been applied to an application by a person to be added as a plaintiff for continuing a representative suit, on the death of a plaintiff who filed the suit on behalf of himself and others. Such a suit does not abate on the death of a plaintiff, and any person having the common interest can make such an application.⁸ Where pending an

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1. *Raghuveer Pershad v. Bhuggolal*, 17 Cal. 268.
 2. 20 Bom. 175; Followed in *Kedarnath v. Prodyot Kumar*, (1911) 11 I.C. 48 (49) (Cal.).
 3. *Ashrafuddin Ahmed v. Bepin Behari Mullick*, (1902) 30 Cal. 407.
 4. *Siri Narain Tewari v. Narain Rai*, 1931 All. 326=131 I.C. 559=1931 A.L.J. 319.
 5. *Lahimiya v. Mazur Hannissa*, (1926) 95 I.C. 718=1926 Mad. 698=1926 M.W.N. 317.
 6. *Gobardhandas v. Dan Dayal*, 54 All. 573=138 I.C. 583 (2)=1932 A.L.J. 365=1932 All. 273 (F.B.).
 7. *Tulsi Pershad v. Gulzarilal*, 14 L.R. 71 (Rev.)=17 R.D. 59.
 8. *Mahomed Kanni v. Naina Mahomed*, 54 Mad. 770=132 I.C. 289=

appeal to the Privy Council, some of the parties died, and their legal representatives were not brought on the record before the decree, an application to add the representatives as parties to the decree falls under this article, and the right to apply accrued from the date of the decree.⁹ The law does not require any application being made to bring on record the legal representatives of a judgment-debtor, and an execution application against them is not barred merely because no application to substitute the legal representatives is made within three years of the death of the judgment-debtor.¹⁰

2488. (2) It has been observed that there is a special provision in Art. 149, Limitation Act, in the case of Application by suits by or on behalf of the Secretary of Crown. State; and, Art. 157, Limitation Act, deals with certain *appeals* on behalf of the Government; but Government does not appear entitled to any special exemption from the provisions of the Limitation Act relating to *applications*. In *Appayya v. Collector of Vizagapatam*,¹¹ an application by the Government under S. 411 of the Code of Civil Procedure, 1882 (O. 33, R. 10) to recover the amount of Court-fees from a party ordered by the decree to pay the same was held governed by the provisions of this article. It was held by the **Privy Council** in *The Government of Bengal v. Shuruffutoonnissa*,¹² that a suit for recovery of costs incurred by the Government in the character of *agents* was not in respect of a public right. But, the **Calcutta High Court** observed in *Shamee Mahomed v. Mahomed Ali Khan*,¹³ that the right of the Government to value of stamp duty which had been remitted in respect of a pauper suit was a *public* right and the Crown not having been named in S. 20 of the Limitation Act, XIV of 1859 (now Art. 182, Limitation Act), was *not barred* by the three years' rule of limitation prescribed therein. The **Bombay High Court** has taken the view in *Venubai v. Collector*,¹⁴ that the Crown has no special privilege provided for in the matter of applications by the Limitation Act which takes care to provide for all *suits*, and certain *appeals* by or on behalf of Government. But it has been doubted whether Crown *prerogatives* can be taken away except by the

60 M.L.J. 659=1931 Mad. 590 (591); Followed *Krishnaswami v. Seethalakshmi*, 9 L.W. 166=1918 M.W.N. 888=49 I.C. 268; see note under Art. 171.

9. *Kalyani v. Tiruvengadaswami*, 47 Mad. 618=47 M.L.J. 154=1924 Mad. 695=80 I.C. 85.

10. *Maula Baksh v. Mahomed Ikram*, 1934 Lah. 55.

11. 4 Mad. 155.

12. 3 W.R. 31 (P.C.).

13. 11 W.R. 67.

14. 7 Bom. 552 N.

express consent of Crown embodied in a statute.¹⁵ In an early Calcutta case, under Act IX of 1871, however, it was held that Government is bound to make an application for execution within the same time as another person.¹⁶ Under O. 33, R. 14, Civil Procedure Code, the Government is now enabled to apply for correction of an error or omission by the Court regarding payment of Court-fees, or to appeal against the order refusing to rectify the error or omission, and this application may be made *at any time*, and is not governed by the ordinary three years' rule.¹⁷

2489. (3) An application for a final decree under O. 34, R. 5, Civil Procedure Code, is an application in the suit and not an application in execution: the limitation applicable is that prescribed by Art. 181 of the Limitation Act, and time begins to run, if there has been an appeal in the suit, from the date of the decree of the final Court of appeal.¹⁸ Section 6 of the Limitation Act will not help the plaintiff, because that section only applies to the time for the institution of suits or the time for an application for the execution of the decrees.¹⁹ Section 6 does not apply to an application to make a decree absolute.²⁰ Under O. 34, R. 5 such applications are not execution applications, and the order absolute is now the decree absolute or the final decree, and time runs from its date, however, informally it may have been drawn up.²¹

2490. **SECTION 48, CIVIL PROCEDURE CODE.—**Section 48, Civil Procedure Code, provides for bar of execution in certain cases. This section corresponds with the third and fourth paragraphs of S. 230 of the Code of 1882. This section deals with the maximum limit of time for execution; it does not prescribe the period within which each application for execution is to be made.²² It applies only to Courts other than chartered High Courts, as explained in sub-S. (2) (b). The period of limitation within which a decree may be executed, under S. 48, Civil Procedure Code, is

15. *Ganpat Putaya v. Collector of Kanara*, 1 Bom. 7; also see and cf. *Gangaram v. Secretary of State*, (1925) 86 I.C. 757 (Crown whether excluded from operation of statute).

16. *The Collector of Beerbhoom v. Sreehurry Chuckerbutty*, (1874) 22 W.R. 512.

17. *Ibid.*

18. *Nizamud Din Shah v. Bohra Bhim Sen*, (1918) 40 All. 203; Relied upon *Gajadhar Singh v. Kishan Jivantal*, (1917) 39 All. 641.

19. *Ibid.*

20. *Vinayakrao Krishnarao v. Baijnath Saligram*, (1918) 48 I.C. 934 (Nag.).

21. *Hayatunnessa v. Achaia Khatan*, (1923) 50 Cal. 743=74 I.C. 1017=1924 Cal. 131.

22. *Surajman v. Anjore*, (1924) 46 All. 73=79 I.C. 605=1924 All. 263.

twelve years from (a) the date of the decree, sought to be executed, or (b) the date of default in respect of the payment of money or the delivery of property, when such payment or delivery has been ordered to be made at a certain date or at recurring periods, either by the decree or by any subsequent order. In the case of a decree of a Court of first instance the period runs from the date of the decree. If there is a preliminary decree and a final decree the two must be read together and the date is the date of the *final* decree.²³ If the decree to be executed is an appellate decree, the period runs from the appellate decree whether it affirms, sets aside, or modifies the original decree.²⁴ This rule does not apply where no appeal lies,²⁵ or if the original appeal is dismissed for default.²⁶ Where a decree is passed in favour of the plaintiff against the defendant, and part of the decree is appealed from, and the rest is not, the period of twelve years prescribed by this section runs from the date of the *appellate decree* both as regards the application to execute the portion appealed from and the portion not appealed from. The reason is that there is only one decree that can be executed, and that is the decree of the appellate Court.²⁷ Where a decree is passed not jointly, but severally against two or more defendants, and one of the defendants appeals from the decree, the period of 12 years as against the other defendants is to be computed from the date of the *original* decree,²⁸ while as against the appellant-defendant it is to be computed from the date of the appellate decree. Similarly, if a decree is passed against the principal defendants and not against the surety and an appeal is directed against the surety, time would run against the principal defendants from the date of the decree of the trial Court and not of the Court of appeal.²⁹ Where a second appeal is preferred to the High Court declaring the appeal before it to have abated, the period of 12 years under this section runs from the date of that order, and not from the date on which the decree was passed in first appeal.³⁰

23. *Shiba Durga v. Gopi*, (1915) 23 C.L.J. 573=33 I.C. 180.

24. *Mahomed Mehdi v. Mohini Kanta*, (1907) 34 Cal. 874; also see *Krishnamachariar v. Mangamma*, 26 Mad. 91 (F.B.).

25. *Sahu Nandlal v. Sahu Dharam*, (1926) 48 All. 377=94 I.C. 961=1926 All. 440; cf. *Rup Narain v. Sheo Prakash*, (1921) 43 All. 405=61 I.C. 129.

26. *Ibid.*

27. *Krishnamachariar v. Mangammal*, (1903) 26 Mad. 91 (F.B.).

28. *Kalyanchand v. Bhogilal*, (1923) 25 Bom.L.R. 371=73 I.C. 310=1923 Bom. 400; *Amir Ali v. Harish Chandra*, (1926) 30 C.W.N. 306=95 I.C. 257=1926 Cal. 664; also see *Mashiatunnissa v. Rani*, (1891) 13 All. 1 (F.B.).

29. *Kalyanchand v. Bhogilal*, 25 Bom.L.R. 371=1923 Bom. 400.

30. *Muhd. Razi v. Karbalai*, (1910) 32 All. 136=5 I.C. 473.

The date of the decree is not always the starting point for limitation when the decree or any subsequent order directs the payment of money or delivery of property at a certain date,³¹ or at recurring periods, the twelve years run from the date of default. If the decree is for annual or monthly payments or for payment by instalments, the time runs from the date of default as to each instalment.³² Each instalment as it becomes due is a claim originating under the decree from the date when such claim arises.³³ But if the decree provides that the whole decree shall become payable at once, the decree would cease to be an instalment decree, and the application must be filed for execution of the *whole* decree from the date of default.³⁴ In the case of a combined mortgage-decree, the period for enforcing the personal remedy runs from the date of the decree and not from the date of the sale of the mortgaged property.³⁵ Where a decree directs mesne profits to be ascertained in execution, the period of 12 years under this section runs from the date of the decree and not from the time they are ascertained.³⁶ Where decree directs payment from one party on failure to recover from another, the period of 12 years under this section runs from the date of the decree and not from the time when the former party fails to pay the decretal amount.³⁷ The operation of the twelve years' rule applies to an application freshly presented and not to an *order* on the fresh application which may be made after the expiration of twelve years. The section does not preclude the Court from making an *order* for execution after the expiration of 12 years, if the application was presented within that period.³⁸ The operation of this section is now extended to all decrees except decrees granting an injunction, *e.g.*,

31. *Yusuf Khan v. Sirdar Khan*, 7 Mad. 83 and *Sabanatha v. Lakshmi*, 7 Mad. 80 (Decree directing payments to be made monthly or annually).

32. *Banarsi Das v. Ramzan*, (1923) 73 I.C. 671=1923 Lah. 381; also see *Gulabrao v. Magan*, (1925) 87 I.C. 769=1925 Bom. 326=27 Bom.L.R. 461 and *Narsingrao v. Bando*, (1918) 42 Bom. 309=46 I.C. 107 and *Surajman v. Anjore*, 46 All. 73.

33. *Maung Sin v. Ma Tok*, 5 Rang. 422=54 I.A. 272 (P.C.).

34. *Bama Sundari v. Kiran Chandra*, 49 I.C. 497 (Cal.).

35. *Khulna Loan Company v. Inanendranath*, (1917) 22 C.W.N. 145=45 I.C. 437 (P.C.); *Baranashi v. Bhobhadeb*, (1921) 34 C.L.J. 167=66 I.C. 758; *Haripada v. Sashi*, (1928) 48 C.L.J. 102; *Sreaminatha Odayar v. Thiagarajaswami*, (1927) 50 Mad. 5=92 I.C. 846=1926 Mad. 954; *Narhar v. Krishnaji*, (1912) 36 Bom. 368; *Aiyasamier v. Venkatachela*, (1917) 40 Mad. 989 (Are no longer law); see Mulla's Civil Procedure Code.

36. *Dakshina Murthi v. Vedamurthy*, (1927) 53 M.L.J. 440=108 I.C. 311=1927 Mad. 842.

37. *Nawab Shiya ul Mulk v. Umir ul Umra*, (1925) 48 Mad. 846=91 I.C. 597=1926 Mad. 20.

38. *Virarama v. Annasami*, (1883) 6 Mad. 359; also see *Sakina Bibi v. Ganesh*, (1918) 3 P.L.J. 103=44 I.C. 560.

it applies to money-decrees as well as mortgage-decrees, as to which there was some conflict of view, under the terms of S. 230 of the Code of 1882.³⁹ The Court has power to grant execution after the expiration of 12 years from the date of the decree on the ground of fraud or force on the part of the judgment-debtor.⁴⁰ But the use of this power would be restricted to cases where the Court is satisfied that the decree-holder on his part has been diligent in proceeding with the execution since the date of the decree.⁴¹ And it is doubtful whether the fraud of one of several judgment-debtors keeps the decree alive against all of them.⁴² According to the High Courts of Madras,⁴³ and Bombay,⁴⁴ S. 6 of the Limitation Act applies only to cases dealt with by the Act itself, but while the Madras Court holds that an application by the minor under S. 48 is not exempt from the operation of the law of limitation, the **Bombay High Court** holds that a minor is entitled to an extension of the period under the general principle of law that time does not run against a minor. However, where the decree has been obtained in the first instance by an adult, the fact that the decree on his death passes to an heir who is a minor does not extend the period of 12 years prescribed by S. 48, Civil Procedure Code.⁴⁵ The Lahore High Court takes the view that S. 6 of the Limitation Act is not applicable to applications under S. 48, Civil Procedure Code which was enacted for the benefit of the judgment-debtor in order that he should not be harassed for ever by execution proceedings.⁴⁶ The **Allahabad High Court**,⁴⁷ follows the Madras, and Punjab view, (dissenting from the Bombay decision), in holding that S. 6 of the Limitation Act, only refers to periods of limitation prescribed by the Act itself, and has no application to a case where a decree is barred by the provisions of S. 48, Civil Procedure Code. In computing the 12 years' period under this section, the period during which the Collector is

39. *Balaram v. Maruti*, (1914) 39 Bom. 256=28 I.C. 478.

40. *Venkayya v. Raghavacharlu*, 22 Mad. 320=9 M.L.J. 28; *Ramanathan v. Mohideen*, 47 M.L.J. 428; *Adaikappa v. Natesa*, 32 L.W. 615; also see *Jogendra v. Mohd. Husain*, 12 I.C. 793 and *Mohsin Ali v. Masum Ali*, 34 All. 20.

41. *Rai Sham Kishen v. Damar Kumari Debi*, (1906) 11 C.W.N. 440; cf. *Ashootosh v. Doorga*, 6 Cal. 504.

42. *Abdul Khadir v. Ahammad*, (1911) 35 Mad. 670=12 I.C. 679.

43. *Ramana v. Babu*, (1914) 37 Mad. 186=18 I.C. 586=27 M.L.J. 96; *Manarsami v. Ramasami*, 30 L.W. 361.

44. *Moro v. Visaji*, (1892) 16 Bom. 536.

45. *Bhagwant v. Kaji Muhammad*, (1912) 36 Bom. 498=15 I.C. 829; also see *Balaram Vithal v. Maruthi*, 39 Bom. 256.

46. *Jhanda v. Mohanlal*, 128 P.R. 1894.

47. *Premnath Tiwari v. Chatarpal*, (1915) 37 All. 638=13 A.L.J. 166=27 I.C. 865 [On Letters Patent appeal from 27 I.C. 865 (All.)]; Followed 128 P.R. 1894 and 37 Mad. 186; Diss. 16 Bom. 536; also see *Jurawan Pasi v. Mahabir Dhar*, 40 All. 198; *Secretary of State v. Shib Narain*, 47 I.C. 502 (504) (Cal.).

acting under Sch. III, to the Civil Procedure Code is excluded.⁴⁸ The period of twelve years cannot be enlarged by the operation of S. 15 of the Limitation Act.⁴⁹ It is not open to a judgment-debtor and a decree-holder to extend the period of 12 years by any compromise agreement,⁵⁰ unless the same is to be enforced in *execution* resulting in, as it were, a *new* decree.¹ The provisions of S. 19 of the Limitation Act as to acknowledgments cannot affect the absolute prohibition under this section,² and the period prescribed thereunder could not be enlarged by the operation of S. 20 of the Limitation Act.³

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
182.	For the execution of a decree or order of any civil court not provided for by Art. 183 or by Sec. 48 of the Code of Civil Procedure, 1908.	Three years, or, where a certified copy of the decree or order has been registered, six years.	(1) The date of the decree, or order, or (2) (w h e r e t h e r e has been an appeal) the date of the final decree or order of the appellate Court, or the withdrawal of the appeal, or (3) (Where there has been a review of judgment) the date of the decision passed on the review, or (4) (Where the decree has been amended), the date of amendment, or (5) (Where the application next hereinafter mentioned has been made), the date of applying

48. *Shiam Karan v. Collector of Benares*, (1920) 42 All. 118=52 I. C. 742.

49. *Jurawan Pasi v. Mahabir Dhar*, 40 All. 198; *Subbarayan v. Natarajan*, 45 Mad. 785=1922 Mad. 268; also see *Shyamkaran v. Collector of Benares*, 42 All. 118=17 A.L.J. 1140; *Somasundaram v. Chokkalingam*, 40 Mad. 780=38 I.C. 806 and *Krityanand v. Pirthichand*, 1929 Pat. 597=120 I.C. 315.

50. *Banarsidas v. Ramzan*, 1924 Lah. 342=72 I.C. 477; also see *Raghunath Prosad v. Kashi Prosad*, 15 C.L.J. 678=13 I.C. 88.

1. *Hirdhoy Mohan v. Khagendra Nath*, 1929 Cal. 687=34 C.W.N. 213=57 Cal. 789=127 I.C. 258; cf. *Palaniappa v. Savari Naidoo*, 18 M. L.J. 548.

2. *Bhikhari v. Gouri Shanker*, 11 O.C. 220.

3. *Mahanti Krishna Dayal v. Mt. Sakina Bibi*, 20 C.W.N. 952 and *Subbarayan v. Natarajan*, 45 Mad. 785=1922 Mad. 268.

in accordance with law to the proper court for execution, or to take some step-in-aid of execution of the decree or order, or

(6) (Where the notice next hereinafter mentioned has been issued), the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such a notice is required by the Code of Civil Procedure, 1908, or

(7) (Where the application is to enforce any payment which the decree or order directs to be made at a certain date), such date.

Explanation I,—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 5 of this article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all.

Explanation II,—"Proper court", means the court whose duty it is to execute the decree or order.

SYNOPSIS.

2491-2495. Title I: Previous History.

2492. Act XIV of 1859. (Ss. 20 to 23.)

2493. Act IX of 1871. (Arts. 166 to 168.)

2494. Act XV of 1877. (Art. 179.)

2495. Act IX of 1908.

2496-2519. Title II: Scope and application.

- 2497. Application for the execution of a decree.
- 2498. Applications for restitution. (S. 144, Civil Procedure Code.)
- 2499. No retro-activity of Art. 182.
- 2500. Character of Court passing decree.
- 2501. Liberal construction.
- 2502. Revenue Court decree.
- 2503. Special or local law.
- 2504. Summary decision.
- 2505. Section 48, Civil Procedure Code.
- 2506. Arts. 181 and 182 distinguished.
 - (i) Partial obstacles.
 - (ii) Application for different process.
- 2507. Amendment of execution applications.
 - Question of limitation.
- 2508. Application of other sections.
- 2509. Section 3: Limitation Act: Mandatory provision.
- 2510. Section 4: " " : Closing of Court.
- 2511. Section 5: " " : Sufficient cause.
- 2512. Section 6: " " : Legal disability.
- 2513. Section 9: " " : Running of time.
- 2514. Section 12 (1) " " : Exclusion of day from which limitation starts.
- 2515. Section 13: " " : Absence of judgment-debtor from British India.
- 2516. Section 14: " " : *Bona fide* proceeding without jurisdiction.
- 2517. Section 15: " " : Stay of execution.
- 2518. Sections 19 and 20: " " : Effect of payment and acknowledgment.
- 2519. Section 22: " " : Joinder of party after time.
- 2520. **Title III.**
- 2521. **Starting point of limitation.**
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NOTES.

2491-2495. TITLE I: PREVIOUS HISTORY.

2492. PREVIOUS HISTORY.—Under Act XIV of 1859, the corresponding provision was made in Act XIV of 1859. Ss. 20-23, which ran as follows:

“20. No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order or to keep the same in force within three years, next preceding the application, for such execution.”

“21. Nothing in the preceding section shall apply to any judgment, decree or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within three years next after the the passing of this Act, whatever shall first expire.”

“22. No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter or of any Revenue authority unless some proceeding shall have been taken to enforce such decision or award or to keep the same in force within one year next preceding the application for such execution.”

“23. Nothing in the preceding section shall apply to any summary decision or award in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within two years next after the passing of this Act, whichever shall first expire.”

The result of case-law under Ss. 20-23 of Act XIV of 1859 has been summarised by Dr. Pal in his work on Limitation in the following way:—

“The time for execution of a decree or order of any Civil Court other than that of a Court established by Royal Charter will run from—

(i) the date of the decree or order⁴;

(ii) or, where there has been appeal, the date of the final decree or order of the appellate Court⁵;

(a) where a decree was joint and several against the defendants and one of them appealed, the time for execution would count from the decision in appeal⁶;

(iii) or, where there has been a review of judgment, the date of the decision passed on the review⁷;

(iv) or, where an application, (a) to enforce⁸; or (b) to keep in force the decree or order had been made to the Court, the date of the application.

N.B.—Mere presentation of petition without any further active steps on the part of the decree-holder would not keep alive the decree.⁹ Applications for execution struck-off for default was also ineffective.¹⁰ Proceedings may be to enforce the decree. Steps directed merely to place the assignee of a decree in the position of a decree-holder were not such proceeding.¹¹

(v) or, where a notice under the Code of Civil Procedure, S. 216 has been issued, the date of issuing the notice.¹²

N.B.—The steps referred to in (iv) and (v) must be *bona fide* in order to be effective in this respect.¹³ The meaning of this *bona fide* is no more than this that proceedings must be taken not merely for the purpose of avoiding the consequence of that section, but really for the purpose of obtaining the fruits of the decree.¹⁴ In *Meer Lootfalli v. Aboo Bibee*,¹⁵

4. *Ram Sahaye Singh v. Degum Singh*, (1866) 6 W. R. Mis. 98 (F.B.).

5. *Biprodass Gossami v. Chunder Seekur*, (1867) 7 W.R. 521 (F.B.); *Girish Chunder v. Bhanoo Motee*, (1869) 11 W.R. 329; *Ramcharan v. Luckee Kant*, (1871) 16 W.R. 1 (F.B.); Affirmed in (1872) 17 W.R. 292 (P.C.); *Bistoo Prosad v. Ishanchunder*, (1874) 23 W.R. 57.

6. *Chedoo Lal v. Nund Coomar*, (1866) 6 W.R. Misc. 60.

7. *Syud Khan v. Jumal Beebee*, (1866) 5 W.R. Misc. 19; *Biprodass v. Chunder Seekur*, (1867) 7 W.R. 521 (F.B.); *Bistoo Pershad v. Ishan Chunder*, (1874) 23 W.R. 57.

8. *Ram Sahaye v. Degum Singh*, (1866) 6 W.R. Mis. 98 (F.B.); *Maharaj Dheraj Mahtab Chand v. Balaram Singh*, (1870) 14 W.R. 21 (P.C.).

9. *Shaikh Idoo v. Shaikh Besharroola*, (1865) 2 W.R. Mis. 10.

10. *Raja Sulto Surn v. Bhyrub Chunder*, (1868) 11 W.R. 80.

11. *Brojo Lall v. Ram Taran*, (1868) 10 W.R. 127.

12. *Ram Sahaye v. Degum Singh*, (1866) 6 W.R. Mis. 98 (F.B.); *Maharaj Dheraj Mahtab Chund v. Bribram Singh*, (1870) 14 W.R. 21 (P.C.).

13. See 6 W.R. Mis. 98 (F.B.) and 14 W.R. 21 (P.C.) and 10 W. R. 248.

14. *Ramdhon v. Gooroo Dossee*, (1870) 13 W.R. 40; also see *Rai Coomar v. Judoo Bungheshee*, (1870) 14 W.R. 112 and *Moonshee Syed Amir Ali v. Saheb Singh*, (1871) 15 W.R. 530 and *Joy Kishen Singh v. Bishopa Moyee*, (1872) 17 W.R. 355.

15. (1871) 15 W.R. 203.

Norman, J., observed that steps taken in execution of a decree must be assumed to have been *bona fide* in all cases in the absence of any evidence to the contrary;

(vi) or, where the decree directs payment to be made at a specified date, the date so specified. In order to give a fresh starting point steps mentioned above must be taken before the expiration of the period of limitation.¹⁶ As to party who is to take these steps, see *Kower Narain v. Sreenath Mitter*,¹⁷ where it was pointed out that the Act did not require that the proceeding should have been taken by the particular party who sought to execute the decree. It was sufficient if any one interested had taken any proceedings. A proceeding taken *bona fide* even in a wrong Court might be a proceeding within S. 20.¹⁸

2493. The results of these decisions were enacted in Act IX of 1871, which made the following provisions:—

“Art. 166. For the execution of a decision (other than a decree or order passed in a regular suit or an appeal), of a Civil Court or of a Revenue Court—One year—The date of the decision or of taking some proceeding to enforce the decision.”

“Art. 167. For the execution of a decree or order of any Civil Court not provided for by No. 169—Three years—The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the appellate Court or (where there has been a review of judgment) the date of the decision passed on the review or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force the decree or order, or (where the notice next hereinafter mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure S. 216 or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.”

“Art. 168. For the execution of any such decree or order of which a certified copy has been registered under the Indian Registration Act—Six years—The date of the decree or order or (where there has been an appeal) the date of the final decree or order of the appellate Court or (where there has been a review of judgment) the date of the decision passed on the review.”

So long as Act IX of 1871 was in force, Act XIV of 1859 governed all applications for the execution of a decree passed in any *suit* instituted before the 1st April, 1873. Act IX of 1871 was wholly repealed by Act XV of 1877.

2494. Act XV of 1877 made the corresponding provision in Act XV of 1877. its Art. 179 in the following terms:—

“Art. 179. For the execution of a decree or order of any civil Court not provided for by No. 180 or by the Code of Civil Procedure, S. 230—Three years, or where certified copy of the decree or order has been registered, six years—(1) The date of the decree or order, or (2) (Where there has been an appeal) the date of the final decree or order of the appellate Court,

16. *Bissashur Mullick v. Maharaj Mahtab Chand*, (1868) 10 W.R. 8 (F.B.); *Radhoo v. Heetlal*, (1869) 11 W.R. 209; *Bhooputty v. Soochee*, (1869) 12 W.R. 255; *Kala Chand v. Maharaj Mahtab Chund*, (1872) 18 W.R. 190.

17. (1868) 9 W.R. 485.

18. *Hira Lall v. Badri Das*, (1880) 6 C.L.R. 561 (P.C.).

or (3) (where there has been a review of judgment) the date of the decision passed on the review, or (4) (where the application next hereinafter mentioned has been made), the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order, or (5) (where the notice next hereinafter mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure, S. 248, or (6) (where the application is to enforce any payment which the decree or order directs to be made at a specified date), such date.

N.B.—The words “specified date” in this clause were replaced by “certain date” by Act XII of 1879.

Explanation I.—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause (4) of this number shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application if made by any one or more of them, or by his or their representatives shall take effect in favour of them all.

Where the decree or order has been passed severally, against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives shall take effect against them all.

Explanation II.—“Proper Court” means the Court whose duty it is (whether under S. 226 or 227 of the Code of Civil Procedure or otherwise) to execute the decree or order. Arts. 179 and 180 of Act XV of 1877, operated from the date on which they came into force as regards all *new* applications for executions made on or after 1st October, 1877.¹⁹

The words “in accordance with law” and the word “proper” before the word “Court”, in para. 4 of the third column, were new. **Legislative changes.** Explanation II was appended to Art. 179, in Act XV of 1877, simply to embody the result of decisions in the case of *Prokash Chunder v. Poorno Chunder*,²⁰ where the term Court in Act IX of 1871 was taken to mean the Court whose business it was either by transfer or otherwise, to execute the decree. Similarly, in *Gouri Shanker v. Arman Ali*,²¹ it was held that an application for execution not in accordance with law would not be such an application as would give a fresh starting point even under Act IX of 1871. The Explanation I was appended to this article as a result of the decision in *Sheikh Khoorshed Hossein v. Nubbee Fatima*.²² Where it was held that a decree for partition is not like a decree

19. *Becharam v. Abdul*, 11 Cal. 55; *Jugmohun v. Luchmessur*, 10 Cal. 748.

20. (1874) 21 W.R. 410.

21. (1874) 21 W.R. 309.

22. (1878) 3 Cal. 551; also see *Chedoolal v. Nand Coomar*, (1866) 6 W.R. Misc. 60.

for money or the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each share-holder or set of share-holders having a distinct share.

2495. Article 182 of Act IX of 1908, corresponds to Art. 179 of Act XV of 1877, with some alterations in language, to remove the conflict of views which arose on certain points under the old article. **Act IX of 1908.** Firstly, there was a conflict of view between the **Bombay High Court**, in *Abdul Rahiman v. Maidin Saiba*,²³ and in *Chandasama Mananbhai v. Mahani Ishwar Gar*,²⁴ and a **Full Bench of the Madras High Court** in *Peria Kovil v. Lakshmi Doss*,²⁵ on the question whether, when an appeal was withdrawn time would run from the date of the withdrawal of the appeal, or from the date of the original decree. The Bombay High Court favoured the view that time would run from the date of the original decree, which was the only decree which could be executed, while the Madras Full Bench took the contrary view. There it was held that where a second appeal is preferred and *an order is made by the Court to which the appeal is preferred* which has the effect of finally disposing of the appeal, time runs from the date of such order; and it makes no difference that such second appeal was withdrawn by the appellant. The alteration was made, by adding the words "**or the withdrawal of the appeal**", to give effect to the Madras Full Bench view. Secondly, there was a difference of opinion on the question whether when a decree has been amended, time for an application for execution would run from the date of the decree, or from the date of amendment. The **Calcutta High Court** took the view that an order granting an application for amendment of a decree (S. 266, Civil Procedure Code, 1882), is an order passed upon review of a judgment within the meaning of Art. 179, Cl. (3), Limitation Act, XV of 1877.²⁶ Similar view was held by the **Madras High Court** in *Venkata v. Venkatasimhadri*,²⁷ where the application was to amend the amount of costs entered in the decree. But, the **Allahabad High Court**, held in several cases, that such an amendment would not give a fresh starting point in favour of the decree-holder.²⁸ The conflict was set at rest by adding the **new clause (4)** to Art. 182 of Act IX of 1908; and

23. (1896) 22 Bom. 500 (506).

24. (1881) 16 Bom. 243.

25. (1906) 30 Mad. 1 (F.B.).

26. *Kali Prasunno Basu v. Lal Mohun*, (1897) 25 Cal. 258=2 C.W. N. 219 and *Amar Chand Kundu v. Asad Alikhan*, (1905) 32 Cal. 908.

27. (1900) 24 Mad. 25.

28. *Kallu Rai v. Fahiman*, (1890) 13 All. 124; *Muhd. Sulaiman v. Muhd. Yar*, 17 All. 39; *Dayakishan v. Nanhi Begam*, (1898) 20 All. 304 and *Ahsanullah v. Dakhini Din*, (1905) 27 All. 575.

time now runs from date of amendment. **Thirdly**, opinions differed as to the meaning of the words "*the date of issuing a notice*" in cl. (5) of Art. 179 of Act XV of 1877. The **Calcutta High Court** held that the "date of issuing" meant the date of actual issuing of the notice and not the date of the order directing that the notice be issued.²⁹ The **Madras High Court** took the same view,³⁰ dissenting from the **Bombay** decision in *Govind v. Dada*,³¹ where the date of issuing notice in the second part of the clause was taken to be the date of the order directing issue. A different view had been taken in *Hari Ganesh v. Yamunabai*,^{31-a} where the Court had ordered notice to issue but no notice had in fact issued because *batta* had not been paid. It was held that the time did not begin to run from the date of the order directing notice to issue in that particular case; because the notice had not in fact been issued. The Court however, proceeded to observe that it might be that where the notice had been issued the date of the issue would be the date on which the issue was ordered by the Court, as had been ruled in a case reported in the Allahabad weekly notes (*Udit Narain v. Ram Partab Singh*)³²; Clause (6) of Art. 182 adopted the Calcutta, and Madras view. Now, the amending Act IX of 1927 has gone further in making the date of the final order on the application, as the starting point. For Cl. (6) of Art. 182, as originally enacted, the Amending Act has substituted the following clause:

"6: (in respect of any amount, recovered by execution of the decree or order, which the decree-holder has been directed to refund by a decree passed in a suit for such refund) the date of such last-mentioned decree or, in the case of an appeal therefrom, the date of the final decree of the appellate Court or of the withdrawal of the appeal."

Clause (5) of Art. 182, column third, has also been amended, by substituting the words "the final order passed on an application made" for the word "applying".

Under Cl. (5), as now amended, the period of 3 years begins, not from the date of the last application for execution, etc., but from the date of the final order passed on the application.

2496-2519. TITLE II: SCOPE AND APPLICATION.

2497. APPLICATION FOR THE EXECUTION OF A DECREE.—The period of limitation provided by this article is restricted to *applications for execution* of a decree or order as contemplated under O. 21, R. 11, Civil Procedure Code.³³ This article ap-

29. *Kedareswar v. Mohini*, (1902) 6 C.W.N. 656; *Ratan v. Deb*, (1906) 10 C.W.N. 303.

30. *Cherurath v. Nerath*, (1906) 30 Mad. 30.

31. 28 Bom. 416; also see *Damodar v. Sonaji*, 27 Bom. 622 (Obiter).

31-a. (1897) 23 Bom. 35.

32. (1881) A.W.N. 147; also see *Bhola Dutt v. Tulshi Singh*, 1 A.W.N. 47.

33. *Paroosh Ramdas v. Kali Puddo*, 17 Cal. 53; *Venkata Ramanamma*

plies to an application under O. 21, R. 34, Civil Procedure Code³⁴; or an application under S. 50, Civil Procedure Code, against a deceased judgment-debtor's representative.³⁵ An application for execution, is a substantive application by which proceedings in execution are commenced, and it does not cover applications for revival or continuance of proceedings already commenced. (See Art. 181: Revival or continuation of proceedings). An application to the Court which passed the decree for transfer of the decree to another Court for purposes of execution is not an application for execution.³⁶ An application for transfer being an application of an entirely different nature from that for execution of a decree, does not suspend the operation of S. 230, Civil Procedure, 1882 (present S. 48, Civil Procedure Code, 1908).³⁷ An order for transmission as such is not an order on an application *for* execution, though it is an order on an application *in* execution. It is a proceeding taken with a view to further action by way of execution elsewhere on which action, unless previously determined, the question of the right to execute the decree is decided.³⁸ An application to a Court by the transferee of a decree to be substituted in place of the original plaintiff and for recognition of the transfer will not be entertained except on an application for execution.³⁹ Such an application is merely for a step-in-aid of execution, within the meaning of Art. 182, Limitation Act, and not an application for execution.⁴⁰ Though the making of an order of contribution under S. 186 of the Companies Act is not controlled by any rule of limitation, the enforcement of such order is not equally so controlled. It is subject to the general law of limitation applicable to execution applications.⁴¹ An application to *enforce* an *agreement* (sanctioned by the Court) by which execution is deferred, but is liable to be again proceeded with,

v. *Purushottam*, 24 Mad. 188; also see *Chunder Coomar v. Bhogobutty*, (1877) 3 Cal. 235 (242)=1 C.L.R. 23; *Prabakara Row v. Patannah*, (1878) 2 Mad. 1 (4) and *Budhe Khan v. Birbal*, 40 P.R. 1898.

34. *Chatur Kushalchand v. Mahadu Bhagaji*, 10 Bom. 91.

35. *Jogendranath Roy v. Rasik Chandra*, 2 C.L.J. 544.

36. *Raj Kumar Sen v. Annoda Charan*, (1911) 9 I.C. 246; *Folld. Nilmony Singh v. Bireshwar*, 16 Cal. 744.

37. *Khetpal v. Tikam Singh*, 34 All. 396; also see *Ankineedu v. Jagayya*, 1929 Mad. 745=120 I.C. 369; *Saklu v. Harbans Deo*, 1926 All. 660=95 I.C. 26; *Makund Ram v. Girdhari Lal*, (1912) 14 I.C. 277 (All.).

38. *Chutterput Singh v. Sait Sonari Mal*, (1916) 43 Cal. 903; Approved in *Banku Behari v. Narain Das*, 54 Cal. 500 (P.C.).

39. *Somamma v. Basamma*, (1912) 14 I.C. 704 (Mad.).

40. *Ramchandra v. Subramania*, (1904) 14 M.L.J. 393; *Annamalai v. Ramaier*, (1908) 18 M.L.J. 24 (25)=31 Mad. 234; also see *Mahalinga v. Kuppanachariar*, 30 Mad. 541; also see *Pitam Singh v. Tota Singh*, 29 All. 301 and *Mohan Singh v. Jagat Singh*, 50 All. 621.

41. *The People's Industrial Bank, Ltd. v. Mahesh Charan*, 93 I.C. 631 (Oudh).

if the judgment-debtor makes default in paying certain instalments, is not an "application for the execution of a decree".⁴² But, where the decree-holder applies to execute the original *decree*, his application is governed by Art. 182.⁴³

2498. The words an "*application for execution*", occurring in Art. 182, Limitation Act mean an **application for restitution to enforce the decree**, and in the case of applications for restitution on reversal of a decree, the legal obligation arising from the appellate-decree itself is sought to be enforced, and not any independent obligation.⁴⁴ The **Allahabad**,⁴⁵ and the **Madras**,⁴⁶ High Courts have taken the view that an application to obtain restitution under S. 583, old Code (S. 144, Civil Procedure Code, 1908) was a proceeding in execution and was governed by Art. 179 (now Art. 182) Limitation Act. The **Calcutta High Court**,⁴⁷ took the view, under the old Act, that an application for restitution is not an application for execution. The **Privy Council**,⁴⁸ held that under the Code of 1882 restitution proceedings had to be commenced by an application for the *execution* of the decree and they had to be regulated by the rules prescribed for the execution of decrees in suits. Under the present Code, all reference to execution has been omitted in S. 144, Civil Procedure Code. But there is a conflict of view between, the **Madras**,⁴⁹ and **Bombay High Court**,⁵⁰ and **Oudh Chief Court**,¹ on one side, and the High Courts of **Allahabad**,²

42. *Sham v. Piari*, 5 All. 596.

43. *Hurronath v. Chunnilal*, 4 Cal. 877.

44. *Unnamalai Ammal v. Nathan*, (1917) 42 I.C. 530=33 M.L.J. 413; Reld. on *Venkayya v. Ragavacharlu*, 20 Mad. 448=8 M.L.J. 79.

45. *Nand Ram v. Sitaram*, 8 All. 545.

46. *Unnamalai Ammal v. Nathan*, (1917) 42 I.C. 530=33 M.L.J. 413; also see *Somasundaram v. Chokkalingam*, 38 I.C. 806=5 L.W. 267=40 Mad. 780 and *Mullaseri v. Krisheki*, 22 M.L.J. 146=13 I.C. 179.

47. *Asutosh Goswami v. Upendra Prasad*, 38 I.C. 17=21 C.W.N. 564=24 C.L.J. 467 and *Harish Chandra v. Chandramohan Das*, 28 Cal. 113.

48. *Prag Narain v. Kamakhia Singh*, 31 All. 551=36 I.A. 197=19 M.L.J. 599 (P.C.).

49. *Somasundaram v. Chokkalingam*, 40 Mad. 780; *Unnamalai v. Nathan*, 42 I.C. 530=33 M.L.J. 413; *Panchapakesa v. Natesa*, 96 I.C. 587=51 M.L.J. 161; *Sudalaimuthu v. Sudalaimuthu*, 17 L.W. 623; *Muniah v. Gangamma*, 1931 M.W.N. 1006.

50. *Kurgad Gowda v. Ningam Gowda*, 41 Bom. 625; *Syed Hamid Ali v. Ahmed Ali*, 45 Bom. 1137.

1. *Santa Sahai v. Chuttai Kurma*, 92 I.C. 23 (Oudh); *Chandika v. Bithal*, 1931 Oudh 51=130 I.C. 78.

2. *Jiva Ram v. Nand Ram*, 44 All. 407=1922 All. 223; *Baijnath v. Balamukund*, 47 All. 98=22 A.L.J. 881=1925 All. 137; *Brijlal v. Damodar*, 44 All. 555; *Parmeshar Singh v. Sitla Din*, 150 I.C. 1096=1934 A.L.J. 503=1934 All. 626 (F.B.) (Art. 181 applied).

Calcutta,³ and **Patna**,⁴ on the other side, as to the limitation applicable. See detailed note under Art. 181, Limitation Act. The **Patna High Court**, however, now takes the view that an application for restitution and for mesne profits under S. 144, Civil Procedure Code is an application in execution and is governed by Art. 182, and not by Art. 181. The earlier Full Bench decision in 3 Pat. 371,⁴ has been recently overruled in 1934 Pat. 246.⁵ The **Rangoon High Court** has taken the same view, as the Allahabad High Court.⁶ The bar of suit under S. 144 (2), Civil Procedure Code applies only to a suit to obtain restitution, etc., which could be obtained *by application under Sub-S. (1)*. A decree for refund obtained *by suit*, would be executable by an application for execution of decree. An application for refund of money, paid by a pre-emptor under the decree of the *first* Court, in consequence of a *modification on appeal*, should be treated as an application for execution governed by Art. 182, Limitation Act.⁷

2499. It has been held by the **Calcutta High Court**, in some cases under Act XV of 1877, that it was not the intention of the Legislature by the enactment of the Limitation Act to revive decrees which were barred by the operation of the prior Limitation Act.⁸ Section 6 of the General Clauses Act I of 1869, referring to "proceedings" did not embrace the whole suit, so as to include proceedings in *execution* after the suit is decreed. The object of this section was probably to leave proceedings commenced under the old Act unaffected by the repealing Act, only so far as they had proceeded, leaving their further progress to be regulated by the procedure in force after the repeal.⁹ In *Sachindranath v. Maharaj Bahadur*,¹⁰ their Lordships observed that the question which of the Limitation Acts, that of 1877, or that of 1908, applied to the case, must be determined by the condition in which the decree stood when the latter Act came into force on January, 1, 1909. The law of limitation applicable to proceedings in execution is not the law

3. *Hari Mohan v. Parmeshur*, 56 Cal. 61; *Saroj Bhusan v. Debendranath*, 35 C.W.N. 1294.

4. *Balmukand v. Basanta Kumari*, 3 Pat. 371 (F.B.); *Krupa Sindhu v. Balbhadra*, 3 P.L.J. 367; *Ramba Jawahir v. Bankey*, (1928) 7 Pat. 794.

5. *Bhaunath Singh v. Kedarnath Singh*, 13 Pat. 411=148 I.C. 1180=15 P.L.T. 173=1934 Pat. 246 (2) (F.B.); also see *Lokenath Singh v. Mahabir Singh*, 1934 Pat. 646=152 I.C. 944.

6. *Maung Hla v. Hnin*, (1930) 8 Rang. 271=1930 Rang. 241.

7. *Nandram v. Sitaram*, 8 All. 545; *Venkayya v. Ragava*, 20 Mad. 448; cf. *Harish v. Chandra*, 28 Cal. 113.

8. *Shumbhoonath v. Guruchurn*, (1880) 5 Cal. 894=6 C.L.R. 437; Folld. in *Nursingh Doyal v. Hurryhur*, 6 C.L.R. 489.

9. *Jogodanund v. Amrita*, 22 Cal. 767 (781) (F.B.).

10. 1922 P.C. 187=48 I.A. 335=26 C.W.N. 858 (867) (P.C.).

under which the suit was instituted, but the law in force at the date of the application for execution, in absence of a legislative provision to the contrary (such as that contained in S. 1 of Act IX of 1871).¹¹ In *Shib Shankar Lal v. Soni Ram*,¹² it was said:

"The law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary."

And this statement of the law was approved by the **Privy Council** on appeal in *Soni Ram v. Kanhaiyalal*.¹³ Section 48 of the Civil Procedure Code has retrospective effect, and governs an application for the execution of a mortgage-decree passed before that Act came into force.¹⁴ Where a decree was passed at a time when the old Civil Procedure Code was in force but the application for execution of it is made at a time when the new Code of 1908 is in force, the law of procedure and limitation applicable to an application for execution would be the law actually in force at the time when the application is made, and such application would be governed by the bar of 12 years contained in S. 48, Civil Procedure Code.¹⁵

2500. It is well settled that the period of limitation applicable to the execution of a decree transmitted by one Court to another for execution depends on the character of the Court which passed the decree, and not on the character of the Court executing it.¹⁶ A different rule will lead to anomalous consequences.¹⁷ Accordingly, where a decree of the Presidency Small Cause Courts (Madras) passed in 1896 was transferred for execution to the City Civil Court, S. 48, Civil Procedure Code, not being applicable to the Court of Small Causes, it was held that an application for the execution presented to the Civil Civil Court in 1910 was not barred, under Art. 182, Limitation Act, and that the fact that S. 48, Civil Procedure Code, was applicable to the executing Court was immaterial.¹⁸ A decree of the Chief Court is not intended to come under a different law of limitation simply because it is executed by the High Court.

11. *Gurupada Basapa v. Virbhadrappa*, (1883) 7 Bom. 459 (462); also see *Kuppu v. Saminath*, 18 Mad. 482; *Jagmohun v. Luchmessur*, 10 Cal. 748; *Becharam v. Abdul Wahed*, 11 Cal. 55.

12. (1909) 32 All. 33.

13. (1913) 35 All. 227 (P.C.); Folld. in *Mt. Begam Sultan v. Sarvi Begam*, 1926 All. 93=48 All. 121.

14. *Gopaldas v. Tribhovan*, (1920) 45 Bom. 365=59 I.C. 790=22 Bom. L. R. 1420; Folld. in *Gulabrao v. Magan*, 1925 Bom. 326=87 I.C. 769=27 Bom. L. R. 461; also see *Bissessar v. Jasoda*, (1913) 40 Cal. 704.

15. *Mt. Begam Sultan v. Sarvi Begam*, 1926 All. 93=48 All. 121.

16. *Tincoverie v. Debendronath*, 17 Cal. 491; *Jogemaya v. Thackemoni*, 24 Cal. 473 (491); *Sambasiva v. Panchanada*, (1907) 31 Mad. 24.

17. *Sree Krishna Dass v. Alumbi Ammal*, (1911) 36 Mad. 108.

18. *Ibid.*

Article 182, and not Art. 183 was therefore applied in such a case.¹⁹ However, the law of limitation applicable to the execution of a decree of the Civil Courts of any Native State, which is executable in British India under the authority of the Civil Procedure Code, would be governed by the law of British India where the decree is being executed.²⁰ Where the plaintiff obtained a decree in the Kalol Court, Baroda State, and this decree after some previous executions in Baroda State, was transmitted on the plaintiff's application to the Bombay High Court for execution, it was held that the application was a substantive application with regard to the property in Bombay which was not the subject of any previous application and being made more than 12 years after the date of the decree, was barred by the provisions of S. 48, Civil Procedure Code.²¹ Similarly, where a decree was passed by the Baroda Court in 1909, and the first application to execute the decree was made in 1913, it being within the time prescribed by the law in Baroda, it was held that the decree when transferred to the Ahmedabad Court (British) for execution in 1915, was incapable of execution in the Ahmedabad Court, having been barred according to the British law of limitation which governed the case.²²

2501. It has been held that the language of this article ought not to be strained in favour of a judgment-debtor, who has not paid his just debt.²³ **Liberal construction.** The Courts are disposed to place a somewhat broad and liberal construction upon the article rather than a limited or confined one.²⁴ The clauses of this article have been construed liberally, and their application should not be restricted to the detriment of the decree-holder.²⁵ It is well settled that the Court would be slow to interpret a statute of limitation so as to affect rights as to the enforcement of which there was no doubt.²⁶ Innes, J., remarked in *Kunhi Mannan v. Seshagiri*,²⁷ that the right to execute decrees having

19. *Alibhai Mohamed v. Mahomed Noor Mahomed*, 1928 Rang. 317=6 Rang. 566.

20. *Hukum Chand v. Gyanender*, (1887) 14 Cal. 570.

21. *Jeewandas v. Ranchhoddas*, (1910) 35 Bom. 103.

22. *Nabibhai Vazirbhai v. Dayabhai Amulakh*, (1916) 40 Bom. 504; cf. *Prabhuling v. Gurunath*, (1920) 45 Bom. 453.

23. *Adhar Chandra v. Lal Mohundas*, (1897) 24 Cal. 778 (780).

24. *Sariatoolla v. Rajkoomar Roy*, (1900) 27 Cal. 709.

25. *Balaramdas v. Mukanda*, (1912) 16 I.C. 370 (Cal.); also see *Gungamoyee v. Shib Sunkur*, 3 C.L.R. 430; *Nurul Hasan v. Muhammad Hasan*, 8 All. 57=1886 A.W.N. 237; *Kristochurn v. Radhachurn*, 19 Cal. 750 and *Abdul Rahim v. Maidin Saiba*, 22 Bom. 500.

26. *Balaramdas v. Mukanda*, (1912) 16 I.C. 370 (Cal.); citing *Boatwright v. Boatwright*, L.R. 17 Eq. 71=43 L. J. Ch. 12.

27. (1882) 5 Mad. 141; Folld. in *Abdul Kader v. Krishnan*, (1913) 38 Mad. 695.

been curtailed by S. 230, Civil Procedure Code, 1877, the provisions of the Limitation Act should be construed as far as possible so as to prevent the defeat of *bona fide* endeavours to secure the fruits of a decree once obtained. But as pointed out in *Kuppuswami v. Rajagopala*,²⁸

"in some cases the Courts in their anxiety to prevent decree-holders being deprived of the fruits of their decrees by the 'technical' plea of limitation have stretched the article to such a point that it has become difficult for the most experienced lawyer (to say nothing of layman) to say when many decrees will become time-barred. In a matter like limitation certainty is the first desideratum."

Similarly, the same learned Judge took occasion to observe in *Masilamani v. Sethuswami*,²⁹ referring to *Varadaraja v. Murugesam*,³⁰ where it was held that Art. 182, Limitation Act, 1908, should receive a fair, liberal and not too technical construction so as to enable the decree-holder to obtain the fruits of his decree,

"I quite agree; but it seems to me that the danger is, not of too technical construction of the article, but that the Courts, in their anxiety to prevent justice being defeated by technicalities, may introduce so much uncertainty, that it will be most difficult for any party to know whether execution of a decree is barred or not".³¹

Judgment-debtors have their rights equally with the decree-holders and the negligence of the latter to take the proper legal steps within the period of limitation should not be condoned.³² However, the view is generally held "that in deciding questions of limitation in execution of decrees the Courts must always lean to the view that the applications are not time-barred"³³; and

"that in matters in which a decree-holder seeks to enforce his undoubted right, a liberal interpretation ought always to be adopted if it can be done without due violence to the express language of the Legislature".³⁴

2502. REVENUE COURT DECREE.—The present article contemplates a decree or order of any **Civil Court**.

In *Nilmoni Singh v. Taranath Mukherji*,³⁵ their Lordships of the **Privy Council** noticed that Act X of 1859 no doubt made

28. *Per* Ayling, J., 45 Mad. 466 (470).

29. (1917) 41 I.C. 701 (Mad.); also see *Natesa Pillai v. Ganapathia Pillai*, (1917) 38 I.C. 136 (Mad.).

30. (1915) 30 I.C. 707=39 Mad. 923=30 M.L.J. 460=18 M.L.T. 313=1915 M.W.N. 769.

31. (1917) 41 I.C. 701 (702) (Mad.).

32. *Sakerchand Narsidas v. Yakoob*, (1923) 73 I.C. 311 (Sind);; also see and cf. *Narsoomal v. Tirathmal*, (1915) 30 I.C. 51 (Sind).

33. *W'ali Ram v. Bhagwandas*, (1913) 18 I.C. 236=20 P.W.R. 1913=18 P.L.R. 1912 *Supp.*

34. *Babu Ram v. Pearey Lal*, (1919) 50 I.C. 143 (All.) (Per Walsh, J.);cf. 19 A.L.J. 174.

35. (1882) 9 I.A. 174=9 Cal. 295 (P.C.); *Folld.* in *Partap Udainath v. Madan Mohan*, (1910) 38 Cal. 288 [*Held*, that the words "Civil Courts"

certain distinction between the Civil Courts and the Rent Courts established by that Act; but observed that

"it is entirely another question whether the Rent Court does not remain a **Civil Court** in the sense that it is **deciding on purely civil questions between persons seeking their civil rights**, and whether, being a Civil Court in that sense, it does not fall within the provisions of Act VIII of 1859".

It was held that the Rent Court was a Civil Court for this purpose. Rustomji is of opinion that, if on a proper interpretation of an enactment a Revenue Officer or Revenue Court is *deemed* to be a Civil Court, an application for execution would obviously fall within Art. 182. So also, if a decision of the Revenue Officer has the force of a decree of a Civil Court (as in certain cases under the Bengal Tenancy Act, 1885), the case would apparently come within Art. 182.³⁶ In *Madho Prakash v. Murli Manohar*,³⁷ a Full Bench of the Allahabad High Court held by the majority that Revenue Courts are Courts of civil jurisdiction within the meaning of the Code of Civil Procedure. But Stuart, C.J., dissented observing that Civil Procedure Code, 1882, defined the Civil Court or Courts of Civil Judicature in such a way as to exclude the idea of Revenue Courts being contemplated by any of its provisions. This view will derive considerable support from the definition of "Revenue Court" in S. 5 (2), Civil Procedure Code.³⁸ The **Calcutta High Court** has taken the view that

"the Revenue Courts are Courts of Civil Judicature within the meaning of the Civil Procedure Code, in that their decrees, when transferred in the regular course, are to be treated in all respects as if they were passed by a Court of Civil Judicature".³⁹

But this does not solve the question whether such a decree would be an application for execution of a decree of a "Civil Court", within the meaning of Art. 182, Limitation Act. According to the principle laid down in *Tincowrie v. Debendro Nath*,⁴⁰ a decree transmitted by a Revenue Court for execution to a Civil Court would retain the character of the Court passing the decree. And

in S. 3 of Act VI of 1876 (Chota-Nagpur Encumbered Estates Act), as amended by S. 4 of Act III B. C. of 1909, are comprehensive enough to include the Revenue Courts deciding rent suits and executing rent-decrees]; also see *Raghunadha Patro v. Govinda Patro*, 55 M.L.J. 798 (F.B.) (*Per Venkatasubbarao, J.*).

36. Rustomji's Limitation Act, p. 944.

37. (1883) 5 All. 406 (412) (F.B.).

38. *Onkar Singh v. Bhup Singh*, 16 All. 496 ("Decree" in Civil Procedure Code means a decree in a Civil Court, which does not include a Revenue Court); Dissented in *Ram Lochan v. Beni Prasad*, (1908) 36 Cal. 252.

39. *Ramlochan v. Beni Prasad*, (1908) 36 Cal. 252.

40. (1890) 17 Cal. 491; also see *Jogemaya v. Thackomoni*, (1896) 24 Cal. 473 and *Susya Pillai v. Aiyakannu*, (1906) 29 Mad. 529.

this view has been expressly taken by the **Madras High Court** in *Sambasiva v. Panchanada*,⁴¹ where referring to the provisions of Ss. 39 and 40 of the Madras Revenue Recovery Act (II of 1864), the learned Judges have observed that S. 40

“places the purchaser in the position of a decree-holder for the purpose of putting the machinery of the Court in motion in order that the certificate of sale granted by the Revenue authority may be given effect to. *It does not by implication, make the law of limitation with reference to the execution of decrees or orders of Civil Courts applicable to proceedings under S. 40 of the Act.* Further, Art. 179 applies to decrees or orders of a Civil Court, and even if the grant of a certificate by the Revenue authority can, for the purposes of S. 40, be regarded as a decree or order we do not think that it can for the purpose of the section be regarded as a decree or order of a Civil Court.”

Starling, in his work on Limitation, is of opinion that “the execution of the decision of a Revenue Court, unless specially provided for in any other Act, would seem necessarily to fall under Art. 181 of the Limitation Act”.

2503. SPECIAL OR LOCAL LAW.—A special or local law may prescribe a *different* period of limitation; accordingly, the present article shall have no application where a special or local law makes a provision for limitation applicable to applications for executions of decrees or orders under that law. For instance, suits for rents, founded on registered contracts in respect of lands subject to the provisions of the Bengal Tenancy Act, are governed by the limitation provided in that Act.⁴² Section 35 of Act XI of 1859 prescribes six months as the period of limitation for applications for execution of a Civil Court decree annulling the sale of a revenue-paying estate for arrears of Government revenue. This special rule, however, does not apply to decrees setting aside sales in execution of certificates issued under Bengal Act VII of 1880.⁴³ It was held by the Calcutta High Court, that an application for execution of a decree for a sum not exceeding Rs. 500 obtained by a co-sharer landlord for his share of the rent is governed by Art. 182 (old Art. 179) and not by Art. 6 of the Third Schedule of the Bengal Tenancy Act (VIII of 1885).⁴⁴ But, this view was dissented from in some later cases.⁴⁵ A decree obtained by one of several joint landlords for his share of the entire rent and made in a suit in which rent was claimed in respect of several holdings in the occupation of a tenant is a decree for rent within the meaning of Art. 6

41. (1907) 31 Mad. 24 [Art. 178, old (now Art. 181) applied].

42. *Mackenzie v. Haji Syed Mahomed Ali Khan*, (1891) 19 Cal. 1 (F.B.); also see *Kali Charan v. Harendralal*, 4 C.L.J. 553.

43. *Mahomed Abdul v. Gajraj Sahai*, 25 Cal. 283.

44. *Kedarnath v. Ardha Chunder*, (1901) 29 Cal. 54.

45. *Thakomoni Dasi v. Mohendra Nath*, (1909) 3 I.C. 389=10 C.L.J. 463; Reld. upon in *Khetra Mohan v. Mohim Chandra Das*, (1913) 18 I.C. 595=17 C.W.N. 518.

of Sch. III of the Bengal Tenancy Act. Therefore, where such a decree was obtained in 1902 and, after intermediate applications for its execution in 1905 and 1908, was sought to be executed in 1912; it was held that the application for execution was barred under Art. 6 of Sch. III of the Bengal Tenancy Act.⁴⁶ Art. 6 is applicable when the decree has been made in a suit between landlord and tenant *to whom* (and not *to which*) the provisions of the Act are applicable, it being immaterial that all the provisions of the Act are not applicable.⁴⁷ Even under the wider language of Art. 6 of Sch. III, after the amendments of 1907 and 1908, some difficulty is felt as to when the special rule is to be followed to the exclusion of the general rule.⁴⁸ The special law of limitation prescribed by the Bengal Tenancy Act for the execution of rent-decrees does not apply to a decree in a suit for arrears of rent brought by a landlord after he has parted with his interest as landlord. The decree-holder in such a case is entitled to execute his decree under the general law of limitation.⁴⁹ The special rule under Art. 6 of Sch. III of Act VIII of 1885, applies to execution of decrees for rent under Rs. 500 and the period of limitation runs from the date of the decree and not from the date fixed for payment⁵⁰; even where a consent decree was passed for the amount claimed payable in fixed instalments.¹ A decree for which the limitation is prescribed by Art. 6 of the Bengal Tenancy Act, is one which is capable of execution.² Under the North-West Provinces Rent Act (XI of 1901), Arts. 47 to 49 of the Fourth Schedule provide a special rule of limitation and deal with the execution of decrees. In other cases the limitation is as for a Civil Court decree.³

2504. A *summary* decision means a decision arrived at by a summary proceeding; and a "decree" made under S. 53 of Act XX of 1866, is a summary decision. Section 20 of Act XIV of 1859 was intended to apply to decisions, whether called judgments, decrees or orders,

46. *Mrityunjay v. Bholanath Datta*, (1913) 20 I.C. 833=18 C.L.J. 81; *Reld. on 3 I.C. 389=10 C.L.J. 463*; *Narendra Chandra v. Afifannessa Bibi*, (1915) 27 I.C. 729=19 C.W.N. 751.

47. *Ibid.*

48. *Bishundeo v. Mahadeo Prasad*, 6 Pat. 274; *Rani Bhuneshwari Kuer v. Maharaj Kumar*, 8 Pat. 358; *Mahendranath v. Ashutosh Pradhan*, 1926 Cal. 545; *Dargahi Mian v. Mt. Mango*, 1 Pat. 779.

49. *Satisranjan Das v. Nasaraddi*, (1916) 34 I.C. 145 (Cal.); *Folld. Arthur Henry Forbes v. Maharaj Bahadur Singh*, 23 I.C. 632=41 Cal. 926=18 C.W.N. 747=27 M.L.J. 4 (P.C.).

50. *Mamtazul Haq v. Nirbhai*, (1883) 9 Cal. 711 (F.B.) and *Ram Saday Mukerjee v. Dwarkanath Mukerjee*, (1895) 22 Cal. 644.

1. *Khetramohan v. Mohim Chandra*, (1913) 18 I.C. 595=17 C.W.N. 518.

2. *Mahamaya v. Abdul Hamid*, (1913) 21 I.C. 615=18 C.W.N. 266.

3. *Mitra's Limitation Act*, Vol. II, p. 1986.

made in a regular suit, and S. 22 of the same Act was intended to apply to all other decisions. A decree made in 1867 under S. 53 of Act XX of 1866 was held to be subject as regards its execution, to the law of limitation provided in Act XIV of 1859, S. 22.⁴

2505. Prior to the passing of Act X of 1877, no period was prescribed beyond which execution of decrees should not be allowed, provided they were kept alive in due manner. Section 230 of Civil Procedure Code, 1877, enacted that there should be an end to all execution proceedings on the completion of twelve years from the date of the decree except in certain specified cases. Section 230 applied only to decrees "for the payment of money or delivery of property". The present section applies to all decrees except decrees granting an injunction. Section 230 applied only where an application for execution had been made "under this section and granted"⁵; but the omission of these words makes the rule of limitation contained in this S. 48 applicable whether the previous application for execution was made under a former Code or the present Code, and whether the application was granted or not.⁶ The words "or the decree (if any) on appeal affirming the same," in S. 230, cl. (a) have now been omitted.

Arts. 181 and 182 distinguished.

2506. See Notes under Art. 181, as to "Revival or continuance of applications".

It has been noticed in comments under Art. 181 of the Limitation Act, that Art. 182 is not applicable to applications which are merely incidental applications to carry on proceedings already commenced, and which were sought to be continued or revived on the termination of certain obstacles not due to the neglect or default of the decree-holder.⁷ Where the objector's claim to two-thirds of

(i) **Partial obstacles.** the attached property having been allowed, the attachment of two-thirds of the property was raised, and the decree-holder filed a regular suit against the objector, but he was unsuccessful in that suit, and then he made a second application for execution, praying for attachment of the

4. *Mina Konwari v. Juggat Setani*, (1883) 10 Cal. 196 (P.C.).

5. *Annaji v. Ramaji*, 10 Bom. 348.

6. See note under Art. 181, *ante*.

7. *Raghubans v. Sheosaran*, 5 All. 243; *Nandram v. Sitaram*, 8 All. 545; *Lakshmichand v. Baland Das*, 17 All. 425; *Bakeant Singh v. Budhe Singh*, 42 All. 564; *Chhattar Singh v. Kamal Singh*, 49 All. 276 (F.B.); *Kalyanbhai Dipchand v. Ghanasham*, 5 Bom. 29; *Chintamon v. Balashastri*, 16 Bom. 294 (301); *Narayan v. Sono*, 24 Bom. 345; *Booboo Pyaroo v. Syed Nazia Hosssein*, 23 W.R. 183 (Cal.); *Chandra v. Gopi Mohan*, 14 Cal. 385 (387); *Rudra v. Pachu*, 23 Cal. 437; *Ashrafuddin v. Bepin*, 30 Cal. 407 (411); *Akshay v. Abdul Kader*, 57 Cal. 860=34 C.W.N. 102; *Subbachariar v. Muthu Veeran*, 36 Mad. 553 (556); *Chalavadi v. Poloori*, 31 Mad. 71; *Suppa Reddiar v. Azudai Ammal*, 28 Mad. 50 (F.B.); *Surayya v. Venkata Ratnam*, 45 M.L.J. 822=1924 Mad. 210=47 Mad. 176=79 I.C. 779.

one-third share, which was not released from attachment, it was held that as the property sought to be attached and sold in the second application was one which the decree-holder might have proceeded against, notwithstanding the order in the claim proceedings, the second application was not a continuation of the previous proceeding for execution.⁸ Where an application for execution has been dismissed, although the attachment has been kept in force, it is not open to the decree-holder to apply for execution any length of time afterwards and contend that the subsequent application is one made in continuation of the previous application.⁹ The proceedings under the first application can be continued or revived only, if the obstruction is removed. Where a suit under O. 21, R. 99 (S. 331, Civil Procedure Code, 1882) was withdrawn, and the decree-holder failed in removing the obstruction, the matters were left where they were before the suit: consequently, a striking off the execution application amounted to a dismissal of the previous application, and a second *darkhast* could not be treated as a continuance or revival of the first.¹⁰ Where a Court executing a decree after the death of the judgment-debtor and his son, made an order exempting from attachment the life estates in certain houses of the judgment-debtor's son's widow, it was held by the **Punjab Chief Court**, that this order had not the effect of suspending the execution, as the decree-holder might attach the residue subject to the life-estate, and that consequently an application for execution, put in after the death of the widows which occurred more than three years after the above order, did not fall under Art. 181 (old Art. 178), but fell under Art. 182 (old Art. 179), Limitation Act, and was barred.¹¹ An application for execution may be in continuation of former proceedings in execution so far as regards the property mentioned in the former application, but if the second application includes other properties sought to be proceeded against, the fresh application would be governed by Art. 182, so far as regards the remaining properties.¹² An application will be deemed

(ii) **Application for different process.** to be a fresh application as contra-distinguished from an *ancillary one* in continuation of a previous application, where the relief claimed in the second application is against properties or persons different from those in the previous application.¹³ For instance, where the first

8. *Raghunandan v. Bhugoo*, 17 Cal. 268 (271); cf. *Krishna Prosad Singh v. Mati Chand*, (1916) 32 I.C. 699 (Cal.); *Gurudeo v. Amrit*, (1906) 33 Cal. 689.

9. *Kedarnath Sarkar v. Prodyot Kumar Tagore*, (1911) 11 I.C. 48 (Cal.).

10. *Shivram Chintaman v. Sarasvatibai*, (1894) 20 Bom. 175.

11. *Sardarni Dya Kaur v. Kanwar Singh*, 129 P.R. 1888.

12. *Baikanta Nath v. Aghore Nath*, (1893) 21 Cal. 387 (Cal.).

13. *Maharaj Bahadur v. Forbes*, 1929 P.C. 209 (212)=33 C.W.N. 977=57 M.L.J. 184=118 I.C. 268 (P.C.).

application is for attachment, and the second for arrest¹⁴; or, the first application is for arrest and the second is for attachment¹⁵; or the first application is against moveables and the second is against immoveables¹⁶; or where there is a substitution¹⁷; or addition¹⁸ of new properties; or, where the prior application is for sale of hypothecated property, and the second application is for sale of other properties.¹⁹ Similarly, where the proceedings under the prior application have *come to an end*, the second application cannot be taken to be one in continuation of the prior application.²⁰ An application can only be considered as a continuation of the previous application when it is similar in scope and character to the former application. Where the former application asked the Court, in form and substance, to sell the properties of the judgment-debtor other than those which were comprised in the mortgage-bond, and the next application, in form and in substance, asked the Court to realise the money from the judgment-debtor by his arrest and detention in prison, it was held that it is quite impossible to regard the second application as a continuation of the previous application. The fact that the decree obtained was a mortgage-decree makes no difference.²¹ An application for execution is of an entirely different nature from the application for the transfer of the decree to another Court, and therefore the former can in no sense be treated as one in continuation of the latter application.²² Where later application for execution prays for reliefs different from those in the earlier one, it cannot be considered as

14. *Harasarup v. Balgobind*, (1896) 18 All. 9 (11)=1895 A.W.N. 133; *Krishnaji v. Anandraz*, (1883) 7 Bom. 293; also see *Virasami v. Athi*, (1884) 7 Mad. 595.

15. *Mewarlal v. Ahmad Ali*, (1912) 13 I.C. 929=9 A.L.J. 17; *Gobardhandas v. Dan Dayal*, 1931 All. 31 (32)=124 I.C. 43; *Kanhayalal v. Mayamal*, 1902 P.L.R. 112.

16. *Hiru v. Gurcharn*, (1910) 5 I.C. 815=17 P.R. 1910=20 P.L.R. 1910=22 P.W.R. 1910.

17. *Sultan Hassan v. Nanki Bai*, 1928 Cal. 241 (243); *Srinath Ghooqbo v. Yusuf Khan*, (1881) 7 Cal. 556=9 C.L.R. 334; *Badhu Singh v. K. T. Bank*, (1931) 129 I.C. 716=53 All. 419=1931 All. 134.

18. *Hayatunnessa v. Achia Khatun*, 1924 Cal. 131 (132)=50 Cal. 743=74 I.C. 1017.

19. *Begum Sultan v. Sarvi Begum*, 1926 All. 93 (95)=90 I.C. 274=48 All. 121; *Thiagarayan v. Kannusami*, (1918) 43 I.C. 122 (Mad.).

20. *Parry & Co. v. Vadivelu Pillai*, (1912) 13 I.C. 160 (Mad.); also see *Delhi and London Bank v. Reilly*, (1893) 13 A.W.N. 124 (125); *Phusa v. Surjan*, (1913) 20 I.C. 563 (564) (Punj.); cf. *Qamaruddin v. Jawahir Lal*, 27 All. 334 (P.C.).

21. *Rama Shivendra v. Awadh Behari*, (1923) 1923 Pat. 488; Relied on *Kesho Prosad v. Harbanslal*, (1920) 2 P.L.T. 22=53 I.C. 85.

22. *Saklu Chaudhri v. Harbans Deo Rai*, (1926) 1926 All. 660=95 I.C. 26; Relied on 34 All. 396.

a revival of the earlier application.²³ Where *A*'s decree for costs against *B* was satisfied by attachment and execution of another decree in judgment-debtor's favour, which latter decree being set aside in appeal, *A* had to refund money realized by him in execution of that decree, and *A* then made a fresh application for execution of his own decree more than three years after his last application, it was held that the application was governed by Art. 182, and not Art. 181, Limitation Act, and was barred by limitation.²⁴ Where on an application for removal of the obstruction, the Court held that the decree-holder was not entitled to possession until the mortgagee in possession had been redeemed, and the decree-holder did not himself redeem this mortgage, but waited till the *judgment-debtor* redeemed the lien of the mortgagee in possession, and then made an application for possession in execution of his decree, more than three years after the Court's order, it was held that the application was barred by time under Art. 182, and could not be treated as a *revival* of his original application.²⁵

2507. AMENDMENT OF EXECUTION APPLICATIONS.—O. 21, Rr. 11 to 14, deal with applications for execution by the holder of a decree desiring to execute it, made orally to the Court at the time of the passing of a money-decree, or a written application, in a tabulated form giving certain required particulars, as noted in R. 11 (2) of O. 21, Civil Procedure Code. Order 21, R. 17 lays down the procedure on receiving application for execution of decree. Sub-R. (1) empowers the Court to reject the application or allow an amendment, in the exercise of its discretionary power,²⁶ provided the execution of the decree has not at the date of the application for amendment become barred by limitation.²⁷ But the Madras High Court has taken a more liberal view, holding that the power of amendment can be exercised at any time before the disposal of the application.²⁸ Art. 182 of the Limitation Act applies to applications for execution of decree which must be made "in accordance with law". An application which is defective in form, and which does not comply

23. *Lalumia v. Mazur Hannissa*, (1926) 1926 Mad. 698=1926 M.W. N. 317=95 I.C. 718.

24. *Sunderlal v. Banarsidas*, (1918) 45 I.C. 531 (All.).

25. *Hira Prasad Pandey v. Kashi Prasad*, (1913) 18 I.C. 897.

26. *Fazloor v. Altaf*, (1884) 10 Cal. 541.

27. *Ganendra v. Sri Sri Shyam*, (1918) 27 C.L.J. 398=44 I.C. 553; *Rai Bahadur v. Ram Bahadur*, (1923) 2 Pat. 328=71 I.C. 741=1923 Pat. 61; *Chaurasi v. Bhagan*, (1923) 2 Pat. 787 (792)=74 I.C. 144=1923 Pat. 209.

28. *Vemuri Pitchayya v. Raja Yarlagadda*, 45 M.L.J. 651=1924 Mad. 367; *Mannakal Maheshwaram v. Veelappa Menon*, 54 M.L.J. 154=1928 Mad. 24; *Tandavamurti v. Durgamba*, 1928 Mad. 1154.

with the requirements of Rr. 11 to 14 of O. 21, Civil Procedure Code, is not one in accordance with law.²⁹ Under the old Code, there was some conflict of view as to the effect of an amendment, within the time allowed by Court. Where the defects were of a trivial character,³⁰ amendment might be allowed even after the period of limitation had elapsed,³¹ but would be taken as relating back to the original presentation of the application. Where the defects were of a serious character,³² the amendment, even if made within time allowed, would relate to the date when the application was *amended* and would not regularise the application from the date of its presentation. The result was that if the *amendment* was not made *until after* the expiration of the period of limitation the application was time-barred.³³ Those decisions are no longer law under the present Civil Procedure Code. Compare S. 149, Civil Procedure Code. Under O. 21, R. 17 (2) where an application is amended under the provisions of sub-R. (1), it shall be deemed to have been an application in accordance with law, and presented on the date when it was first presented. This sub-R. (2) applies only if the application is returned for amendment for *non-compliance with the provisions of Rr. 11 to 14*, and the application is subsequently amended. Sub-R. (2) does not in terms apply to cases where an application is returned for amendment for some

other reason.³⁴ The Court in each case has a discretionary power to allow an amendment, but this power would be exercised in a sound and judicial manner, depending upon the circumstances of each case, but not so as to admit a fresh application which would be barred on that date, if the amendment were not allowed. The rule contemplates the amendments of defects in the execution application before *admission and registration*. But where a substantive fresh application can be entertained on the date when defects are sought to be amended, there can be no bar to allowing the application for amendment at any time during its pendency.³⁵

29. *Asgar v. Troilokya*, (1890) 17 Cal. 631 (639); *Gopal v. Janki*, (1896) 23 Cal. 217 (223); But see now *Pitambar v. Damodar*, 53 Cal. 664; *Abdul Karim v. Lakshmanaswami*, 1928 Mad. 440 (Substantial compliance with the rule is sufficient).

30. *Abdul Karim v. Lakshmanaswami*, 1928 Mad. 440=112 I.C. 36.

31. *MacGregor v. Tarini Churn*, 14 Cal. 124; *Syed Mahomed v. Syed Abedoollah*, 12 C.L.R. 279.

32. *Raghunatha v. Venkatesa Tazker*, 26 Mad. 101; *Sangilia Pillai v. Muthu Chettiar*, 61 M.L.J. 516.

33. *Gopal v. Janki*, (1896) 23 Cal. 217; *Raghunatha v. Venkatesa*, (1903) 26 Mad. 101; also see *Mathura v. Anurago*, (1910) 14 C.W.N. 481=5 I.C. 579.

34. *Bhagrat v. Dwarka*, (1923) 2 Pat. 809 (811)=74 I.C. 174=1924 Pat. 23.

35. *Ram Sumran v. Ram Bahadur*, 1923 Pat. 224 (225)=2 Pat. 328=

Where, however, on the date when the defect is sought to be amended the decree would be barred by limitation, two views are held. Some High Courts have held that the Court is not empowered under the rules to allow amendment where it would be an obvious evasion of the rule of limitation to allow the amendment after the expiry of the period of limitation.³⁶ The opposite view is held in other cases that the Court can allow such an amendment under sub-R. (1), at any time before the disposal of the application; and the amendment relates back to the date of the application.³⁷ The better view appears to be that the petitioner is not entitled to insist for amendment *as of right*³⁸; and, amendment should not be allowed to the prejudice of the judgment-debtor by including a fresh prayer by a distinct, or additional relief not covered or intended to be covered by the original application.³⁹ Where the original application is one in accordance with law, an amendment may be allowed to be made in the shape of filing a *supplementary* list of properties sought to be attached.⁴⁰ Whether the amendment can or cannot be allowed depends upon the circumstances of each case with due regard to the statutory provisions of limitation.

2508. Section 3 of the Limitation Act, applies to suits, appeals and applications. Under this section the Court is bound to take notice of limitation whether raised or not as a defence.⁴¹

Application of other sections.

2509. The provision is of a mandatory character, and casts upon the Judge, the duty of applying the rules of limitation, in cases of applications as in the case of suits or appeal, even when they are not pleaded.⁴² It is Court's duty to dismiss a barred applica-

Mandatory provision.

71 I.C. 741; *Ganga Ram v. Dinanath*, (1913) 18 I.C. 526=118 P.R. 1912=51 P.W.R. 1913=86 P.L.R. 1913; *Chaurasi v. Bhagan*, 2 Pat. 787 (792); *Ganendra v. Shyam Sundar*, 27 C.L.J. 398.

36. *Asgar Ali v. Troilokanath*, (1890) 17 Cal. 631 (636) (F.B.); *Salimullah v. Sainaddi*, 22 I.C. 337=18 C.L.J. 538; *Abdul Hasmat Ahmad v. Hrishikeshdas*, 1925 Cal. 1048 (1050)=85 I.C. 742.

37. *Pitchayya v. Ankineedu*, (1924) 76 I.C. 750=1924 Mad. 367=45 M.L.J. 651; *Maheshwaram v. Vallappa*, 1928 Mad. 24=54 M.L.J. 154=107 I.C. 303.

38. *Sankaran Nair v. Ambu*, 1926 Mad. 260=49 M.L.J. 699=92 I. C. 109.

39. *Patta Veeran Kutti v. Kunhi Kandi*, (1911) 9 I.C. 760=1 M.W. N. 181; *Varadarajan v. Rajakumara*, (1913) 21 I.C. 782=26 M.L.J. 83=1914 M.W.N. 157.

40. *Ganendra Kumar v. Shyama Sundar*, (1918) 44 I.C. 553 (554)=23 C.W.N. 540=27 C.L.J. 398.

41. See S. 75, p. 79, Vol. I, *ante*; also see S. 80, p. 82.

42. *Bala Ram v. Mangtu*, 34 Cal. 941=6 C.L.J. 237 (F.B.).

tion for execution of a decree.⁴³ So long as an application for execution is pending, the judgment-debtor can at any time show that the application is barred and the Court has no option but to dismiss it under S. 3 of the Limitation Act.⁴⁴ It is only when the point of limitation is concluded by proceedings in a previous execution, that the judgment-debtor is not allowed to take an objection on the score of limitation in a subsequent execution of the decree.⁴⁵ Where a person relies upon a particular ground as reviving limitation for an execution application, it is incumbent upon him to specify the ground in the application. If he fails to do so, it is not open to him to take advantage of it subsequently.⁴⁶

2510. Section 4 of the Limitation Act, also applies to applications expiring on a day when the Closing of Court. Court is closed. Such an application may be made on the day that the Court re-opens.

2511. SUFFICIENT CAUSE.—Section 5, (re: sufficient cause) being inapplicable to the case of an application for execution, the Court has no power under that section to admit an application for execution which is time-barred.⁴⁷

2512. LEGAL DISABILITY.—Section 6 of the limitation Act, expressly applies to a person entitled to make an application for execution of a decree, who is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, and he may make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the First Schedule. The minors, or persons under legal disability may claim the benefit of S. 6, both during the period of disability, and after its cessation, irrespective of the fact whether they have a guardian or not.⁴⁸ Where a decree was passed in 1881 in favour of *A* and *B*: and on the death of *B*, he was represented by his minor sons and daughter, who made an application in 1894, through a guardian, it was held that the application was not time barred.⁴⁹ Where a minor obtained a decree in 1873, and this decree was

43. *Ramu Rai v. Dayal Singh*, 16 All. 390=14 A.W.N. (1894) 131; *Asutosh Goswami v. Upendra Prasad*, 38 I.C. 17=21 C.W.N. 564=24 C.L.J. 467.

44. *Kesho Prasad Singh v. Harbanslal*, (1919) 53 I.C. 85 (Pat.).

45. *Ibid.*

46. *Kaliandas Balchand v. Mahomed Khan*, 1933 Sind 365=147 I.C. 30.

47. *Bhagwan v. Dhondi*, (1896) 22 Bom. 83 (85); *Sunderlal v. Banarsidas*, (1918) 45 I.C. 531 (532) (All.); *Midnapore Zamindary Coy. v. Deputy Commissioner*, (1918) 44 I.C. 570 (Pat.).

48. See S. 6, S. 261, p. 282, ante.

49. *Zamir Hassan v. Sundar*, (1899) 22 All. 199 (F.B.).

first executed in 1875 by his natural father as his guardian and a fresh application was made by the minor on attaining majority in 1879, it was held that the application was saved from limitation.⁵⁰ The existence of a next friend or guardian *ad litem* cannot deprive a minor of the benefit of S. 6, Limitation Act, and the minor can make an application for execution of decree after his attaining majority within the time allowed by S. 6, Limitation Act.¹ If the person entitled to execute a decree is under a disability at the time when any one of the six periods mentioned in Art. 181, Limitation Act 1877 (Art. 182, present Act) commences, the operation of the Act is suspended during the continuance of the disability by the operation of S. 6, Limitation Act.² As S. 6 of the Limitation Act applies only to cases dealt with by the Statute itself, it does not exempt a minor from the provisions of S. 48, Civil Procedure Code.³ An application for restitution falls within the purview of S. 6 of the Limitation Act, and the time for making such application in the case of a person under legal disability is, therefore, extended under the provisions of S. 6.⁴

2513. Time may commence to run from the date of the decree if there is nothing to prevent it at such date. But the rule in **S. 9, Limitation Act**, that when time once commences to run it does not cease to run, does not apply to the *separate* periods which commence to run from the date of the appellate decree or of an application to execute the decree or to take some step-in-aid of execution or from the other four points of time.⁵ A Full Bench of the Madras High Court held in *Periasami v. Krishna Ayyar*,⁶ that S. 6, Limitation Act, (old S. 7) only applies where all the joint execution-creditors were under a disability at the time when the period of limitation began to run. Joint execution-creditors are not "joint creditors" within the meaning of S. 8 of the Limitation Act, 1877 (now S. 7, Act IX of 1908). The words "a person entitled to institute a suit or make an application" in S. 6 of the

50. *Anantharama v. Karuppanan*, (1881) 4 Mad. 119.

1. *Jagat Narain v. Narbada*, (1913) 21 I.C. 365 (Oudh).

2. *Lolit v. Janaky*, (1893) 20 Cal. 714; *Narendra v. Bhupendra*, (1895) 23 Cal. 374 (388); cf. *Periasami v. Krishna*, (1902) 25 Mad. 431 (436, 444).

3. *Ramnath Tewari v. Chatterpulman*, (1915) 30 I.C. 521=13 A.L.J. 826.

4. *Kurgodi v. Ningam*, (1917) 41 Bom. 625=41 I.C. 238=19 Bom.L.R. 638; cf. *Hari Mohan v. Parameshwar*, 1928 Cal. 646=56 Cal. 61 (77) (S.B.); also see S. 251, p. 270, *ante*.

5. *Lolit Mohun v. Janaky*, 20 Cal. 714.

6. (1901) 25 Mad. 431 (436, 443, 444) (F.B.); Diss. *Surja Kumar Dutt v. Arun Chunder*, 28 Cal. 465; Approved *Seshan v. Rajagopala*, 13 Mad. 236 and *Vigneswara v. Bapayya*, 16 Mad. 436.

Limitation Act (old S. 7), refer to one who, in his own right, is so entitled, and not to a person who, by a rule of procedure, such as that contained in S. 231, Civil Procedure Code, 1882 (O. 21, R. 15, Civil Procedure Code, 1908), is authorised, with the permission of the Court, to make an application for execution for the benefit of himself and others interested jointly with him in the decree to be executed. A subsequent disability is to be distinguished from the case of initial disability or want of legal capacity to sue or make an application on account of minority, insanity or idiocy.⁷ Where a decree-holder, after making various applications for execution of a decree, each of which was within time, died, and his son, a minor, made an application for execution of the decree within 3 years of his father's death but more than 3 years after the date of his deceased father's last application, it was held that under S. 9 of the Limitation Act (XV of 1877) the minor's application for execution was time-barred, it not being a case of initial disability, but of subsequent disability.⁸ Section 9, Limitation Act has been applied to suits as well as to execution applications.⁹ Where a decree obtained in 1898 was sought to be executed in 1901 by the decree-holder, and the decree-holder died thereafter leaving a minor son, who attained his majority in 1910; and he then applied for the extension of the period of 12 years under S. 48, Civil Procedure Code, it was held that the limitation began to run once from the date of the decree, and the 12 years' period must be computed from that date.¹⁰

2514. The rules as to computation of period in S. 12 (1),
Exclusion of day from which limitation starts. Limitation Act applies to any suit, appeal or application, and the day from which the period of limitation is to be reckoned shall be excluded.

2515. **Section 13, Limitation Act,** is restricted to suits, and the provision is not applicable to proceedings in execution of decree. Consequently, the judgment-debtor's absence from British India does not save limitation for an execution application.¹¹ However, the decree-holder may keep alive his decree by applications presented from time to time, and an application in proper form would suffice, though it is merely

7. *Jivraj Gulabchand v. Babaji*, (1904) 29 Bom. 68.

8. *Ibid.*, (1904) 29 Bom. 68; also see *Kalka Baksh v. Ram Charan*, 40 All. 630=46 I.C. 584=16 A.L.J. 633 (F.B.).

9. *Jivraj v. Babaji*, (1904) 29 Bom. 68 and *Bhagwant v. Kaji*, (1912) 36 Bom. 498.

10. *Ibid.*, 36 Bom. 498.

11. *Ahsankhan v. Gangaram*, (1880) 3 All. 185.

colourable.¹² The words "in accordance with law", do not exclude an application filed merely with the object of keeping the decree alive, and not in the expectation that any effectual steps could be taken to execute it against the judgment-debtor.¹³ An application for execution made as against a deceased person is not an application in accordance with law. But, an application for execution made against a person whose whereabouts are unknown is not invalid. Until a judgment-debtor is dead, it is impossible to bring upon the record his heirs: and, in the absence of any evidence as to his death, an application for execution of the decree against the judgment-debtor alone was held to be an application in accordance with law.¹⁴

2516. Under Act XIV of 1859, S. 20, it was held by their Lordships of the Privy Council, that a proceeding taken *bona fide* and with due diligence, before a Judge whom the judgment-creditor believed *bona fide*, though erroneously, to have jurisdiction was a proceeding to enforce the decree.¹⁵ In cases under Act XV of 1877, the time during which the applicant had been making *another application* for the same relief alone could have been deducted. Section 14 of the Act was applied to proceedings in execution which were stayed by proceedings in the opponent's suit.¹⁶ And, under Cl. (3) of S. 14, the decree-holder was entitled to a deduction of all the time occupied in executing the decree in the Court having no jurisdiction, where the application had been made in good faith.¹⁷ Similarly, S. 14 (3) was used in deducting the period during which the application was pending in the Madras Court of Small Causes.¹⁸ However, S. 14 had no application where the decree-holder was *bona fide* litigating or resisting the judgment-debtor's application to have the alleged satisfaction certified.¹⁹

Under the present Act, IX of 1908, the wording of S. 14 (2) is comprehensive enough to cover all applications, and it should not be interpreted as excluding execution applications from its pur-

12. *Mrs. Baness v. Col. Turton*, 23 P.R. 1883.

13. *Ibid.*

14. *Muht. Hussain v. Inayat Husain*, (1914) 36 All. 482=12 A.L.J. 830.

15. *Hiralal v. Badridas*, 2 All. 792=7 I.A. 167 (P.C.); Followed in *Jahar v. Kamini Devi*, (1900) 28 Cal. 238; also see and cf. *Raja Pro-mothanath v. Robert Watson & Co.*, 24 W.R. 303 (Act. IX of 1871).

16. *Navalchand v. Amuchand*, (1893) 18 Bom. 734.

17. *Rajbullabh v. Joy Kishen*, (1892) 20 Cal. 29.

18. *Barrow v. Javerchand*, (1895) 19 Mad. 67 (69).

19. *Kartick Chandra v. Nilmani*, 32 I.C. 931=20 C.W.N. 686.

view.²⁰ Section 14 (2) has been applied by several High Courts to all *bona fide* applications for execution if they have been filed, and prosecuted in wrong Court in circumstances described in the section.²¹ This clause is intended to protect a party from time running against him during the pendency of a *bona fide* civil proceeding which may eventually prove abortive by reason of want of jurisdiction or some similar cause.²²

2517. Section 15, of the Limitation Act, applies to suits and applications for execution of *decrees*, and in computing the period during which the execution has been stayed or suspended will have to be excluded; though no application for execution was pending at the time, when the stay order was made in anticipation.²³ The fact that the decree-holder might possibly have obtained execution of his decree against other property of the judgment-debtor does not affect the question.²⁴ Section 15 applies to an absolute, not a limited stay of execution.²⁵ The period of 12 years fixed in S. 48, Civil Procedure Code, cannot be extended by the executing Court under S. 15, Limitation Act by the addition of the time during which a stay of execution was obtained by a prior order of the Court.²⁶

2518. Section 19 of the Limitation Act, while giving the effect of acknowledgment in writing speaks of the period prescribed for a suit or "application in respect of any property or right". Explanation III given in that section makes it clear that "*an application for execution of a decree*" is an "application in respect of right" within the meaning of S. 19. So the doctrine of acknowledgment will equally apply to execution applications: and a right to enforce a judgment or decree may be kept alive by an admission made by the judgment-debtor in favour of the decree-holder. Under Act XIV of 1859 there was a conflict of view as to whether the Act was applicable to execution proceedings.²⁷ Under

20. *Kala Singh v. Gehna Singh*, (1932) 138 I.C. 646=1932 Lah. 531. cf. *Dhandevi v. Kashmiri Bank*, 134 I.C. 878=1932 Oudh 69.

21. *Pandy v. Jamnadas*, 1923 Bom. 218=76 I.C. 317, s.c., on appeal 1925 Bom. 113=26 Bom.L.R. 470.

22. *Ibid.*

23. *Govindarajulu v. Ranga Rowe*, 62 I.C. 255 (256)=40 M.L.J. 124; compare *Krityanand v. Prithi Chand*, 12 Pat. 195=141 I.C. 760=1933 P.C. 52 (P.C.).

24. *Ghulam Nasiruddin v. Hardeo Prashad*, (1912) 34 All. 436.

25. *Chanbasappa v. Halibasappa*, 1924 Bom. 383=48 Bom. 485 and *Kirtyanand v. Prithichand*, 1929 Pat. 597.

26. *Subbarayan v. Natarajan*, (1922) 70 I.C. 396=45 Mad. 785=1922 Mad. 268; also see S. 526, p. 538, ante; *Ganeshlal v. Imtas Ali*, 1931 Oudh 351.

27. See S. 19, S. 592, p. 605; *Digamburee v. Sharado*, (1865) 3 W.R. Misc. 27; cf. *Mt. Lutchman v. Luckman*, (1866) 7 W.R. 79.

Act IX of 1871, S. 20 referring to *debts* and legacies was held not to cover judgment-debts.²⁸ However, under Act XV of 1877, an application for the execution of a decree was held to be an application in respect of a "right," *viz.*, "the right of the decree-holder to execution, within the meaning of S. 19, Limitation Act; according to the view of Allahabad²⁹; and Calcutta High Court,³⁰ though the Madras High Court took a contrary view.³¹ It is now expressly enacted by adding Expl. III, to the section, that an application for the execution of a decree or order is an application in respect of a right within the meaning of S. 19 of Act IX of 1908. It is also expressly enacted that the word "debt" in S. 20 includes money payable under a decree or order of Court. See Explanation, S. 20, Act IX of 1908. The difference of opinion between the Madras High Court on one side, and all the other High Courts on the other, is thus set at rest by Expl. III "which makes it clear that the provisions of the section are applicable to execution applications".³²

2519. Section 22, (re: joinder of ne-
cessary parties after time) is inapplica-
ble to execution proceedings.³³

Joinder of party
after time.

2520: TITLE III: STARTING POINT OF LIMITATION.

2521. **STARTING POINTS OF LIMITATION.**—Article 182, mentions several starting points. (1) The date of the original decree or order; (2) the date of the appellate decree or order

28. *Mungool v. Shamakanta*, 4 Cal. 708.

29. *Rahmat Rai v. Satgur Rai*, (1880) 3 All. 247 (F.B.); also see *Janki Prosad v. Ghulam Ali*, (1882) 5 All. 201; *Fateh Mohd. v. Gopaldas*, (1885) 7 All. 424; *Mohd. Said Khan v. Payag Sahu*, (1894) 16 All. 228; *Hingolal v. Mansaram*, (1896) 18 All. 384.

30. *Ram Coomar v. Jakurali*, (1882) 8 Cal. 716; also see and cf. *Trimbak v. Kashinath*, (1897) 22 Bom. 722; Relied on *Venkatrao v. Biji Singh*, 10 Bom. 108; also see *Taree Mahomed v. Mahomed Mabood Bux*, (1883) 9 Cal. 730, etc.

31. *Rama Rau v. Venkatesa*, (1882) 5 Mad. 171 (F.B.); Followed in *Kuppusami v. Rangasami*, (1904) 27 Mad. 608.

32. *Mt. Resha Kuari v. Rameshwar Ojha*, (1924) 79 I.C. 897 (898) = 1925 Pat. 197; also see *Lachmandas v. Ahmed Hasran*, (1917) 38 I.C. 105 (All.); *Ban Behary v. Janendra Nath*, (1914) 22 I.C. 709 (Cal.); also see *Chandra v. Ramdin*, 13 I.C. 702 = 16 C.W.N. 493; *Subbalakshmi v. Ramalinga*, (1918) 48 I.C. 298 = 42 Mad. 52; *Venkatrao v. Bije Singh*, (1886) 10 Bom. 108; *Jogendra Prasad v. Ashutosh*, (1917) 37 I.C. 138 = 24 C.L.J. 462; *Ramdas v. Kanshi Ram*, (1912) 14 I.C. 335 = 155 P.L.R. 1912; *Rampal v. Nandlal*, 13 I.C. 603 = 16 C.W.N. 346; *Viswanath v. Sitalakshmi*, 1921 Mad. 126 = 61 I.C. 970; also see *Shrinivas Krishna v. Narhar Khando*, (1908) 32 Bom. 296; *Janki Prosad v. Ghulam Ali*, (1882) 5 All. 201 and *Brindeswari v. Awadh Behary*, 6 I.C. 366; see S. 19, S. 593, pp. 608, 609, *ante*.

33. *Jagat Tarini Dasi v. Rakhal Chandra Tewary*, (1909) 10 C.L.J. 396 = 14 C.W.N. 752 = 3 I.C. 324.

or withdrawal of the appeal; (3) the date of the decision on review; (4) the date of amendment; (5) the date of the final order passed on an application, (a) for execution, or (b) to take some step-in-aid of execution; (6) the date of the original decree or the final decree of the appellate Court directing a refund; (7) the date at which the decree or order directs a payment to be made.

Registered decree. The period of limitation is 3 years from the above dates, but **six years** are provided for, when a *certified copy* of the decree or order (and not a mere memorandum) is registered.³⁴

2522. Clause (1).—Under the Limitation Act, Art. 182, the period of limitation begins, *firstly*, from the date of the decree or order appealed from; and under O. 20, R. 7, Civil Procedure Code (S. 205, Act XIV of 1882), "*the decree shall bear date the day on which the judgment was pronounced*". Therefore, the date of the decree is not the date on which the decree is reduced to writing and signed by the Court, but the date on which the Court delivers the judgment, (or makes the order), and expresses what the decree (or order) is.³⁵ When a person has the judgment of the Court in his favour, it may be said he then obtains his decree, and that the decree when subsequently drawn up, relates back to that time.³⁶⁻³⁷ This rule does not apply, however, to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, R. 3, cl. (5)]. The judgment is properly pronounced in Court when the parties know the effect of the judgment whether it would be necessary for them to appeal or not.³⁸ The rule as to date of decree being the starting point is applicable only to ordinary decrees, where other clauses of Art. 182, are inapplicable, *i.e.*, if there has been no appeal, no

34. *Raja Rughoo Nundan Singh v. Cochrane*, (1875) 24 W.R. 372 (Three years' limitation applied, where only a memorandum was registered); also see 1883 B.P.J. 168; cf. *Arunachala v. The Zemindar of Sivagiri*, (1883) 7 Mad. 328 (A memorandum of the decree was registered under S. 42 of Act XX of 1866—Suit to enforce the judgment-debts against the property in the son's hands).

35. *Anandram v. Nityananda*, (1916) 32 I.C. 744 (Cal.); *Golam Gaffar v. Goljan*, (1897) 25 Cal. 109; *Afzal Hossein v. Umdabibi*, (1895) 1 C.W.N. 93; *Rakhal v. Jogendra*, 10 C.L.J. 467=3 I.C. 391; *Surajdeo v. Musahroo*, 20 C.W.N. 950=1 P.L.J. 359=34 I.C. 504.

36-37. *Giribala Dasi v. Biswambhar Haldar*, 1924 Cal. 1064=40 C.L.J. 87=82 I.C. 746; also see *Ramkunai v. Purna Chandra*, 34 C.L.J. 494; cf. *Mangni Ram v. Liakat Hossein*, (1889) 17 Cal. 347 (P.C.) ("When the plaintiff has judgment that he shall have a decree in his suit it may be said that he has obtained his decree").

38. *Sagarmal v. Lachmisaran*, (1922) 1 Pat. 771=1923 Pat. 129=75 I.C. 879; also see *Hiralal v. Jamuna Prasad*, (1920) 5 P.L.J. 490.

review of judgment, no amendment, and no final order on previous application for execution, or to take some step-in-aid of execution. Clause (7) of Art. 182 directs computation from date of payment which the decree or order directs. Whatever the date on which a decree may be stamped as required by the Court-fees, or the Stamp Act, the *date of the decree* for the purposes of Art. 182, Limitation Act, must be taken to be the date of the judgment.³⁹

2523. Where the decree directs *something* to be done (not money to be paid) at some future date it would seem none of the several clauses in Cl. (3) of Art. 182 would apply, and the case would be governed by the residuary Art. 181, of the Limitation Act.⁴⁰ Article 182 is not exhaustive of applications for execution of decrees, and there are cases to which Art. 181 may apply.⁴¹ See notes under Art. 181, *ante*.

This article does not apply to an application asking the Court to enforce a decree granting an injunction (i) Decree for injunction. to abstain from some particular Act.⁴² Where a perpetual injunction has been granted, on each successive breach of it the decree may be enforced, under O. 21, R. 32 (S. 260, Civil Procedure Code, 1882), by an application made within 3 years of such breach under Art. 181, Limitation Act (Art. 178, Act V of 1877).⁴³ When a Court issues an order to a party in a suit for abstention from any particular act, and when the person to whom the order has been issued disobeys that order, the Court can take proceedings in contempt to enforce its authority, notwithstanding anything contained in Art. 182 (Art. 179, Act XV of 1877).⁴⁴ The **Lower Burma Chief Court** takes the view that an application to a Court to exercise its powers under O. 21, R. 32, Civil Procedure Code, is an application for execution of decree, within Art. 182, Limitation Act⁴⁵; and the **Calcutta**

39. *Bhajan Behari v. Girish Chandra*, (1913) 19 I.C. 410=17 C.W.N. 959 and *Kishore Mohan v. Provash Chandra*, (1923) 72 I.C. 646=1924 Cal. 351; Followed in *Budhukhan v. Boner*, (1927) 100 I.C. 476=1927 All. 335.

40. *Chhedi v. Lalu*, 24 All. 300.

41. *Rungia v. Nanjappa*, (1903) 26 Mad. 780.

42. *Bhagwandas v. Sukhdei*, (1905) 28 All. 300.

43. *Venkata Challam Chetty v. Veerappa Pillai*, (1905) 29 Mad. 314; Followed in *Udmi v. Sohanlal*, (1922) 66 I.C. 166 (Lah.) (*Held*, that where the decree-holder's right of grazing was infringed by the cultivation of the land by the proprietors, every successive season was the occasion of a fresh breach of the injunction).

44. *Ramsaran v. Chatar Singh*, (1901) 23 All. 465=(1901) A.W.N. 142.

45. *Haji Ahmad Moola Dawood v. Poker Mull*, (1912) 15 I.C. 945=5 Bur.L.T. 116; Dist. 23 All. 465=A.W.N. (1901) 142.

High Court has also held that the enforcement of an injunction is a question relating to the execution of the decree by which the injunction was granted, and it was queried whether Art. 181, Limitation Act applies to an application to enforce an injunction or whether such an application is *exempt* from the operation of the Limitation Act.⁴⁶

There is a difference of opinion on the question whether a decree for pre-emption is capable of enforcement, and falls under Art. 182, cl. (ii) Pre-emption decree. (1), Limitation Act. The **Allahabad view**,⁴⁷ which is followed also by the **Oudh Judicial Commissioner's Court**,⁴⁸ holds that the decree is not capable of execution till the payment is made. The **Madras High Court**, on the other hand, is of opinion that as it is perfectly open to the decree-holder to pay the amount into Court on the date of the decree, there can be no bar to the application of Art. 182, Limitation Act, and Art. 181, being the residuary article is inapplicable.⁴⁹ The **Nagpur Judicial Commissioner's Court** has adopted the Madras view. It has been held that when a decree for possession is passed on condition of a payment of a certain sum by the decree-holder, the starting point of limitation for execution of the decree is the *date of the decree*, and not the date of payment by the decree-holder, and an application for execution of such a decree is governed by Art. 182, and not by Art. 181, Limitation Act.⁵⁰ Limitation runs in such cases from the date of the decree, whether any time for payment is fixed or not. The only effect of fixing a time for payment is that payment cannot be made after the date fixed.¹ This agrees with the Bombay view in *Maruti v. Krishna*.²

In *Etyati Pooparambil v. Matalakat*,³ it was held that a decree for redemption should be treated as executable from the date on which it is passed although it allows the decree-holder no

(iii) Decree for redemption.

46. *Sachi Prasad Mukherji v. Amarnath*, (1918) 45 I.C. 864=27 C. L.J. 506.

47. *Chhedi v. Lalu*, 24 All. 300=A.W.N. (1902) 60.

48. *Chandika Prasad v. Kalu*, (1912) 52 I.C. 156=22 O.C. 82 (Oudh) (The payment of the money held to form a fresh starting point, whether Art. 181, or 182, applies) and cf. *Ajudhia Singh v. Drigpal Singh*, (1911) 10 I.C. 187 (Oudh) (Where the soundness of Allahabad view has been questioned).

49. *Rungiah v. Nanjappa*, 26 Mad. 780 (786); also see *Etyati Pooparambil v. Matalakat*, 28 Mad. 211 and *Ramappayya v. Charadda Bhatta*, 1910 M.W.N. 391.

50. *Dada v. Ganpatrao*, 130 I.C. 148=26 N.L.R. 353=1931 Nag. 54.

1. *Ibid.*

2. 23 Bom. 592.

3. 28 Mad. 211.

time within which to pay the mortgage-money. That decision was approved and followed by the **Oudh Judicial Commissioner's Court** in *Jogeshur Singh v. Raja Bhagwan Buksh*,⁴ in which the question was whether execution of a decree for redemption was barred by limitation. Where the decree did not provide any period within which the payment was to be made, the ordinary law of limitation, Art. 182, Limitation Act, would apply to the execution of the decree.⁵ In *Maloji v. Sagaji*,⁶ it was held that if no time for payment of the mortgage money is fixed by the decree for redemption, the decree-holder has three years within which to execute the decree. This decision was approved in *Narayan Govind v. Ananda Ram*⁷ and *Maruti v. Krishna*,⁸ in which it was said that such a decree may be executed after the expiry of three years if it has been kept alive by applications for execution made according to law within the prescribed period. The Bombay view has been followed by the **Nagpur Judicial Commissioner's Court** in *Dada v. Ganpat Rao*.⁹ Where the decree is indefinite as to the date on which payment is to be made, it would be incapable of execution on the date on which it was passed, and Art. 182, Limitation Act, would not govern the period of limitation for its execution.¹⁰ Accordingly, where, under the decree, the plaintiff was to pay a certain sum of money to the defendants in respect of the debt on mortgage "in *Chaitra* of any year," and the plaintiff was not entitled to take possession of the lands in dispute in any other month except *Chaitra*, it was held that it was really a preliminary decree, and under Art. 181, until he paid the money, he was not entitled to possession, and until possession was asked for and refused he had no right to apply to the Court.¹¹ Where the decree is against the

(iv) Decree against
Government.

Secretary of State for India in Council or against a public officer, S. 82 of the Civil Procedure Code, enacts that a time shall be specified in the decree within which it shall be satisfied; and execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of report of case by the Court for the orders of the Local Government. Art. 182 (1) has no application because the decree is not

4. 14 O.C. 10=9 I.C. 337.

5. *Naraindas v. Udhem Singh*, (1913) 18 I.C. 48=68 P.R. 1913=44 P.L.R. 1913.

6. 13 Bom. 567; Followed in *Krishna Chandra v. Jakeral Haq*, 1 I.C. 71=10 C.L.J. 115.

7. 16 Bom. 480.

8. 23 Bom. 592; Approved in 1931 Nag. 54=130 I.C. 148.

9. 1931 Nag. 54=130 I.C. 148=26 N.L.R. 353.

10. *Mt. Rukmina Kuer v. Sheo Dat Rai*, (1919) 51 I.C. 576 (All.)=17 A.L.J. 841.

11. *Hanmant v. Shidu Sambhu*, 1923 Bom. 300=47 Bom. 692.

capable of immediate execution, and if none of the other clauses of Art. 182 applies, the case would be governed by the residuary Art. 181, Limitation Act: and time would run on the expiry of three months mentioned in S. 82, Civil Procedure Code.¹²

2524. DECREES—CAPABLE OF EXECUTION.—

Their Lordships of the Privy Council have held in *Rameshwar Singh v. Homeshwar Singh*,¹³ that in order to make the provisions of the Limitation Act, Art. 182, apply, the decree sought to be enforced must be in such a form as to render it capable in the circumstances, of being enforced. The **Allahabad High Court** has taken the view that the first clause of the third column of Art. 182 only applies where there is a decree or order which can at its date be executed. The paragraph necessarily contemplates the existence of a decree capable of being executed at the date of the decree.¹⁴ The *terminus a quo* under that paragraph cannot be a date on which the decree or order is not executable.¹⁵ A decree indefinite as to the date on which payment is to be made by plaintiff would not be governed as to the period of limitation for its execution, by Art. 182, Limitation Act.¹⁶ So long as no decree capable of execution is in existence no question of limitation arises with respect to it and, consequently, a decree which cannot be executed cannot be time-barred.¹⁷ When a decree as originally drawn up is incapable of execution, time runs from the date when a proper decree capable of execution has been drawn up.¹⁸ A decree which leaves certain matters to be subsequently ascertained becomes capable of execution as to them only when they are ascertained, and an application for execution of such a decree in regard to such matters will not be barred if presented within three years of the time when by such matters being settled it becomes executable.¹⁹ Where a portion only of the amount decreed is left to be ascertained in future, limitation for execution of the whole decree runs from the date of ascertainment.²⁰ The date of decree means when the

12. *Rungiah v. Nanjappa*, 26 Mad. 780 (785, 786).

13. 1921 P.C. 31=40 M.L.J. 1=48 I.A. 17=59 I.C. 636 (P.C.).

14. *Muhd. Suleman v. Muhd. Yar*, (1894) 17 All. 39; Relied in *Chhedi v. Lahu*, (1902) 24 All. 300 (Pre-emption decree); also see *Behari v. Resal*, 5 A.L.J. 403=A.W.N. (1908) 191.

15. *Ali Ahmed v. Naziran Bibi*, (1902) 24 All. 542.

16. *Mt. Rukmina Kuer v. Sheodatrai*, (1919) 51 I.C. 576 (All.) and *Hanmant v. Shidu Sambhu*, 1923 Bom. 300=47 Bom. 692.

17. *Ibid.*

18. *Sanaton Sant v. Dinabandhu Giri*, (1921) 64 I.C. 622=34 C.L.J. 397; Applied 17 All. 39.

19. *Ratnachallam Ayyar v. Venkataramma Ayyar*, (1905) 29 Mad. 46.

20. *Vydianatha Iyer v. Subramanian Pattar*, (1911) 10 I.C. 552=36 Mad. 104.

decree is executable as a whole.²¹

Illustrations.

(1) A decree for sale of property which is non-existent is incapable of execution. On amendment of such a decree the decree-holder may execute the decree within three years from the date of the amendment.²²

Decree for sale of non-existent property.

(2) The execution and application contemplated by S. 48, Civil Procedure Code, relate to a decree which is executable at that date in respect of the application made and execution sought.²³ Where a decree absolute in a suit for foreclosure is incapable of execution owing to the absence of a formal order for delivery of possession, the rule of twelve years contained in S. 48, Civil Procedure Code applies from the date when the decree becomes capable of execution, i.e., from the date of the formal order for delivery of possession.²⁴ However, when a decree *nisi* is passed under the provisions of the Dekhan Agriculturists Relief Act, there is no necessity to apply to the Court to have the decree made absolute. The decree-holder should apply for execution at once, and the application to have the decree made absolute would at best be considered as a step-in-aid of execution, so that the order of the Court cannot be treated as a decree which would form a first starting point for the period of 12 years allowed by S. 48, Civil Procedure Code.²⁵

Application for execution contemplated by S. 48, C. P. Code.

(3) An application for an order absolute under S. 87, Transfer of Property Act (O. 34, R. 3, Civil Procedure Code) is not governed by Art. 182.²⁶

Application in mortgage suit.

(4) This article cannot apply to a decree for possession of property containing a condition that if the judgment-debtor paid an annuity, ending with the *Dasdua*, the decree should not be executed. Art. 181 would govern such an application.²⁷

Conditional decree for possession.

2525. TIME RUNS FROM FINAL DECREE.—Art. 182

applies to an application for execution of a mortgage-decree²⁸; and in such an application the date of the order absolute is to be considered the date of the decree for the purpose of calculating

(i) Mortgage decree.

21. *Surajman v. Anjore Shukul*, 1924 All. 263=46 All. 73.

22. *Muhd. Suleiman v. Md. Yar Khan*, 17 All. 39; Followed *Behari v. Risal*, 1908 A.W.N. 191.

23. *Narhar Raghunath v. Krishnaji Gobind*, (1912) 36 Bom. 368.

24. *Amir Ali v. Gopaldas*, (1920) 54 I.C. 924 (Nag.).

25. *Hirachand Khemchand v. Ababala Patil*, 1922 Bom. 95=46 Bom. 761=67 I.C. 153=24 Bom. L. R. 269.

26. *Ali Ahmed v. Naziran Bibi*, (1902) 24 All. 542; Reld. on *Ranbir Singh v. Drigpal Singh*, (1893) 16 All. 23 and *Ram Sarup v. Ghauran*, (1899) 21 All. 453.

27. *Muhammad Islam v. Muhammad Ahsan*, (1894) 16 All. 237.

28. *Troylokyanath v. Jyoti Prokash*, (1903) 30 Cal. 761=8 C.W.N. 251.

the period of limitation.²⁹ A final decree for sale under O. 34, R. 5, Civil Procedure Code, stands in the same position as any other decree for sale that may be passed by a Civil Court, and such applications fall under Art. 182, and are not governed by Art. 181, Limitation Act.³⁰ An application to execute a personal decree passed under O. 34, R. 6 (S. 89, Transfer of Property Act), is in effect an application for execution of the decree passed under S. 88, Transfer of Property Act.³¹ But an application for execution of a decree made under S. 90 of the Transfer of Property Act cannot save from limitation an application for execution of the decree for sale.³² A personal decree against the mortgagor may be executed within the period prescribed by cl. (1); and cl. (6) of Art. 182 would apply, if payment is enforceable from a future date, but neither cl. (1), nor cl. (6) applies to the execution of a mortgage-decree as such, namely, to an application for sale of the mortgaged property which the decree directs to be sold in default of payment of the ascertained amount on or before the day fixed in the decree.³³ Where a decree is in part a mortgage-decree and in part a simple money-decree, and the decree-holder first executes the decree, so far as it is a decree for sale, he can apply for execution of the simple money-decree later, partly by arrest of one of the judgment-debtors within three years of the previous application.³⁴ When an *ex parte* decree is set aside, and the case is re-heard only as against one of the defendants, limitation for execution against the other defendants begins to run from the date of the *ex parte* decree, and not from the date when the application of the other defendant for setting aside the *ex parte* decree was disposed of.³⁵ In *Ashfaq Hossein v. Gauri Sahai*,³⁶ where a decree for sale on a mortgage was passed against several defendants jointly, and made absolute, but it was subsequently set aside against one defendant, against whom it was passed *ex parte*, the decree subsequently passed against that defendant on the merits was held to have supplemented and completed the former, and time under the Limitation Act began to run from the date of latter decree, or rather from the date it was made absolute and justified the plaintiff for the joint execution of the decree.

29. *Yemani Chinna v. Varanasi Papaya*, 15 I.C. 732 (Mad.); *Ashfaq Hussain v. Gauri Sahai*, 33 All. 264=8 A.L.J. 332=9 I.C. 975 (P.C.).

30. *Somar Singh v. Deonand*, 1927 Pat. 215=8 P.L.T. 379=102 I.C. 811=6 Pat. 780.

31. *Mallikarjanadu v. Lingamurti*, (1900) 25 Mad. 244 (F.B.).

32. *Purna Chander v. Radhanath*, (1906) 33 Cal. 867.

33. *Rangiah v. Nanjappa*, 26 Mad. 780.

34. *Ram Bricch Rai v. Devo Tewari*, (1921) 44 All. 166.

35. *Umesh Chandra Roy v. Akrur Chandra*, (1919) 50 I.C. 15=46 Cal. 25 (29, 30); also see *Jabar Khan v. Rahim Khan*, 18 N.L.R. 190=1922 Nag. 197=68 I.C. 728 (An application for execution of an *ex parte* decree, against which no appeal is preferred, is governed by cl. 1, Art. 182).

36. (1910) 33 All. 264 (P.C.).

The principle of this ruling is in favour of starting limitation from the last date of the composite decree.³⁷

Under O. 20, R. 12, Civil Procedure Code, 1908, the amount of mesne profits to be awarded has to be determined not in execution, but by the decree itself³⁸ and the power to grant them vests in the Court by virtue of the special provision, whether the complaint contains or not a claim to future profits.³⁹ The decree, when it awards mesne profits without qualifying words must be construed to have granted past as well as subsequent profits.⁴⁰ Under O. 20, R. 12, a statutory obligation is laid upon the Court to inquire into mesne profits and pass a final decree on the application of the decree-holder.⁴¹ Such an application for the determination of mesne profits is one within the scope of Art. 181⁴²; or, it may be made at any time so long as the suit is a pending suit.⁴³ But, the Court having power to determine past and future mesne profits in the suit itself, may make a decree called the final decree for the mesne profits capable of execution, which would be governed as to limitation by the first paragraph of Art. 182 of the Limitation Act.⁴⁴ A decree for possession and mesne profits may be partly a final, and partly a preliminary decree.⁴⁵ The final part, *viz.*, for possession, can be executed apart from the preliminary part, and it falls within Art. 182, Limitation Act.⁴⁶ A final decree for mesne profits cannot be made unless the amount due is found upon further enquiry.⁴⁷ Hence, time for execution of the decree for *possession* runs at the latest from the date of the final decree of the appellate Court, and not from the time when the decree ascertaining the profits is passed.⁴⁸ However, if the Court in a suit for possession after ascertaining mesne profits passes a decree for past and future mesne profits, besides directing defendant to deliver possession to plaintiff, without directing an inquiry the decree is not preliminary

37. Mitra's Limitation Act, Vol. II, p. 2020.

38. *Kemgam Swami v. Vaddadi Subamma*, 1930 Mad. 30=53 Mad. 838 =124 I.C. 290=57 M.L.J. 728=30 L.W. 810.

39. *Ibid.*

40. *Ibid.*

41. *Alluri Timararaju v. Narasimha*, 1928 Mad. 522=109 I.C. 528=1928 M.W.N. 222=28 L.W. 152=54 M.L.J. 665.

42. *Ibid.*

43. *Shanker Appaji v. Gangaram Bapuji*, 1928 Bom. 236=52 Bom. 360=109 I.C. 734=30 Bom. L. R. 503.

44. *Ram Golam v. Chintaman Singh*, 1926 Pat. 218=7 P.L.T. 313=93 I.C. 939=5 Pat. 361 (F.B.).

45. *Satish Chandra v. Sarat Kamini*, 1929 Cal. 383=118 I.C. 852.

46-48. *Ibid.*

but final.⁴⁹ Where the decree in a suit for redemption of a usufructuary mortgage provided that certain mesne profits were payable to the mortgagor, the mortgage having been more than satisfied by the profits of the property, and the amount of mesne profits was to be ascertained in the execution department, it was held that as regards execution of the decree in respect of such mesne profits time did not begin to run against the mortgagor until the profits had in fact been ascertained.⁵⁰

2526. **CLAUSE (2).—**

2527. There is no definition of “*appeal*” in the Civil Procedure Code, and any application by a party to an appellate Court asking to set aside a decision of a subordinate Court is an appeal within the ordinary acceptation of the term.¹ An appeal is none the less an appeal because it is **irregular or incompetent.**²

2528. Hence an appeal against an order granting the review would be included in the above definition though it is incompetent.³ The word “*appeal*” means not only an appeal from the original decree, but also an appeal against an order passed in review of the original judgment.⁴ Their Lordships of the Privy Council have held in *Nagendranath Dey v. Suresh Chandra*,⁵ that the words of Art. 182 (2) are plain, and without any qualification either as to the character of the appeal or as to the parties to it, and that where an appeal, irregular in form, and insufficiently stamped is dismissed both on the ground of irregularity and upon the merits, it is nevertheless an “*appeal*” within the meaning of Art. 182 (2), cl. 2, Limitation Act,⁶ and though the judgment-debtors against whom execution is

49. *Muthu Alagappa v. Ahmed Ibrahim*, 1925 Mad. 1276=22 L.W. 347=90 I.C. 789; *Reld. on Subbe Goundan v. Krishnamachari*, 1922 Mad. 112=45 Mad. 449=42 M.L.J. 372.

50. *Narsing Das v. Debi Prasad*, (1918) 40 All. 211; *Folld. Mohamad Umarjan v. Zinat*, 25 All. 385.

1. *Nagappa Bandappa v. Gurushantappa*, 1933 Bom. 255=67 Bom. 388=35 Bom. L. R. 432.

2. *Ibid.*, 1933 Bom. 255=67 Bom. 388.

3. *Ibid.*

4. *Narsing v. Madhu*, 4 All. 274=1882 A.W.N. 25; cf. *Ram Rattan v. Upendra Chandra*, (1922) 68 I.C. 727=1923 Cal. 288 (Appeal against the dismissal of the review application was incompetent, and the running of limitation against a decree-holder was held not suspended by reason of the incompetent appeal).

5. 1932 P.C. 165=137 I.C. 529=59 I.A. 283=60 Cal. 1=34 Bom. L. R. 1065 (P.C.).

6. *Dinatulla Beg v. Wajid Ali Shah*, (1884) 6 All. 438—which is now insupportable. *Held*, that where an appeal is rejected owing to the memo-

sought are not parties to the appeal, time only runs against the decree-holders from the date of the appellate Court's decree dismissing the appeal.⁷ Where though the plaintiff's claim was decreed in full, the plaintiff appealed by reason of certain remarks in the judgment, but the appeal was dismissed as incompetent, it was held that the limitation (under S. 48, Civil Procedure Code) must be calculated from the dismissal of the appeal.⁸

2529. The **Bombay High Court** held in *Jivaji v. Ramchandra*,⁹ that the appeal referred to in

(ii) Appeal from decree or order sought to be executed.

Art. 182, cl. 2, is clearly an appeal from the decree or order sought to be executed, and not an appeal from an order of the

Court refusing to set it aside. Accordingly, that the unsuccessful attempts made by the defendants to set aside the *ex parte* decree could not have the effect of extending the period prescribed by law for execution of the decree. The **Calcutta High Court** has also held that the words "final decree" mentioned in the article must be the final decree in the suit, and cannot be held to include an order in an appeal upon an application to set aside that decree under O. 9, R. 13 (S. 108, Civil Procedure Code, 1882).¹⁰ The **Patna High Court** takes the same view, that the words "*where there has been an appeal*" in cl. 2, Art. 182, Limitation Act, mean where there has been an appeal against a decree in the suit and cannot be held to include an appeal against an order made on an application to set aside that decree.¹¹ This has been followed by the **Nagpur Judicial Commissioner's Court** in *Jhar Khan v. Rahim Khan*,¹² and by the **Lahore High Court** in *Mulkh Raj v. Gurditta Shah-Hari Chand*,¹³ where the view taken in *Lutuful Haq v. Sumbhudin Pattuck*,¹⁴ is held to be no longer good law.

random of appeal being insufficiently stamped, there has not been an appeal or final order within cl. 2, Art. 182, Limitation Act.

7. 1932 P.C. 165=137 I.C. 529=60 Cal. 1 (P.C.).

8. *Rup Narain v. Sheo Prakash*, 1921 All. 134=19 A.L.J. 159=43 All. 405; also see *Kameshwar v. Beni Madho*, 1931 Pat. 422=12 P.L.T. 701; cf. *Nandlal v. Dharm Kirti*, 48 All. 377; Dist. 1932 P.C. 165=60 Cal. 1 (P.C.).

9. (1891) 16 Bom. 123; Reld. on *Sheo Prasad v. Anrudh Singh*, 2 All. 273; Diss. from *Lutful Haq v. Sumbhudin*, 8 Cal. 248.

10. *Baikanta Nath Mittra v. Aughore Nath Bose*, (1893) 21 Cal. 387; Not Foll. 8 Cal. 248; also see *Fakir Chand v. Daiba Charan*, 54 Cal. 1052=1927 Cal. 904=104 I.C. 466; Foll. 21 Cal. 387 and 16 Bom. 123.

11. *Rai Brij Raj v. Nauratanlal*, (1918) 44 I.C. 575=3 P.L.J. 119; cf. *Somar Singh v. Deonandan*, 6 Pat. 780=102 I.C. 811=1927 Pat. 215 (*Held*, that the words "where there has been appeal" should not be interpreted to mean where there has been an appeal *against* a decree or order, for the execution of which the application is made).

12. (1922) 68 I.C. 728=1922 Nag. 197=18 N.L.R. 190; Foll. 2 All. 173; 16 Bom. 123; 21 Cal. 387.

13. (1929) 120 I.C. 179=1929 Lah. 283=30 P.L.R. 283.

14. 8 Cal. 248=10 C.L.R. 143.

2530. The word "appeal" in Art. 182 (2) should not be restricted to mean *bona fide* appeal. The fact that there was an appeal of which the appellate Court had seizin, and which was determined by a judgment of that Court, is sufficient to bring the provisions of Art. 182 (2) into operation and the period of limitation for execution would run from the date of the final decree or order of the appellate Court.¹⁵ If in a case no appeal really lies, an appeal is *bona fide* presented to the Court which would have the power to entertain an appeal if such a one lay, the proceedings are sufficiently of the nature of an appeal to be considered an appeal for the purpose of Art. 182, Limitation Act.¹⁶ An order dismissing an appeal on the ground of deficient payment of Court-fee is equivalent to a decree, and limitation would run with regard to execution from the date of that order.¹⁷ Where a memorandum of appeal has been presented to the proper Court, but is rejected for non-payment of additional Court-fees declared to be leviable thereon, limitation would still run from the date of the appellate Court's order of rejection.¹⁸ Where there has been an appeal, and where that appeal has been properly presented and is within time, an order dismissing the appeal, or putting an end to the appeal in any way is either a decree or order within the meaning of Art. 182 (2), although it may be that in many cases such an order is not an order of which execution could be sought.¹⁹ The question as to whether an appeal properly presented is barred by limitation or not is a question which has to be decided by the Court to which the appeal is preferred, and when that question is decided and it is found that the appeal is barred by limitation, then an order will be made or a decree will be passed dismissing the appeal. Such an order or decree will come within the operation of Art. 182 (cl. 2), and a fresh period of limitation will begin to run from the date of such order or decree.²⁰ Presentation of appeal does not include its admission. The words "where there has

(iii) Appeal not *bona fide*.
Presentation of appeal.
Presentation not admission.

15. *Basanta Kumar Roy v. Manjuri Dassi*, 1922 Cal. 349=74 I.C. 679.

16. *Donald Graham & Co. v. Kewalram*, (1924) 79 I.C. 477=16 S.L.R. 245; also see *Wasir Mahton v. Lalit Singh*, 9 Cal. 100; cf. 48 All. 377.

17. *Raghuprasad Singh v. Jadunandan*, 1921 Pat. 6=59 I.C. 896=6 P.L.J. 27; *Dist. Batuknath v. Munni Dei*, (1914) 36 All. 284=23 I.C. 644=41 I.A. 104 (P.C.).

18. *Rup Singh v. Mukhraj Singh*, 7 All. 887; *Basanta Kumar v. Manjuri*, 74 I.C. 679=1924 Cal. 349.

19. *Raghuprasad Singh v. Jadunandan*, 1921 Pat. 6=59 I.C. 896=6 P.L.J. 27; cf. *Murlidhar v. Tapeshrai Rai*, 48 All. 377=1926 All. 440=94 I.C. 961.

20. *Kameshwar Singh v. Beni Madha Singh*, 1931 Pat. 422=

been an appeal" in Art. 182, Limitation Act, mean where a memorandum of appeal has been presented in Court. There are not such words in Ss. 3 and 4 of the Limitation Act, as appeal *admitted*; and there is nothing in the articles of the Limitation Act, and O. 41, R. 1, Civil Procedure Code (S. 541, Civil Procedure Code, 1882) that would permit the construction that these words mean that there has been an appeal presented and admitted.²¹

2531. Their Lordships of the **Privy Council** have held, in several cases, that the order dismissing the appeal from want of prosecution "does not deal judicially with the matter of the *suit*, and can in no sense be regarded as an order adopting or confirming the decision appealed against."²² In the case of a dismissal of appeal for want of prosecution, the appeal must be considered not to have been filed and the appellant is in the same position as if he had not appealed at all.²³ The **Lahore High Court** has held recently that the Privy Council rulings do not insist that "the order dealing judicially with the matter of the *suit*" should be an order on the merits of the appeal before the Court. Accordingly, it does not appear to have been the intention of their Lordships of the Privy Council to lay down the proposition that where an appeal is dismissed in default, under O. 41, R. 17, Civil Procedure Code, limitation runs from the date of the decree appealed against, and not from the date of the dismissal by the appellate Court in default. The order under O. 41, R. 17, Civil Procedure Code, is a judicial order.²⁴ As to order dismissing for default of prosecution such as non-payment of printing charges, see *Girwal Raut v. Bigu Raut*.²⁵

12 P.L.T. 701=134 I.C. 425; cf. *Mir Waziruddin v. Deokinandan*, 6 C.L.J. 472 (Appeal rejected, which was sought to be preferred, after excusing the delay under S. 5, Limitation Act).

21. *Akshoy Kumar Nundi v. Chunder Mohun*, (1888) 16 Cal. 250=22 C.W.N. 158.

22. *Abdul Majid v. Jawahir Lal*, 1914 P.C. 66=36 All. 350 (P.C.); *Batuk Nath v. Munni Dei*, 1914 P.C. 65=23 I.C. 644=41 I.A. 104=36 All. 284 (P.C.); *Sachindra Nath v. Maharaj Bahadur*, 1922 P.C. 187=74 I.C. 660=48 I.A. 335=49 Cal. 203 (P.C.).

23. *Nagappa v. Gurushantappa*, 1933 Bom. 255=57 Bom. 388=147 I.C. 1227=35 Bom. L. R. 432; Folld. in *Narayan Ganpat v. Radhabai Krishnaji*, (1936) 162 I.C. 223=1936 Bom. 162=38 Bom. L. R. 215; also see *Surajdeo Narain Singh v. Partap Rai*, (1923) 75 I.C. 284=1923 Pat. 14=2 Pat. 739 (Order dismissing appeal for want of prosecution not regarded as adopting or confirming decision appealed from).

24. *Bank of Upper India v. Sri Krishna Das*, 1935 Lah. 771 (773)=16 Lah. 564=37 P.L.R. 727.

25. 1930 Pat. 146; also see and cf. *Hiralal Kumar v. Genu Mahto*, 4 Pat. 844 and *Raghu Prasad v. Jamnandan*, 59 I.C. 896=6 P.L.J. 27; Diss. in *Hirday Narain v. Maheshwari Prasad*, 1932 Pat. 251.

2532. FINAL ORDER DISPOSING OF APPEAL.

2533. Under the previous Act, there was a conflict of views as to the effect of withdrawal of an appeal.²⁶

Effect of withdrawal
of appeal.

The withdrawal rendered it unnecessary, according to one view, for any decree to be drawn up,²⁷ but the order allowing withdrawal, at any rate, amounted to a "final order" disposing of the appeal.²⁸ The Madras Full Bench, held in the case of *Ramanuja v. Lakshmi*,²⁹ that where a second appeal is preferred, and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time runs from the date of such order, and it makes no difference that such second appeal was withdrawn by the appellant. The present Act has now added the words "*or the withdrawal of the appeal*" to cl. (2), of the third column to remove the conflict.³⁰ The Bombay High Court decisions are now superseded. An appeal is withdrawn within the meaning of Art. 182 (2), Limitation Act on the date when the order permitting it to be withdrawn is made by the Court, and not on the date when the application for permission to withdraw the appeal is filed.³¹ Where a Court decides that an appeal has been wrongly presented to it, and orders a return of it for presentation to the proper Court, such an order is neither a "final order" of the appellate Court nor a withdrawal of the appeal, within Art. 182, Cl. (2).³² Where an appeal was dismissed upon the representation of the appellant's counsel that he was unable to support it, limitation was held to run from the date of the final decree in appeal.³³ Where the trial Court, on remand after a compromise decree in High Court, passed a supplementary decree in terms of the High Court decree, which the High Court set aside on revision, it was held that the decree was capable of execution, and the limitation under Art. 182 (2) began to run from the date on which the High Court set aside the supplement-

26. *Patloji v. Ganu*, 15 Bom. 370; *Chudasama v. Mahani*, 16 Bom. 243; *Abdul Rahiman v. Maidin*, 22 Bom. 500 (506); *Hingan Khan v. Ganga Pershad*, (1876) 1 All. 293; *Manavikrama v. Uniappan*, 15 Mad. 170 (173); *Bhagwan v. Mohanlal*, 54 P.R. 1908; cf. *Bholanath v. Kanti Chandra*, 25 Cal. 311.

27. See 15 Bom. 370; 16 Bom. 243; 15 Mad. 170 (173).

28. *Wazira Mahton v. Lalit Singh*, 9 Cal. 100.

29. *Peria Kovil Ramanuja v. Lakshmi Das*, (1906) 30 Mad. 1=16 M.L.J. 393 (F.B.).

30. *Kelu Nair v. Meenakshi*, 25 M.L.J. 586=21 I.C. 639; *Fazlul Rehman v. Shah Muhammad*, 30 All. 385; *Ramchandra v. Nasarali*, 94 I.C. 390 (All.); *Shyam Mandal v. Satinath*, 24 C.L.J. 523=44 Cal. 954.

31. *Ramchandra v. Nasarali*, 94 I.C. 390=24 A.L.J. 544.

32. *Abdul Kadir v. Samipandia*, (1920) 43 Mad. 835=39 M.L.J. 431=60 I.C. 267.

33. *Fazlul Rehman v. Shah Muhammad Khan*, (1905) 30 All. 385; *Folld.* 30 Mad. 1=16 M.L.J. 393 (F.B.).

tary decree passed by the Court of first instance.³⁴ A dismissal of appeal under S. 551, Civil Procedure Code, 1882 (O. 41, R. 11, Civil Procedure Code, 1908), is a decree which can be executed,³⁵ and such determination being an exercise of the function of the appellate Court gives a fresh starting point of limitation.³⁶

2534. The words "appellate Court", in Art. 182 (2), signify "Appellate Court," the Court to which the appeal mentioned meaning of. in the article has been preferred.³⁷ The expression means an appellate Court having jurisdiction to hear the appeal,³⁸ i.e., a proper appellate Court. Accordingly an order returning an appeal for presentation to proper appellate Court is not a final order of an appellate Court within the meaning of Art. 182 (2).³⁹ The order contemplated in this clause is an order which disposes of the appeal *on the merits* in some form, and not simply one which intimates to the party that the appeal should be filed elsewhere.⁴⁰ But this view is to be compared with the note under para "Appeal not prosecuted": and "dismissal in default", where the order disposing of the appeal is not on merits.⁴¹ The "appeal" referred to in this clause, does not include Revision under S. 115, Civil Procedure Code, or S. 25, Provincial Small Causes Courts Act.⁴²

2535. Where an appellate decree either affirms, modifies, or reverses the decree of the trial Court, the period of limitation will begin to run (under S. 48, Civil Procedure Code), from the date of the decree of the Appellate Court.⁴³ This is on the principle of merger, laid down in an early Calcutta Full Bench case.⁴⁴ Another Full Bench of the same High Court held

34. *Gurpada Haldar v. Tarit Bhusan Chowdhry*, (1918) 44 I.C. 141 (Cal.).

35. *Asmabibi v. Ahmed Hussain*, (1908) 30 All. 290 (295).

36. *Akshoy Kumar Nundi v. Chunder Mohun*, (1887) 16 Cal. 250 and *Murlidhar v. Tapesri Rai*, A.W.N. (1894) 46=48 All. 377=1926 All. 440=24 A.L.J. 465=94 I.C. 961; cf. *Rupnarain v. Sheo Prakash*, 1921 All. 134=19 A.L.J. 159=43 All. 405; also cf. *Kameshwar Singh v. Beni Madho Singh*, 1931 Pat. 422.

37. *Wazir Mahton v. Lalit Singh*, (1882) 9 Cal. 100; also see *Abdul Kadir v. Sami Pandia*, (1920) 43 Mad. 835.

38. *Abdul Kadir v. Sami Pandia*, (1920) 43 Mad. 835=60 I.C. 287=39 M.L.J. 431.

39-40. *Ibid.*

41. *Akshoy Kumar v. Chunder Mohun*, 16 Cal. 250, etc.

42. *Subramania v. Seethi Ammal*, 36 Mad. 135; *Phusa v. Surjan*, 20 I.C. 563 (Punj.); *Mohfuzali v. Birji Nand*, 28 I.C. 282 (Punj.); cf. *Mary Gold v. Goldenberg*, 16 Bom. 550.

43. *Nandlal v. Dharm Kirti*, 48 All. 377=1926 All. 440=24 A.L.J. 465=94 I.C. 961; cf. *Rup Narain v. Sheo Baksh*, 1921 All. 134=19 A.L.J. 159=43 All. 405; also see and cf. *Kameshwar Singh v. Beni Madho*, 1931 Pat. 422.

44. *Ramchurn Bysack v. Luchee Kant*, 16 W.R. (F.B.) 1=7 B.L.R. 704 (F.B.).

in *Lachman Persad Singh v. Jadunandan*,⁴⁵ that although an order of H. M. in Council may confirm a decree of the Court below, that order is the paramount decision in the suit, and any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirmed. The order in council becomes in fact the decree or order of the appellate Court, and "it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution."⁴⁶ Where an appeal to the High Court from dismissal of suit is dismissed, and his appeal to the Privy Council is also dismissed for non-prosecution, the period of limitation under Art. 182 runs not from the dismissal of the appeal to the Privy Council for want of prosecution, but from the order of the High Court confirming the decree which was "*the final decree of the appellate Court*", and which did not become merged in the order of the Privy Council.⁴⁷ However, the **Bombay High Court** takes the view that the words "final decree" merely indicate the final order by which an appellate Court decided an appeal, and they cannot be interpreted to mean that the decree must be one which finally disposes of the suit, and merges in itself the decretal order of the original Court. The word "final" is used in contradistinction with "interlocutory".⁴⁸ Of course, if the decree of the appellate Court reverses the decree of the first Court or embodies the decision of the lower Court, in other words, if the decree of the lower Court is merged, in the decree of the appellate Court, time must obviously run from the date of the appellate decree.⁴⁹ When the appellate Court confirms the decree of the Court below, the latter becomes incorporated in the decree of the appellate Court which is thenceforth the only decree to be executed,⁵⁰ for it has been substituted for that of the original Court, and technically a fresh application for execution is necessary.¹ The **Lahore High Court**² has observed in a recent case that

45. (1882) 8 Cal. 218 (F.B.).

46. *Pitts v. La Fontaine*, L.R. 6 App. Cas. 482 and *Lethbridge v. Prohlad Sen*, 19 W.R. 301; cited in 8 Cal. 218 (F.B.).

47. *Hirday Narain Singh v. Rao Maheshwari*, 1932 Pat. 251=11 Pat. 477=139 I.C. 198; Relied on 1914 P.C. 65 and 1922 P.C. 187 (P.C.).

48. *Nagappa v. Gurushantappa*, 1933 Bom. 255=57 Bom. 388=35 Bom. L.R. 432; Followed in *Narayan Ganpat v. Radhabai Krishnaji*, (1936) 162 I.C. 223=1936 Bom. 162=38 Bom.L.R. 215 (*Held*, that sub-clause (2) does not refer exclusively to appeals against a decree).

49. *Ibid*.

50. *Sakhal Chand v. Velchand*, (1893) 18 Bom. 203; *Nanachand v. Vithu*, (1894) 19 Bom. 258; *Satzaji v. Shakerlal*, (1914) 39 Bom. 175=26 I.C. 754 and *Darubhai v. Bechar*, 1925 Bom. 270=49 Bom. 305.

1. *Harilal Dalsukh v. Mulchand Asharam*, 1930 Bom. 225=127 I.C. 199.

2. *Bank of Upper India v. Sri Krishna Das*, 1935 Lah. 771 (773)=16 Lah. 564=37 P.L.R. 727.

"there appears to be no conflict regarding the proposition that when an appellate Court makes an order which has the effect of finally disposing of an appeal, time runs from the date of that order, and not from the date of the decree against which the appeal was preferred".³

The Judicial Commissioner's Court, N.-W.F.P. has held that the plain meaning of cl. (2) of Art. 182, is that the time for execution runs from the final order of the appellate Court, whether that be an order of dismissal in default of prosecution or an order passed on the appeal on the merits.⁴

2536. ILLUSTRATIVE CASES.—

(1) Where a decree of 1887 made by a District Court for the possession of land awarded to the plaintiff future mesne profits, and this decree after having been reversed by the High Court was restored and affirmed by the order in Council in 1895, it was held that the order in Council was the only operative decree in the case, under which mesne profits would be taken as due from the institution of the suit, in 1886, down to 1895, when possession was delivered.⁵ (See "Appeal to Privy Council"—*post.*)

(2) Where a decree for payment of money was modified in appeal, it was held that the decree to be executed being the decree made on appeal, the 12 years mentioned in S. 48, Civil Procedure Code (S. 230, Civil Procedure Code, 1882) would run from the date of the appellate decree.⁶ In the case of a decree for payment of money, or the delivery of property, the period of limitation for an application to execute a portion of the decree which has not been appealed against runs, under S. 48, Civil Procedure Code, from the date of the decree on appeal.⁷

(3) Where *P*'s suit upon a hand note against *A* and *B* was decreed against *A* but dismissed against *B*, and *P* appealed against *B*, without impleading *A*, and his appeal was dismissed it was held that the time for an application for execution against "*A*" ran from the date of the appellate decree finally dismissing the suit against *B*.⁸

(4) The time for executing a decree *nisi* for possession runs from the date of the High Court's decree confirming the decree of the lower Court, for what is to be looked at and interpreted is the decree of the final appellate Court.⁹

3. *Ramanuja v. Lakshmidas*, 30 Mad. 1=16 M.L.J. 393 (F.B.); Approved in *Gohur Bepari v. Ramkrishna*, 32 C.W.N. 387=1927 Cal. 60=104 I.C. 566 and *Ragho Prasad v. Jadunandan*, 1921 Pat. 6=59 I.C. 896=6 P.L.J. 27 and in *Nagendranath v. Suresh*, 1932 P.C. 165=60 Cal. 1 (P.C.) and *Abdulla Asghar Ali v. Ganesh Das*, 1933 P.C. 68=142 I.C. 326=60 Cal. 362 (P.C.).

4. *Budhu Ram v. Mushtaqshah Singh*, 1935 Pesh. 129; Relied on 1921 Pat. 6=59 I.C. 896.

5. *Bhup Indar v. Bijai Bahadur*, (1900) 23 All. 152=27 I.A. 209 (P.C.); also see *Nand Kumar v. Bilas Kumar*, (1918) 43 I.C. 855 (Pat.).

6. *Mahomed Mehdi v. Mohun Kanta*, (1907) 34 Cal. 874.

7. *Krishnamachariar v. Mangammal*, (1902) 26 Mad. 91 (F. B.); Dissented from *Muthu v. Chellappa*, 12 Mad. 479.

8. *Satish Chandra v. Girish Chandra*, (1921) 60 I.C. 915=47 Cal. 813.

9. *Satwaji v. Sakharlal*, 39 Bom. 175=26 I.C. 754; Followed 27 I.A. 209=23 All. 152 (P.C.) and 19 Bom. 258.

(5) It has been held, by a **Full Bench of the Allahabad High Court**, that in a suit for sale on a mortgage, if an appeal has been preferred from the preliminary decree, the decree which is to be made absolute is the decree of the final Court of appeal. In such a case, therefore, limitation for an application for a decree absolute runs, not from the expiry of the term fixed for payment by the original decree, but from the date of the decree in the final Court of appeal.¹⁰

(6) Where an appeal is preferred against a decree, the decree-holder is entitled to wait until the decision of the appeal before applying for execution of the decree, and limitation does not commence to run against him till the appeal is decided.¹¹ An appeal from an amended decree postpones the date from which limitation runs for execution purposes.¹² The appeal, by itself, never operates as a stay. There is the right to execute the moment the decree is passed, but the **broad principle** is that the time for execution is not computed when the right to apply accrues, but is postponed in cases where there is an appeal.¹³

2537. Their Lordships of the **Privy Council** have laid down **Abatement of appeal.** in *Abdulla Asghar Ali v. Ganesh Das*,¹⁴ that when an order is judicially made by an appellate Court which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Art. 182 (2). In this case the appellate Court had considered the judgment-debtor's contention that his appeal had not abated, and held that it had. He rejected the application to set aside the abatement. This order was not appealed against and became final. Their Lordships noticed that there had been some difference of opinion upon this question in Indian Courts, and approved of the **Calcutta** decision in *Gohur Bipari v. Ram Krishna*,¹⁵ where it was held that an order of an appellate Court declaring that an appeal has abated and dismissing the appeal on the ground of abatement is a "*final order of the appellate Court*", within the meaning of Cl. (2) of Art. 182, Limitation Act, and an application for execution presented within three years of such an order is not barred. In *Muhd. Razi v. Karbalai Bibi*,¹⁶ the **Allahabad High Court** held that an order declaring an appeal to have abated is in effect an affirmation of the decree of the Court

10. *Gajadhar Singh v. Krishan Jiwan*, (1917) 39 All. 641 (F.B.) [O. R. *Madhoram v. Nihal Singh*, (1915) 38 All. 21; Relied on 11 All. 267 and 36 All. 250].

11. *Krishenlal v. Satyabala*, (1924) 81 I.C. 569=51 Cal. 342=1924 Cal. 686.

12. *Nagendranath v. Ambica*, 1929 Cal. 676=50 C.L.J. 12=33 C.W. N. 958.

13. *Ibid.*, 1929 Cal. 676.

14. 1933 P.C. 68=142 I.C. 326=60 Cal. 662=37 C.W.N. 412 (P.C.).

15. 1927 Cal. 760=104 I.C. 566; Followed *Lokenath Singh v. Gaju Singh*, 31 I.C. 426=20 C.W.N. 178 (183)=22 C.L.J. 333; *Raghu Prasad Singh v. Jadunandan*, 59 I.C. 896=6 P.L.J. 27=2 P.L.T. 28; *Muhd. Razi v. Karbalai Bibi*, 5 I.C. 473=32 All. 136=7 A.L.J. 58.

16. 5 I.C. 473=32 All. 136=7 A.L.J. 58.

below, and limitation only begins to run against the decree-holder from the date of such order and not from the date of the decree under appeal. The **Patna High Court** held in *Hiralal v. Ganu Mahto*,¹⁷ that the fact that the appellants allowed their appeal to abate against the deceased respondent could not prevent the latter's legal representatives from taking the benefit of the appellate Court's decree and limitation ran under Art. 188, Cl. (2) from the date of the decree of the Court of appeal. In *Raghu Prasad Singh v. Jadunandan*,¹⁸ it was pointed out that there is no distinction in principle and there ought to be no difference in the result for the purpose of Art. 182, Cl. (2) when the appellant instead of withdrawing from the appeal allows it to abate. In that case it has been held that where an appeal is presented within time any order putting an end to the appeal in any way is either a decree or order within the meaning of Art. 182, Cl. (2). The **Calcutta High Court** has held that an order of the High Court declaring that an appeal has abated is, if not a decree, certainly an order which has finally disposed of the suit, and that, therefore, an application for execution presented within 3 years from the date of such order is not barred.¹⁹ This agrees with the view taken by the **Madras Full Bench** in *Peria Kovil v. Lakshmidas*,²⁰ that when an appeal is entertained, and an order made by the trial Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time runs from the date of the order of the appellate Court. The opposite view taken in *Fazal Husen v. Raj Bahadur*,²¹ and in *Tikait Krishna v. Wazir Narain*,²² is no longer authoritative.

2538. APPEAL AGAINST PART OF DECREE, OR SOME OF DEFENDANTS.—It is now fully established by judicial decisions that there is only a single starting point where there has been an appeal Cl. (2), review, Cl. (3), or amendment Cl. (4), although it might be open in some of the cases falling within their purview for the decree-holder to apply for the execution of a part of the decree before the proceedings in appeal, review, or amendment have terminated.²³ It has also been decided that an application for execution of a portion of a decree or against

17. 91 I.C. 308=4 Pat. 844=1925 Pat. 585=7 P.L.T. 209.

18. 59 I.C. 896=6 P.L.J. 27=2 P.L.T. 28 (Explained the Privy Council decisions in *Batuknath v. Manni Dei*, 23 I.C. 644=36 All. 284=41 I.A. 104 (P.C.) and *Abdul Majid v. Jawahirlal*, 23 I.C. 649=36 All. 350 (P.C.).

19. *Ramgati Dhar v. Nagendralal*, 1 C.L.J. 17 Note.

20. 16 M.L.J. 393=1 M.L.T. 233=30 Mad. 1 (F.B.).

21. 20 All. 124=A.W.N. (1897) 218.

22. 58 I.C. 977=5 P.L.J. 731=2 P.L.T. 49.

23. *Vyidianatha v. Subramania*, (1911) 10 I.C. 552=36 Mad. 104 (106); Relied on *Gopal Chander v. Gosaindas*, (1898) 25 Cal. 594 (F.B.); *Krishnamachariar v. Mangammal*, (1903) 26 Mad. 91 (F.B.); *Abdul Rahim*

some only of the judgment-debtors would give a fresh starting point for the execution of the whole decree.²⁴ In the words of a **Calcutta** decision, the legal position may be thus stated:—

“When a decree is appealed against even though the appellant appeals against only a portion of the decree, the whole decree of the first Court is superseded by or becomes merged in the decree of the appellate Court, and there is no part of the first Court’s decree that remains to be executed. There is only one decree to be executed, and that is the decree of the appellate Court.”²⁵

The policy of the Limitation Act in the case of execution of decree appears to be to lay down a **simple rule** and to **treat the decree as a whole** except when the decree itself directs that different portions of the relief granted are to be rendered by the defendant to the decree-holder at different times.²⁶ For the purposes of limitation regarding execution of a decree, the decree must be taken as a whole, and ordinarily when a portion of the decree is not executable by reason of the fact that the amount due under that portion is left to be determined at a future time, limitation begins to run as regards execution of the whole decree only from the time of ascertainment of the amount left undetermined, even though it might have been open to the party to have executed the other portions earlier.²⁷ The **Bombay High Court** has taken the view that the word “**appeal**” in Art. 182, does not mean only an appeal against the whole decree, and by which the whole decree is imperilled, it means an appeal by any party²⁸; and except in the case where a nominally single decree awards separate reliefs against separate defendants, the words of Art. 182 must be construed in their natural sense as permitting the extension of limitation where an appeal is preferred and is not withdrawn.²⁹

2539. The **Calcutta** and **Madras High Courts** are not in favour of the Court executing the decree going into complicated questions which must arise in determining whether in such a case

The literal interpretation.

v. Maidin Saiba, (1898) 22 Bom. 500 and *Gauri Sahai v. Ashfaq Hussain*, (1907) 29 All. 623; also see *Harakant v. Brijmohun*, 23 Cal. 876.

24. *Vydianatha v. Subramania*, (1911) 36 Mad. 104 (107); see also *Subramanya v. Alagappa*, (1907) 30 Mad. 268; *Nepal Chandra v. Amritlal*, (1889) 26 Cal. 888.

25. *Abdul Alim v. Abdul Hakim*, 53 Cal. 901=1927 Cal. 89=97 I.C. 838=31 C.W.N. 262.

26. *Vydianatha v. Subramanya*, (1911) 36 Mad. 104 (107, 108); Relied on *Haji Ashfaq Hussein v. Gauri Sahai*, (1911) 13 C.L.J. 351.

27. *Vydianatha v. Subramania*, (1911) 36 Mad. 104; Relied on *Ratnachalam v. Venkatarama*, 29 Mad. 46; also see *Krishnan v. Nilkantan*, (1885) 8 Mad. 137.

28. *Abdul Rahiman v. Maidin Saiba*, (1896) 22 Bom. 500—Per Parson, J.

29. *Ibid.*, 22 Bom. 500—Per Ranade, J.; Relied on *Sakhal Chand v. Velchand*, 18 Bom. 203.

the whole decree was or might have become or became imperilled in the Court of appeal. The Court should follow the plain meaning of the words of Art. 182, *viz.*, that the period of limitation runs from the date of the decree or order of the appellate Court whenever there has been an appeal,³⁰ and it is also the view taken by the **Bombay High Court**.³¹ A **Full Bench of the Madras High Court**, in *Kristnama v. Mangammal*,³² has dissented from an earlier Madras decision, in *Muthu v. Chellappa*,³³ which had followed two early Calcutta cases, in *Asgar Ali v. Troilokyanath*,³⁴ and *Gopal Shah v. Janki Koer*,³⁵ and it has been held that when a portion of a decree has been appealed against, and a portion has not, the period of limitation for an application to execute the portion not appealed against runs from the date of the decree on appeal. A **Full Bench of the Calcutta High Court** in *Gopal Chunder v. Gosaindas*,³⁶ has overruled the two early cases which had been followed by the Madras decision in the case of *Muthu v. Chellappa*, since overruled by the Madras Full Bench. The old rulings,³⁷ went by the theory of the appeal imperilling the whole decree. But, the view is now generally held that the literal interpretation is to be preferred, and that language of Art. 182 makes no distinction between the cases in which the whole decree is appealed against, and those in which only a part of the decree is appealed against. Similarly, in S. 48, Civil Procedure Code also, no distinction is made by the legislature in the case of a decree against a part only of which an appeal is preferred.³⁸

30. *Krishtochnurn Das v. Radha Churn*, (1891) 19 Cal. 750 (754) and *Viraraghava v. Ponnammal*, 23 Mad. 60; *Ari v. Theerathamalat*, 3 L.W. 521.

31. *Sakhar Chand v. Velchand*, 18 Bom. 203 and *Abdul Rahiman v. Maidin*, 23 Bom. 500.

32. 26 Mad. 91 (93) (F.B.) [O.R. 12 Mad. 479].

33. 12 Mad. 479.

34. (1890) 17 Cal. 631.

35. (1895) 23 Cal. 217.

36. 25 Cal. 594 (F.B.) [O.R. 17 Cal. 631 and 23 Cal. 217; also see Minority of Judges in *Mashiatunnissa v. Rani*, 13 All. 1 (F.B.)].

37. *Imamali v. Dasaundhi Ram*, 1 All. 508; *Sreenath v. Brojonath*, 13 W.R. 309; *Shaikh Fazl v. Doolhun*, 5 W.R. Misc. 6; *Wise v. Rajnarain*, 19 W.R. 30 (F.B.); *Hur Proshad v. Enayet Hosein*, 2 C.L.R. 471; also see *Mashiatunnissa v. Rani*, 13 All. 1 (F.B.) (Majority decision) and *Muthu v. Chellappa*, 12 Mad. 479.

38. *Gyan Singh v. Ata Husain*, 1921 All. 56; *Tularam v. Bhup Singh*, 47 All. 913; *Ramchandra v. Antaji Vasudev*, 5 Bom.L.R. 735; *Kalyanchand v. Bhogilal*, 1923 Bom. 400=5 Bom.L.R. 735; *Christiana Sens Law v. Benarshi Proshad*, 19 C.W.N. 287=22 I.C. 685; *Kartick Chandra v. Nilmani Mondal*, 20 C.W.N. 686; *Amir Ali v. Harishchandra*, 30 C.W.N. 306; *Anwar Ali v. Inayat*, 32 P.R. 1907.

2540. APPEAL BY SOME OF THE DEFENDANTS.—

2541. In view of the provisions in S. 544 of the old Code (O. 41, R. 4) the Allahabad High Court

The theory of appeal held in the Full Bench case of *Mashiat-imperilling whole decree.* *uni-nissa v. Rani*,³⁹ by a majority, that

where an appeal by one imperils the whole decree, time does not run against the decree-holder, even so far as the non-appealing defendants are concerned. But, that cl. 2 of Art. 179, Act XV of 1877 (now Art. 182), does not apply so as to make time run from the proceedings in appeal preferred by the other defendants, where the parties to the execution proceedings are not parties to the appeal, or the case is not one of a class to which O. 41, R. 4, Civil Procedure Code (S. 544) applies. Accord-

Allahabad.

ing to Allahabad High Court, in the case of an application for execution against non-appealing defendants, limitation was computed from the date of the original decree, and not from the date of the decree of the appellate Court, if such appeal did not proceed on a ground common to all the defendants.⁴⁰ In cases where the first Court's decree becomes merged in the appellate Court's decree, time, of course, begins to run from the date of the appellate Court's decree; but, Art. 182 is not held to mean that, even if an appeal had been preferred against other defendants in which the decree against some defendants who are not parties to the appeal is not challenged in any way, and has, in fact become final, the time can still be enlarged

Bombay.

by reason of the appeal.⁴¹ According to the Bombay view also, where a suit was dismissed against one defendant, but decreed against five other defendants, an appeal against the first defendant would not keep alive the execution against the other defendants.⁴² The Calcutta High Court has proceeded on this theory in several cases.⁴³ Where a decree for possession of certain property was made jointly against three persons, and one of them appealed against the decree only so far as it affected himself, and not against the whole decree, and the decree did not relate to property in respect to which the defend-

39. (1889) 13 All. 1 (F.B.); Relied on *Wise v. Rajnarain*, 19 W.R. 30 and *Mullick Ahmed Zumma v. Muhd. Sayad*, 6 Cal. 194=6 C.L.R. 573.

40. *Sangram Singh v. Bujarat Singh*, (1881) 4 All. 36; also see and cf. *Basant Lal v. Najrunnissa*, 6 All. 14 (15).

41. *Jadunandun v. Parsotam G. C., Ltd.*, (1930) 128 I.C. 399=1930 All. 636=1930 A.L.J. 941; Relied on 13 All. 1 (F.B.) and 1921 All. 156.

42. *Kalyanchand Lalchand v. Bhogilal*, 1923 Bom. 400=73 I.C. 310=25 Bom.L.R. 371; also see and cf. *Shivaram v. Sakharam*, 33 Bom. 39.

43. *Gopal v. Gosain*, 25 Cal. 594 (F.B.); *Mullick Ahmed v. Mullick Sayed*, 6 Cal. 194; *Lokenath v. Gaju*, 20 C.W.N. 178=31 I.C. 426 (Joint decree affected as a whole by appeal of some of the defendants).

ants had a common interest, and a common defence, so *that the appeal by one would imperil the whole decree*, it was held that the fact of one defendant having appealed will not prevent limitation running in favour of the others, against the execution of the decree.⁴⁴ A decree against one person for the rent of one period, and against another for the rent of another period was held to be in fact two decrees, *i.e.*, a separate decree against each for the sum for which he is liable. In such a case the decree is to be kept in force against each, and the proceedings in execution against one of the defendants were held not sufficient to prevent the law of limitation applying to the other defendant.⁴⁵ Therefore, in dealing with the question of limitation of an application for execution when there has been an appeal, the Court should see whether the original decree was really one decree, or an incorporation of several decrees, and whether the appeal against it imperilled the whole decree or not.⁴⁶ A decree of the trial Court does not merge in the decree of the appellate Court where the particular defendant against whom decree is sought to be executed was not a party to the appeal, and as such no order could have been made as against him by the appellate Court by its decree.⁴⁷

2542. However, a different view has been taken by the **Full Bench of the Madras High Court**, in *Kristnama v. Mangammal*,⁴⁸ and by the **Calcutta High Court** in *Satish Chandra v. Girish Chandra*.⁴⁹ And it has been observed in some other cases in **Calcutta**⁵⁰ and **Allahabad**¹ High Courts that the language of Art. 182 (cl. 2) does not admit of any qualification: and that

"there are no qualifying words as to by whom the appeal is to be made, or what the nature of this appeal to be made should be; but, simply that when there *has* been an appeal, time shall begin to run from the date of the *final* decree or order of the appellate Court".

The **Bombay High Court** also holds, that the word "appeal" in Art. 182 does not mean an appeal against the *whole* decree, and by

44. *Hur Proshad v. Enayet Hossein*, (1878) 2 C.L.R. 471; Followed in *Christiana Sense Law v. Benarsi Prosad*, (1914) 22 I.C. 685=19 C.W.N. 287.

45. *Wise v. Rajnarain*, 19 W.R. 30=10 Bom.L.R. 258.

46. *Christiana Sense Law v. Benarsi Prosad*, (1914) 22 I.C. 685=19 C.W.N. 287; also see *Pancha Bamia v. Anand Thakur*, 2 Pat. 712 (714)=1924 Pat. 160=77 I.C. 357.

47. *Amir Ali v. Harish Chandra*, 1926 Cal. 664=30 C.W.N. 306=95 I.C. 257.

48. (1903) 26 Mad. 91 (F.B.).

49. (1920) 47 Cal. 813=60 I.C. 915.

50. *Ganga Moyi v. Shib Shunker*, 3 C.L.R. 430; *Gopal Chandra v. Gosaindas*, 25 Cal. 594 (F.B.).

1. *Basant Lal v. Najamunnissa*, 6 All. 14; also see and cf. *Nural Hassan v. Muhd. Hassan*, 8 All. 573.

which the whole decree is imperilled; it means an appeal by any party.² The Patna High Court takes the view that there are no qualifying words in cl. 2 and relies upon the terms of O. 41, R. 33 for a similar view.³ The real test accordingly would seem to be not whether an appeal against a part of the decree, or by or against some of the defendants, imperils the decree as a whole, but whether or not the decree is really made up of several distinct decrees.⁴

2543. ILLUSTRATIVE CASES.—

(1) Where the trial Court decreed plaintiff's suit for possession of land, but dismissed a claim for mesne profits; however, the appellate Court ordered a remand, and the trial Court gave the plaintiffs a decree for certain mesne profits. Subsequently a special appeal was preferred to the High Court against the appellate decree, and while this was pending, an appeal was preferred against the decree for mesne profits, and the plaintiff obtained an appellate decree for mesne profits; it was held that the limitation for execution of the appellate decree ran not from the date of such decree, but from the date of the High Court's decree, which was "the final decree of the appellate Court", and the only "final decree" within the meaning of (Art. 167, Act IX of 1871) Art. 182.⁵

(2) In an appeal against a part of the decree, or against some only of the defendants, the final decree in the case may be against the plaintiff, and, therefore, one which he cannot apply to execute. Nevertheless for purposes of limitation under Cl. (2) the date of the final decree is the starting point.⁶

(3) In *Raghunath v. Abdul*,⁷ it has been held that where there are really separate decrees, against each of several defendants, who had not such common interest that an appeal by one would *imperil the whole decree*, or all the separate decrees, an appeal against one of such decrees will not give the decree-holder an extended time as regards the other decrees.

(4) Where *P* sued *A*, and *B*, upon a hand-note, and the suit against *A* was decreed, but it was dismissed against *B*; and *P* appealed against the decree dismissing his suit, and did not implead *A* as a party. Held, that his appeal being dismissed, the application within 3 years of the date of the appellate decree was not barred.⁸

2. *Abdul Rahiman v. Maidin Saiba*, (1896) 22 Bom. 500; Relied on *Sakhal Chand v. Velchand*, 18 Bom. 203; also see *Kashi Prasad v. Mathura Prasad*, 48 All. 6.

3. *Somar Singh v. Mt. Premdei*, 3 Pat. 327.

4. *Wise v. Rajnarain*, 19 W.R. 30 (F.B.); *Harakant v. Birj Mohan*, 23 Cal. 876; *Gopal Chander v. Gasaindas*, 25 Cal. 594; *Abdul Rahman v. Maidin*, 22 Bom. 500; *Kalyanchand v. Bhogilal*, 1923 Bom. 400.

5. *Imamali v. Dasaundhi Ram*, (1877) 1 All. 508 (Theory of appeal imperilling the whole decree).

6. *Venkata Chinnayya v. Krishna Charyulu*, 8 M.L.J. 228.

7. 14 Cal. 26; also see *Christiana Sense Law v. Benarsi Proshad*, 19 C.W.N. 287=22 I.C. 685 and *Kartick Chandra v. Nilmani*, 20 C.W.N. 686=32 I.C. 931.

8. *Satish Chandra v. Girish Chandra*, 60 I.C. 915=43 Cal. 817.

(5) In *Nural Hassan v. Muhd. Hassan*,⁹ where a suit for pre-emption was decreed in March, 1882, against the vendor, the purchaser, and another set of pre-emptors, and the appeal which the last mentioned defendants alone preferred was dismissed in May, 1882, it was held that even as against the purchaser who did not appeal, the plaintiff was entitled to execute his decree within 3 years of May, 1882.

(6) In *Gopal Chunder v. Gosain Das*,¹⁰ it was held that the limitation would run from the date of the *final* decree in second appeal in a case in which the first Court had decreed the suit against all the defendants, some of whom only appealed and were released from a portion of their claim, and a second appeal by plaintiff against this modification by the first appellate Court was dismissed.

(7) A final decree in a partition suit directing the payment of a certain sum of money by one set of defendants to another set of defendants, is a single decree, and limitation for execution of the decree in respect of the sum awarded to one set of defendants under the decree began to run from the date on which the appeal was dismissed and not from the date on which the decree was passed.¹¹

(8) Where *all* the parties to the suit were parties to the appeal, the final decree in the suit between the parties is the decree of the appellate Court, although the appeal related only to a *part* of the subject-matter of suit, and that the decree-holder is entitled to count the three years from the date of the appellate decree even as regards property which was not a subject-matter of the appeal.¹²

(9) Where the plaintiff's suit was decreed by the first Court in part, and his appeal against the portion of the decree disallowing the rest of his claim failed, it was held that limitation for execution would run from the date of the appellate decree.¹³

(10) In a suit where a decree has been obtained against one set of defendants by consent, and against the other on contest, and the contesting defendant appeals against the decree and thereby the validity of the entire decree is in controversy in the appeal, the decree-holder is entitled to the benefit of cl. 2 of Art. 182, Limitation Act, in execution of the decree against both sets of the defendants.¹⁴

9. 8 All. 573.

10. 25 Cal. 594 (F.B.); also see *Mahomed Mehdi v. Mohini Kanta*, 34 Cal. 874; *Abdul Alim v. Abdul Hakim*, 53 Cal. 901; *Satish Chandra v. Girish Chandra*, 47 Cal. 813; *Lokenath v. Gaju Singh*, 20 C.W.N. 178=22 C.L.J. 333=31 I.C. 426.

11. *Kashi Prasad v. Mathura Prasad*, (1925) 89 I.C. 286=23 A.L.J. 878=48 All. 6=1926 All. 145.

12. *Badiunnissa v. Shamsuddin*, 17 All. 103; also see *Sakhalchand v. Velchand*, 18 Bom. 203; *Kashi Prasad v. Mathura Prasad*, 48 All. 6.

13. *Hara Kant v. Biraj Mohan*, 23 Cal. 876; contra: *Muthu v. Chellappa*, 12 Mad. 479 and *Raghunath v. Pareshram*, 9 Cal. 635; cf. *Gopal Chunder v. Gosaindas*, 25 Cal. 594 (F.B.) and *Kristnamma v. Magammal*, (1903) 26 Mad. 91 (F.B.).

14. *Lokenath Singh v. Gaju Singh*, (1915) 31 I.C. 426 (Cal.).

2544. **APPEAL TO PRIVY COUNCIL.—**

2545. The words "*appeal*" and "*Appellate Court*" in Art. 182 (2) [old Art. 179 (2)] are intended to

(i) "**Appeal**" and "**Appellate Court**"—
Meaning of.

include appeals to His Majesty in Council, and are not restricted to appellate Courts in India;¹⁵ and time will be computed for execution purposes from the date of the decree of His Majesty in Council.¹⁶ Where a decree for future mesne profits, after having been reversed by the High Court was restored and affirmed by the order of Queen in Council, it was held that Queen's order was the only operative decree, and that mesne profits were in effect decreed by the order with reference to its own date, and not to that of the original decree.¹⁷ Similarly, where an appeal had been preferred to His Majesty in Council from a decree of the High Court reversing the decree of the Court of first instance, and the High Court's decree was affirmed by an order in Council, it was held that time under this article (Art. 167, Sch. II, Act IX of 1871) must be computed from the date of His Majesty's order in Council, and being within three years from that period was not barred, although it was made more than three years after the date of this decree.¹⁸ In *Somar Singh v. Premdei*,¹⁹ the **Patna High Court** held that cl. 2 of Art. 182, Limitation Act applies where there has been an appeal from a part, or whole of the decree, or when some only of the parties to the suit have brought the appeal; and that the Courts in India were bound to carry out the directions contained in the Order in Council, and could not go behind it.²⁰

2546. **An application for leave to appeal to Privy Council**

(ii) Application for leave not an appeal. cannot be treated as equivalent to an appeal, and where the amended decree of the High Court, pending appeal to Privy Council, was *ultra vires*, the original decree remained in force against the non-appealing defendants, and might have been executed against them, and they were entitled, on the other hand, to the benefit of the limitation as from the date of the appeal decree.²¹

2547. Although an order of His Majesty in Council may con-

(iii) Execution of Order in Council. firm a decree of the Court below, that order is the paramount decision in the suit; and any application to enforce it is, in point

15. *Narsingdas v. Naraindas*, (1880) 2 All. 763 (764, 765); also see *Gopal Sahu v. Joyram*, (1881) 7 Cal. 620.

16. *Kishen Sahai v. The Collector of Abbottabad*, (1881) 4 All. 137.

17. *Bhup Indar v. Birjai Bahadur*, (1900) 23 All. 152 (P.C.).

18. *Gopal Sahu v. Joyram Tewary*, (1881) 7 Cal. 620.

19. 1925 Pat. 40=79 I.C. 794.

20. (1924) 79 I.C. 794=1925 Pat. 40.

21. *Kotaghiri Venkata v. Vellanki Venkatarama*, (1899) 24 Mad. 1 (P.C.).

of law, an application to execute the order and not the decree which it confirmed. Such an application is governed by Art. 183 (Art. 180, Limitation Act, 1877), Limitation Act, 1908.²²

"When a decision of the Judicial Committee of the Privy Council has been reported to His Majesty, and has been sanctioned, and embodied in Order in Council, it becomes the decree or order of the final Court of appeal; and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution."²³

It was laid down in *Lethbridge v. Prohlad Sen*²⁴ that

"the Privy Council order affirming the previous decrees must comprehend and embrace those decrees . . . for they fall to be executed with the Privy Council order; in other words, the judgment-creditor is unquestionably entitled in executing the 'decree or order' of the Privy Council to get the benefit of the decrees or orders which the Privy Council order confirmed".²⁴

2548. In Art. 183 (old Art. 180) Orders in Council stand in the same categories as decrees of Courts

(iv) Dismissal of appeal for want of prosecution.

established by Royal Charter in the exercise of such jurisdiction.²⁵ Where the appeal to Privy Council is dismissed for want of prosecution, the matter of suit is not dealt with judicially, and the order of dismissal can in no sense be regarded as an order adopting or confirming the decision appealed against: consequently, the appeal is taken as not to have been filed at all.²⁶

2549. CLAUSE 3.

2550. This clause only applies to cases in which there has been a review of judgment; but where a review of judgment has been applied for, and after notice to the other side refused, the period during which such application was pending cannot be excluded in computing the period of limitation for execution of the decree under Art. 182, Limitation Act.²⁷ Where the order on a review petition, as distinguished from an appeal petition, merely refuses to interfere with the judgment or order sought to be reviewed, or where an

22. *Luchman Persad Singh v. Kishun Pershad Singh*, (1882) 8 Cal. 218 (F.B.); also see notes under Art. 183; and *Futteh Narain v. Chandra Batti*, 20 Cal. 551; *Chutterput v. Sait Sumari*, 43 Cal. 903; *Tribikram Deo v. Badri*, 1 P.L.J. 385; *Mt. Bhagwanta Kuer v. Zamir Ahmed*, 3 Pat. 596.

23. *Pitts v. La Fontaine*, 6 A.C. 482.

24. 19 W.R. 301.

25. *Futteh Narain v. Chundrabatti*, (1892) 20 Cal. 551.

26. See "Appeal not prosecuted", ante; *Abdul Majid v. Jawahirlal*, 1914 P.C. 66=36 All. 350 (P.C.); *Batuk Nath v. Munni Dei*, 1914 P.C. 65=23 I.C. 644=41 I.A. 104=36 All. 284 (P.C.); *Sachindra Nath v. Maharaj Bahadur*, 1922 P.C. 187=74 I.C. 660=48 I.A. 335=49 Cal. 203 (P.C.).

27. *Kurupam Zemindar v. Sadasiva*, (1886) 10 Mad. 66; Folld. in *Harish v. Chandra Mohan*, (1900) 28 Cal. 113.

appeal is not entertained at all, though filed, the **original decree or order is and continues to be the subsisting and final decree or order.**²⁸ In this respect an **order rejecting a review petition** stands on a different footing from a decision passed on appeal confirming the lower Court's judgment and dismissing the appeal.²⁹ If the **decision on review** or revision *does* interfere with the original decision, the former decision **becomes the only subsisting order**, and stands on the same footing as the decision in a competent appeal.³⁰ Clause 3 of the third column of Art. 182, Limitation Act, does not apply where an application for a re-hearing of the review has been dismissed.³¹ When the alteration of the decree is *ultra vires*, the period of limitation commences from the date of the primary decree of Court.³²

2551. Any order made upon an application for a review of judgment except an order absolutely rejecting the application, becomes, if it in any way modifies or alters the original order, although the modification or alteration extends only to the rectification of a clerical mistake, the final order in the case; and the party aggrieved by the original decree is entitled, although the modification or alteration was made in his favour, to treat the order upon review of judgment as the final decree or order in the case.³³ The Bombay High Court has observed in *Vadilal Hakam Chand v. Fulchand Umedram*,³⁴ that

"A petition of review involves three stages of procedure. The first stage commences ordinarily with an *ex parte* application (S. 114: O. 47, R. 1). The Court may then either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected, and the hearing of the rule may involve to some extent an investigation into the merits. If the rule is discharged, then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached. The case is re-heard on the merits, and may result in a repetition of the former decree or some variation of it. Though in one respect the result is the same, whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest, on the old decree."

An order dismissing the application for review against the decree, is not appealable, and the running of limitation against a decree-holder is not suspended by reason of an incompetent appeal by the

28. *Venugopal Mudali v. Venkatasubbiah*, (1915) 28 I.C. 367 (Mad.).
29-30. *Ibid.*

31. *Rai Brijraj v. Nauratanlal*, (1918) 44 I.C. 575=3 P.L.J. 119; Folld. 10 Mad. 66.

32. *Kotaghiri Venkatasubamma Rao v. Vellanki Venkatarama Rao*, (1899) 24 Mad. 1 (P.C.).

33. *Joykishen Mookerjee v. Ataoor Rohoman*, (1880) 6 Cal. 22.

34. (1905) 30 Bom. 56.

judgment-debtor.³⁵ If the application for review is not accepted, and the Court refuses to re-open the matter, no fresh starting point will be obtained by the applicant for the purpose of limitation.³⁶ However, where review is *granted*, the decree passed on a review of judgment is appealable, and if an appeal from the decree passed on review is made, and such decree has been set aside by the appellate Court, application for execution of the original order may be made under Art. 182, and under cl. 3 of the third column, the starting point of limitation would be not from the date of that decree, but from the date of the decree of the appellate Court.³⁷

2552. In *Vydianatha Aiyar v. Subramania Pattar*,³⁸ it was laid down by the Madras High Court, **Review against portion of a decree—Or some of parties.** that for the purposes of limitation regarding execution of a decree, **the decree must be taken as a whole** and under Art. 182, there is only a single starting point, where there has been an appeal, review, or amendment, although it might be open for a decree-holder to apply for the execution of a part of the decree before proceedings in appeal, review, or amendment have terminated.³⁹ The policy of the Limitation Act in the case of execution of decrees is to lay down a simple rule and to treat the decree as a whole except when the decree itself directs that different portions of the relief granted are to be rendered by the defendant to the decree-holder at different times.⁴⁰ Where a joint *ex parte* decree against several judgment-debtors is set aside against only one of them, without notice to the others, this will not give a fresh starting point of limitation against others.⁴¹

Where the decree has been amended or judgment reviewed, time would run for execution only from the date of the final or revised decree though not all the judgment-debtors may be concerned in the review or amendment.⁴² The general policy of the Limitation Act is that where a decree is kept alive, as the result of something done by the judgment-creditor, against one of several joint-debtors, it is alive against all the joint-debtors.⁴³ Where there has been a review of the decree, the period of limitation should

35. *Ram Rattan Chowdhry v. Upendra Chandra Das*, (1922) 68 I.C. 727=1923 Cal. 288.

36. *Bhagwan Baksh Singh v. Mt. Manraj Kunwar*, (1922) 66 I.C. 205=24 O.C. 280.

37. *Narsing Sewak Singh v. Madhudas*, (1882) 4 All. 274.

38. (1911) 36 Mad. 104=10 I.C. 552.

39-40. *Ibid.*

41. *Umesh Chunder Roy v. Akrur Ch. Dutt*, (1918) 46 Cal. 25.

42. *Abdul Khadir v. Ahammad*, (1911) 35 Mad. 670 (s.c.) (1913) 38 Mad. 419=30 I.C. 423,

43. *Ibid.*

be taken to run from the date of the review, notwithstanding that the person against whom time is reckoned were not parties to the review proceeding.⁴⁴

2553. CLAUSE 4.—

2554. Under the previous Act XV of 1877, an order granting an application for amendment of decree, under S. 206, Civil Procedure Code, 1882, was held to be an order passed upon review of judgment within the meaning of Art. 179, Sch. II, cl. (3) of the Limitation Act, 1877; therefore, an application for execution of a decree within three years from such an order was not barred by limitation.⁴⁵ Under the present article, a separate provision has been made in cl. 4, dealing with an amendment of decree. It was added to this article in the present Act, to settle a conflict of decisions as to whether or not “review” included an “amendment”; and, consequently, when a decree was *amended*, limitation ran from the date of the original decree, or from the date of the amendment. In *Kali Prosunno v. Lal Mohun*,⁴⁶ an order for amendment of a decree under S. 206 of the Code of 1882 was treated as equivalent to an order for review of judgment for the purpose of Art. 179, cl. 3 of the Limitation Act, 1877. This relied on an **Allahabad** decision in *Kishen Sahai v. Collector of Allahabad*,⁴⁷ where an application to amend a decree was treated substantially as one for review of judgment, under Art. 167 of Act IX of 1871. Similarly, in *Venkata Jogayya v. Venkata Simhadri*,⁴⁸ the **Madras High Court** held that an order passed by the Court determining the amount of costs, was a continuation or completion of the judgment, and should be treated as substantially made on review of judgment. There were, however, other decisions to the contrary. In *Ahsanullah v. Dukhini*⁴⁹ the Calcutta view was dissented from, as based on a misunderstanding of the earlier Allahabad decision in *Kishen Sahai v. Collector of Allahabad*,⁵⁰ as already explained in *Kallu Rai v. Fahiman*¹ and *Dayakishen v. Narhi Begam*.² The **Allahabad High Court** held that S. 206, Civil Procedure Code, 1882, contemplated that the judgment was correct. An application under that section

44. *Ramayya v. Kotayya*, (1933) 141 I.C. 175 (2)=36 L.W. 919=1933 M.W.N. 155=64 M.L.J. 75=1933 Mad. 276.

45. *Kali Prosunno v. Lal Mohun*, (1897) 25 Cal. 258; Reld. on *Kishen Sahai v. The Collector of Allahabad*, 4 All. 137; also see *Venkata Jogayya v. Venkata Simhadri*, 24 Mad. 25 (26).

46. (1897) 25 Cal. 258=2 C.W.N. 219.

47. (1882) 4 All. 137.

48. (1900) 24 Mad. 25.

49. (1905) 27 All. 575.

50. (1882) 4 All. 137.

1. (1891) 13 All. 124.

2. (1898) 20 All. 304.

was not an application for a review of the judgment: nor could it be treated as a step-in-aid of execution.³ However, an application to execute a decree which became capable of execution by amendment was held to come under Art. 181 (Art. 178, Act XV of 1877).⁴ The **Calcutta** view that "review of judgment" was interchangeable with "review of decree" in *Kali Prosunno's* case, was doubted by the same High Court in a later case of *Chhoto Rakhal Das v. Jogendra Narain*,⁵ where a distinction was drawn between an amendment to bring decree into conformity with the judgment, and any other amendment. The controversy was finally settled by cl. 4, Art. 182, Limitation Act, 1908, which enacts that where the decree has been amended, whether on review of judgment or otherwise, limitation for execution runs from the date of amendment.⁶

2555. DATE OF AMENDMENT.—The **Calcutta High Court** held in *Amarchandra v. Asad Ali*,⁷ that where the original decree was amended in respect of the name of a party, which had been incorrectly recorded, and of the amount of the claim allowed which had been wrongly entered, the period of limitation should be reckoned from the date of amendment when the correct decree was prepared. The **Madras High Court** held differently in *Parameshwara v. Seshagiriappa*,⁸ where Subramania Aiyar, J., observed that where a decree which is at variance with the judgment is brought into conformity with the latter under S. 206, Civil Procedure Code, the date of the rectification is immaterial with reference to the calculation of the time in which any appeal may be preferred against such decree. But where a decree is *wrongly varied*, a party affected by such variation should be entitled to calculate the time during which an appeal may be preferred as commencing from the date of the variation. The present cl. (4) sets this conflict at rest, by providing that where the decree has been amended, time would run from the date of the amendment.

<p>2556. However, an amendment of a decree after its execution</p> <p>Amendment after execution is barred by limitation.</p>	<p>has become barred by time, cannot give a fresh start to limitation from the date of the amendment under this clause.⁹ Where the original decree was capable of execu-</p>
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3. *Tarsi Ram v. Man Singh*, 8 All. 492; also see 13 All. 124; 20 All. 304, *supra* and *Mt. Umar Jan v. Zinat Begam*, 25 All. 385 (387); *Ahsanullah v. Dakhini Din*, 27 All. 575.

4. *Muhammad Suleman Khan v. Muhammad Yar Khan*, (1894) 17 All. 39.

5. (1909) 3 I.C. 391=10 C.L.J. 467; also see *Venkata Jogayya v. Venkata Simhadri*, 24 Mad. 25 and *Narsingh Rao v. Bande Krishna*, 42 Bom. 309.

6. *Golab v. Mt. Janki Kuer*, (1920) 57 I.C. 236=5 P.L.J. 472 (F.B.).

7. (1905) 32 Cal. 908.

8. (1899) 22 Mad. 364.

9. *Anand Ram v. Nityananda*, (1916) 32 I.C. 744 (Cal.); cf. *Mohamaya v. Abdul Hamid*, 18 C.W.N. 266 (268)=21 I.C. 615; *Sanatun v.*

tion, the error in orthography of the original decree passed against the assets of one *Joti Prasad* in the hands of *M. & S.*, (being written as *Jwala Prasad* in the decree) being immaterial, the decree-holder could not be permitted to take advantage of a slight mistake in writing in order to execute a decree which was time barred, by applying for its amendment.¹⁰

Allahabad. In *Rabiuddin v. Ram Kanai Sen*,¹¹ it was decided that as the original decree was capable of execution, the amended decree was barred, so far as execution is concerned, by limitation, inasmuch as the application for amendment was made after the first application for execution, and at the date of application for amendment time had already run against the decree-holder. In the converse case of *Rameshwar Singh v. Homeshwar Singh*,¹² the Judicial

Calcutta. Committee decided to the effect that the decree as originally framed not being capable of execution was not barred by limitation, without holding that if the decree is capable of execution at the time it was prepared, it would be barred even although an amendment were made later. There are several other decisions holding to the same effect.¹³ The decree as originally framed not being capable of execution at the time it was prepared would not be barred by lapse

Privy Council. of time. The **Lahore High Court** has held that where a decree is quite capable of execution as it stands, its amendment cannot entitle the decree-holder to a fresh period of limitation under Art. 182, Cl. (4). A decree which is capable of execution and is not executed within 3 years from its date becomes dead, and cannot be revived by a subsequent application for amendment.¹⁴ This has been relied upon

Lahore. in *Ahmmad Kutty v. Kuttu*,¹⁵ but the **Madras High Court** takes a different view

Madras.

Dinabandhu, 34 C.L.J. 397=1921 Cal. 89=64 I.C. 622 (Decree incapable of execution at the time when it was passed, was amended more than three years after the decree was passed).

10. *Mt. Maharani v. Debi Das*, 1929 All. 253=1929 A.L.J. 427=115 I.C. 118.

11. (1919) 59 I.C. 186 (Cal.).

12. 1921 P.C. 31=48 I.A. 17 (P.C.).

13. *Sanaton Sant v. Dinabandhu*, 1921 Cal. 89=34 C.L.J. 397; *Mohamaya v. Abdul Hamid*, (1913) 18 C.W.N. 266; *Ratnachallam v. Venkatarama*, 29 Mad. 46; *Amir Ali v. Gopaldas*, 54 I.C. 924 (Nag.); *Durga Pershad v. Kedarnath*, 1929 Cal. 650; *Mt. Maharani v. Debidas*, 1929 All. 253; *Bhagwati Kuer v. Narsing Narain*, 1930 Pat. 286.

14. *Jhammanlal v. Daulat Ram*, 1924 Lah. 329=5 L.L.J. 398=73 I.C. 461; Folld. 32 I.C. 744 and 59 I.C. 186; Reld. in *Ahmmad Kutty v. Kuttu*, 1933 Mad. 315.

15. 1933 Mad. 315, '

in *Lakshmi Kanta v. Ramayya*,¹⁶ where it was held that the fact that the decree had already become barred before the amendment or that the amendment applied was unnecessary are matters which ought to have been dealt with by the Court which was moved to

Patna.

amend the decree. The Patna High Court has held that provided that the application for amendment is within time, the action of the Court in delaying the making of the amendment ought not to prejudice the decree-holder as to his rights in respect thereof.¹⁷ Reliance is placed for this view on the Calcutta decision in *Durga Prasad v. Kedar-nath*,¹⁸ where it is observed that

"where the legislature has provided that the time for which the period of limitation for execution of a decree should begin to run where a decree has been amended is the date of amendment, it is not for the Court of execution to enquire whether the amendment was properly made, whether the original decree was capable of execution, or whether for any other reason the Court was wrong in making the order for amendment of the decree. The executing Court does not sit as a Court of appeal over the Court which has made the decree or which has made the amendment; but it has only to see whether the decree has been amended in order to decide whether application for execution was barred by limitation or not."

The Oudh Chief Court, also holds that under Art. 182, Limitation

Oudh.

Act, a period of 3 years is provided for the execution of a decree from the date of the amendment of a decree, where a decree has been amended.¹⁹ A recent decision of the same Court holds that Cl. (4) of Art. 182 pre-supposes that at the time of the amendment the decree is alive. The decree-holder cannot get a start for limitation from the date of amendment, even in a case where the decree had already become barred by time when the amendment was made.²⁰

2557. When a decree is amended at a later stage, the starting point of limitation for an application for execution of the decree is the date of amendment.²¹ The "date of amendment", means the date when the order of amendment is made, and not the date when the decree is actually amended.²² When a decree is amended, the date of amendment is the date of the decree, within

16. 40 L.W. 896=67 M.L.J. 904.

17. *Mt. Bhagwati Kuer v. Narsingh Narayan Singh*, 1930 Pat. 286 =11 P.L.T. 181=125 I.C. 785=9 Pat. 782.

18. 1929 Cal. 650; Not Foll. in 1933 Mad. 315.

19. *Narottamdas v. Sukhraj Singh*, (1929) 116 I.C. 49=5 O.W.N. 791=1928 Oudh 442=3 Luck. 719.

20. *Haidri Khanum v. Bhawani*, 1934 Oudh 43=11 O.W.N. 10=147 I.C. 815.

21. *Thiagaraja v. Sambasiva*, 1934 Mad. 283=57 Mad. 795.

22. *Venkataswami v. Venkatasubba*, (1926) 49 Mad. 807=1926 Mad. 747=50 M.L.J. 554; also see *Nirit v. Kalananda*, 36 I.C. 533 (Pat.).

the meaning of S. 48 of the Civil Procedure Code.²³ Where a decree as originally drawn up is incapable of execution, time runs from the date when a proper decree capable of execution has been drawn up.²⁴ In *Brojola v. Tara Prasanna*,²⁵ the distinction between amendments of different scopes is explained. This clause does not specify the nature of the amendment, and therefore it must be said to include all kinds of amendment, whether an amendment of a clerical error under S. 152, or an amendment under O. 47, Civil Procedure Code, or any other provision of law.²⁶

2558. Upon a strict construction of Art. 182, or in principle, there is no ground for the contention that
 Appeal from an amended decree. the case of an appeal from an amended decree is different from the case of an appeal from any other decree. Therefore, as in the other case, an appeal from an amended decree postpones the date from which limitation runs for execution purposes.²⁷

Application for amendment by some or for part of decree. 2559. See Cl. (3): "Review against portion of a decree". It has been observed by the Madras High Court that

"where an appeal has been preferred against a decree or the decree has been amended or judgment reviewed, time would run for execution only from the date of the final or revised decree, though not all the judgment-debtors may be concerned in the appeal, review or amendment. Also that, where an application is made against one of the several judgment-debtors that would give a further starting point as against all including those against whom no application has been made".²⁸

For the purposes of limitation regarding execution of a decree, the decree must be taken as a whole,

"the policy of the Limitation Act in the case of execution of decrees is to lay down a simple rule and to treat the decree as a whole except when the decree itself directs that different portions of the relief granted are to be rendered by the defendant to the decree-holders at different times".²⁹

23. *Baldeo Shukul v. Syed Yusuf*, (1921) 60 I.C. 318.

24. *Sanatan Sant v. Dinabandhu*, (1921) 64 I.C. 622; Appl. *Muhammad Suleman Khan v. Muhammad Yar Khan*, 17 All. 39=A.W.N. (1894) 191; also see *Behari v. Risal*, 5 A.L.J. 403=A.W.N. (1908) 191.

25. 3 C.L.J. 188.

26. *Aditya Kumar v. Abinash*, 34 C.W.N. 1002 (1007)=1931 Cal. 323.

27. *Nagendranath v. Ambica Churn*, (1929) 50 C.L.J. 12=33 C.W.N. 958=1929 Cal. 676.

28. *Abdul Khadir v. Ahammad*, (1911) 35 Mad. 670 (675); s.c. 38 Mad. 419.

29. *Vydinatha v. Subramaniam*, 36 Mad. 104; Followed in *Annamalai v. Rajappier*, (1928) 109 I.C. 829 (Mad.)—(Decree as a whole became executable only on the date of the final decree, and not previously).

This view does not agree with the Patna decision in *Kalonand v. Raj Kumar*,³⁰ where it was held that an amendment of a rent-decree consisting merely of a correction in the rate of rent, the amount of rent decreed remaining the same, does not start a fresh period of limitation after the limitation for executing the original decree has expired.

TITLE I: PREVIOUS HISTORY.

2560. CLAUSE 5.—Old para. 4 of Act XV of 1877 is re-numbered as para. 5, in Art. 182 of Act IX of 1908. Originally, in present Act, Previous History. the clause ran as follows:—

“(Where the application next hereinafter mentioned has been made) *the date of applying* in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order.”

The amendment by Act IX of 1927 has replaced the words “the date of applying” by the words “*the date of final order passed on an application made*”. This amendment came into force on the 1st day of January, 1928.

2561. Under S. 20 of Act XIV of 1859, the starting point was the date of some proceeding to enforce any judgment, decree or order of any Court not established by Royal Charter, or to keep the same in force.³¹ The words “*some proceeding*” in this section included ‘applications for execution *bona fide* made under S. 207, Civil Procedure Code, and all acts done either by the Court, or by an officer of the Court, or *bona fide* by the applicant, for enforcing the decree or keeping it in force.’³² The word proceeding meant anything done by a decree-holder *bona fide* or by the Court at the instance of a decree-holder in furtherance of the execution of a decree.³³ The case-law as summed up by Dr. Pal in his Limitation Act shows that mere presentation of a petition without any further active steps on the part of a decree-holder were not held sufficient to keep alive his right to execute a decree.³⁴ A suit carried on by a decree-holder in furtherance of an intention to execute his decree was held to be proceeding within the section,

30. (1917) 39 I.C. 624 (Pat.).

31. *Ram Sahaye Singh v. Degum Singh*, (1866) 6 W.R. Mis. 98.

32. *Maharaja Mahtab Chand v. Bulram Singh*, (1870) 14 W.R.P.C. 21; *Kalee Kishore v. Prosunno Chunder*, (1868) 10 W.R. 248.

33. *Maharanee Inderjeet Kunwar v. Mazum Ali Khan*, (1866) 6 W.R. (Mis. 76).

34. *Sheikh Idoo v. Besharoola*, (1865) 2 W.R. Misc. 10; *Chander Koomer v. Ranee Shurut Soonduree*, (1866) 6 W.R. Mis. 37; cf. *Ram-sahaye Singh v. Degum Singh*, (1866) 6 W.R. Misc. 98 (F.B.) (Application made *bona fide*).

which could keep the decree alive.³⁵ If legal proceedings were taken by a judgment-debtor or another person, the creditor's proceedings taken for the purpose of *bona fide* resistance to the above, though unsuccessful, were held to be a proceeding to keep the decree in force.³⁶ A notice by the Court to the judgment-debtor issued *bona fide*, was a proceeding under S. 20 to enforce, or to keep in force, a decree³⁷; though a mere petition filed praying that notice might be served on a judgment-debtor was not held to be a process to enforce a decree.³⁸ Steps taken merely to place the assignee of a decree in the position of a decree-holder,³⁹ or a petition to be admitted as a representative of a deceased decree-holder, without obtaining a certificate under Act XXVII of 1860,⁴⁰ were not held to be proceedings within the meaning of S. 20, Limitation Act, 1859. The mere striking off of an application for execution did not constitute a proceeding to enforce or to keep in force a decree.⁴¹ However, the attachment of a judgment-debtor's property,⁴² or a sale of a judgment-debtor's property would be a proceeding within the meaning of S. 20 of Act XIV of 1859⁴³; though a mere formal confirmation by the Court of an auction-sale, where no objection to it was preferred, was not taken in some cases to be a proceeding keeping the decree alive.⁴⁴ While others held it to be such a pro-

35. *Syudakbar's case*, (1867) 8 W.R. 99; *Abdul Gunny v. Pogose*, (1869) 12 W.R. 436; *Radha Gobind v. Brojendra Coomar*, (1871) 15 W.R. 207; *Peary Soondaree v. Bhubo Soondaree*, (1874) 23 W.R. 31 and *Nittyannund v. Nugendro*, (1871) 16 W.R. 299.

36. *Kalee Kishore v. Prosunno Chunder*, (1868) 10 W.R. 248; *Ram Soondur v. Ram Kanto*, (1869) 11 W.R. 8; *Poornanund v. Huro Soondaree*, (1870) 13 W.R. 208; *Maharaja v. Bulram*, (1870) 14 W.R.P.C. 21; *Sheikh Mahomed v. Ramkant*, (1871) 16 W.R. 266; *Romanath v. Roy Luchmeepat*, (1873) 19 W.R. 417; *Nistarinee v. Debnath*, (1873) 20 W.R. 286; *Becharam v. Abdul Wahed*, (1884) 11 Cal. 55.

37. *Ram Sahayee v. Degum Singh*, (1866) 6 W.R. Mis. 98 (F.B.).

38. *Gooroo Churn v. Roy Preonath*, (1866) 5 W.R. Misc. 15.

39. *Brojolall v. Ram Tarun*, (1868) 10 W.R. 127.

40. *Sheo Partap v. Issur Roy*, (1866) 5 W.R. Mis. 23; *Bishen Dyal Singh v. Ram Sunkur*, (1866) 6 W.R. Misc. 38.

41. *Anund Mohun v. Huro Chunder*, (1866) 5 W.R. Mis. 16; *Maharaja v. Dina Moyee*, (1866) 6 W.R. Mis. 60; *Maharaja v. Bularam Singh*, (1866) 6 W.R. Mis. 63; *Mudan v. Dooar*, (1867) 8 W.R. 320; *Raghuram v. Dannu Lal*, (1879) 2 All. 285.

42. *Prosunno Coomar v. Ramtonoo*, (1866) 5 W.R. Mis. 43; *Kalee Pershad v. Jankee Deo*, (1867) 7 W.R. 9.

43. *Maharaja v. Luckee Monce*, (1867) 8 W.R. 359; *Rajeshuree v. Raj Coomaree*, (1871) 15 W.R. 182; *Juttadharee v. H'azeer*, (1869) 12 W.R. 357.

44. *Juggut Mohinee v. Ram Chund*, (1868) 9 W.R. 100; *Shib Ram v. Bance Madhub*, (1869) 11 W.R. 117; *Mullick Enayet Ali v. Wahed Ali*, (1870) 13 W.R. 315.

ceeding.⁴⁵ The following were held to be a “proceeding” within the meaning of S. 20: (1) Transmission by a Court of a copy of a decree and of a certificate to another Court for execution⁴⁶; (2) an attempt at settlement of account in Court⁴⁷; (3) execution of a portion of the decree⁴⁸; or for one of the reliefs decreed⁴⁹. However, the following were held not to be proceeding to enforce the decree, or keep its enforcement alive:—(4) A dispute between a purchaser of a decree and a third party and the proceedings connected therewith⁵⁰; (5) the relinquishment by a decree-holder of an attachment of his judgment-debtor’s property¹; (6) an application for execution of a decree, by alleged purchaser of the decree, without supportive evidence of the claim²; (7) payments made *privately* in liquidation of decrees³; or (8) a partial execution by one or more of decree-holders operating not for the benefit of all parties having an interest in the decree⁴; or (9) the act of taking out the proceeds of a sale in execution of a decree.⁵ What was a *bona fide* proceeding was a question of fact⁶. and the test was whether the proceeding was really for the purpose of obtaining the fruits of the decree.⁷

2562. The result of the decisions under Act XIV of 1859 were enacted in Arts. 166, 167 and 168 of the Limitation Act IX of 1871. The insistence on *bona fides* under the previous

Decisions under Act IX of 1871.

45. *Brojungona v. Sona Mookhee*, (1871) 15 W.R. 51; *Gobind Chunder v. Jochooral*, (1872) 18 W.R. 156; *Wahed Ali v. Enayet Ali*, (1873) 20 W.R. 31.

46. *W. F. Leake v. W. Daniel*, (1868) 10 W.R. 337.

47. *Mt. Fuzeelutoonissa v. Chutterdharee*, (1866) 6 W.R. Mis. 43; *Tufuzzul Hossain v. Bahadoor Singh*, (1869) 11 W.R. 205.

48. *Oopendur Mohun v. Tripp*, (1866) 5 W.R. Mis. 40; *Ameerun v. Shib Pershad*, (1867) 8 W.R. 199.

49. *Jogesh Prokash v. Kalee Coomar*, (1867) 8 W.R. 274.

50. *Narain Acharjee v. Mohamaya*, (1868) 10 W.R. 240.

1. *Kristo Koomal v. Huree Sirdar*, (1869) 13 W.R. 44 (F.B.).

2. *Ooday Chand v. Nobo Coomar*, (1868) 10 W.R. 428.

3. *Kedarnath Mahata v. Heeralal*, (1865) 4 W.R. Miss. 21.

4. *Chooa Sahoo v. Tripoora Dutt*, (1870) 13 W.R. 244.

5. *Kishen Mohun v. Chunder Kanta*, (1866) 6 W.R. Mis. 49; compare *Gunga Bishen v. Maharaj*, (1868) 10 W.R. 224; *Wody Tara v. Abdool Jafar*, (1875) 24 W.R. 339; *Rajeshuree v. Raj Coomaree*, (1871) 15 W.R. 182.

6. *Juttadharee v. Wazeer Singh*, (1869) 12 W.R. 357; *Sheikh Irshad Ali v. Kadoo Shah*, (1874) 21 W.R. 188.

7. *Ramdhun Goor v. Gooroo Dossee*, (1870) 13 W.R. 40; *Moonshee v. Saheb Singh*, (1871) 15 W.R. 530; *Lootfi Ali v. Aboo Bibi*, (1871) 15 W.R. 203.

Act of 1859, was not a requirement under Act IX of 1871.⁸ A perfectly abortive application, which was meant by the decree-holder to be abortive, and under which nothing whatever was done, served to keep the decree alive for three years from the date of such application.⁹ A decree-holder applying for the execution of a decree, was entitled, under Act IX of 1871, to have such execution upon his showing that his application was made within three years next following a previous application to the Court to enforce the same decree, or from the date of issuing notice in the same matter.¹⁰ An application for execution was out of time, if not made within three years of the last previous application to enforce the decree, and all subsequent proceedings would be bad.¹¹ Where an application was made, and proceedings taken to enforce or keep in force a decree, limitation ran from the date of such application, or the notice, as the case might be, even if such proceedings were taken subsequent to an application for execution of a decree and to the issue of a notice.¹² A decree-holder was not entitled, under Act IX of 1871, to count the three years allowed by that Act from the date of an application not made by the decree-holder then on record.¹³ One of several joint decree-holders might make an application substantially conforming to the requirements of Civil Procedure Code.¹⁴ An application for execution not in accordance with such requirements of law, would not be such a proper application that the date upon which it was made would constitute a point of time from which the limitation of three years would run.¹⁵ An application for execution once barred, is always barred, and the subsequent application does not take the case out of the statute of limitation.¹⁶ The principle was that if the application was not a

8. 6 W.R. Misc. 98 (F.B.); 14 W.R. P.C. 21; 10 W.R. 248; see also *Rohinee Nundan v. Bhugwan Chunder*, (1874) 22 W.R. 154; *Shurrut Chunder v. Abdool Khyr*, (1875) 23 W.R. 327; *Mt. Moracho Koer v. Chutturbooj*, (1875) 24 W.R. 459; *Annoda Proshad v. Sheikh Kurpamali*, (1878) 1 C.L.R. 408.

9. *Eshan Chunder v. Prannath*, 22 W.R. 512 (F.B.) and *Faiz Buksh v. Sadut Ali*, (1875) 23 W.R. 282.

10. *Eshan Chunder Bose v. Prannath Nag*, (1874) 22 W.R. 512; *Durias Roy v. Doola Roy*, (1875) 24 W.R. 10; *Subhan Ali v. Sufdar Ali*, (1875) 24 W.R. 227.

11. *Abdool Hakim v. Aseen Toolali*, (1876) 25 W.R. 94.

12. *Faiz Buksh v. Sadut Ali Khan*, (1875) 23 W.R. 282; also see *Raja Nilmoney Singh v. Nil Camal Tuffadar*, (1876) 25 W.R. 546; cf. *Shurut v. Abdool*, 23 W.R. 327 (Under Act XIV of 1859).

13. *Durias Roy v. Doola Roy*, (1875) 24 W.R. 10.

14. *Huruck Roy v. Zohoree Mull*, (1874) 22 W.R. 468.

15. *Gource Sunkar v. Arman Ali*, (1874) 21 W.R. 309.

16. *Bemuldas v. Ikbali Narain*, (1876) 25 W.R. 249; *Annoda Pershad v. Keerfan Ali*, (1878) 3 Cal. 518; also see *Prabhacara Row v. Patannah*, (1878) 2 Mad. 1.

proceeding within the meaning of S. 20, Act XIV of 1859, at the time when it was made, it could not subsequently become so, merely because the judgment-debtor did not come in and oppose it.¹⁷

The words "*applying to enforce the decree*" in Art. 167 meant the application in accordance with law, by which proceedings in execution were commenced, and not applications of an incidental kind made during the pendency of such proceedings.¹⁸ In cases governed by Act IX of 1871, a decree-holder who had applied to the Court *simpliciter* "to keep the decree in force" might, within three years of the date of such last named application, obtain execution of his decree.¹⁹ An application to the Court to transfer a decree for execution from one Court to another,²⁰ also an application to continue the attachment of property,²¹ would be an *application to keep the decree in force*. But, an application by decree-holder to take out the proceeds of a sale held in execution of his decree,²² or an application for sale of certain properties already under attachment,²³ or an application made by a decree-holder with the object of staying execution of his decree,²⁴ were held not to be an application to enforce or keep alive a decree, within Art. 167 of Limitation Act, 1871. A defendant in a partition suit is also entitled to execute the decree for partition, which is a joint declaration of the rights of persons interested in the property of which partition is sought. A decree in such a suit is, when properly drawn up, a decree in favour of each shareholder, or set of shareholders having a distinct share.²⁵

2563. In Art. 179, para. 4, the alteration in the language by addition of the words "*in accordance with law*" and "*proper*" before the word "Court" is noticeable. Under Act IX of 1871, the word "Court" was understood to mean the Court whose business it was, either by transfer or otherwise, to execute the

17. *Bisseshur Mullick v. Maharaja*, (1868) 10 W.R. 8 (F.B.).

18. *Chunder Coomar Roy v. Bhugobutty*, (1877) 3 Cal. 235 (F.B.); Followed in *Prabhacara Row v. Patannah*, (1878) 2 Mad. 1; Expld. in *Ambica Pershad v. Sardharulal*, (1884) 10 Cal. 851 (F.B.); also see *Govind Shanbhog v. Appaya*, (1880) 5 Bom. 246 ("Application to enforce decree").

19. *Ibid.*

20. *Collins v. Moula Buksh*, (1879) 2 All. 284.

21. *Jamnadas v. Lalitram*, 2 Bom. 294.

22. *Chunder Coomar v. Bhugobutty*, (1877) 1 C.L.R. 23; *Hurree Shunkur v. Krishna Kant*, (1876) 25 W.R. 116.

23. *Chunder Coomar Roy v. Bhugobutty*, 1 C.L.R. 23; also see *Ram Soonder v. Gopeesur*, (1878) 2 C.L.R. 284.

24. *Fakir Muhd. v. Ghulam Hussain*, (1878) 1 All. 580.

25. *Khoorshed Hossein v. Nubhee Fatima*, (1878) 3 Cal. 551; also see *Mohun Chunder v. Mohesh Chunder*, (1883) 9 Cal. 568.

decree.²⁶ Explanation II appended to Art. 179 in Act XV of 1877 simply enacted the results of this and similar decisions.²⁷ In cl. 5 of Art. 179 of Limitation Act XV of 1877, time was made to run from "the date of issuing a notice". There was a difference of opinion as to the meaning of these words, and the Calcutta view has now been adopted by the Legislature in amended cl. (6) of Art. 182, Limitation Act, 1908. The Madras and Calcutta High Courts held that the

"date of issuing meant the date of actual issuing of the notice, and not the date of the order directing that the notice be issued".²⁸

The opposite view had maintained that the date of issue meant the date of order to issue the notice.²⁹

2564. The starting point under Cl. (4) of Art. 179, Limitation Act XV of 1877, or Cl. (5) of Art. 182 of Act IX of 1908, before the amendment by Act IX of 1927, was the date of applying for execution as contemplated by S. 230 (Civil Procedure Code, 1882), or O. 21, R. 10, Civil Procedure Code, Act VI of 1908: and S. 235 (O. 21, R. 11), Civil Procedure Code,³⁰ or the date of taking some *step-in-aid* of execution. The date of application to a proper Court within the meaning of Cl. (4) of Art. 179 signified the date of presentation of the application, and not the date on which the application was considered and disposed of by the Court.³¹ Similarly, limitation ran from the date when an application was made to the Court to take a *step-in-aid* of execution and not from the date when the Court disposed of the application,³² or from the date of taking a *step-in-aid* of execution.³³ To satisfy the requirements of Art. 179, Cl. (4), Limitation Act, 1877, there must have been an application to the proper Court, and time ran from the date of application and not of the order made upon it.³⁴ The date of apply-

26. *Prokash Chunder Lahery v. Poorno Chunder Roy*, (1874) 21 W. R. 410.

27. Dr. Pal's Limitation Act, p. 1200.

28. *Kedareswar v. Mohini*, (1902) 6 C.W.N. 656; *Rattan v. Deb*, (1906) 10 C.W.N. 303; also see *Cherurath v. Neratti*, (1906) 30 Mad. 30.

29. *Udit v. Ram Pertab*, 1 A.W.N. 147 and *Gobinda v. Dada*, (1904) 28 Bom. 416.

30. *Tarachand v. Kashinath*, 10 Bom. 62 (64); *Chunder Coomar v. Bhogobutty*, 3 Cal. 235 (F.B.); *Prabhakhara v. Patannah*, 2 Mad. 1.

31. *Raj Behary v. Kalihar*, (1909) 3 I.C. 336=10 C.L.J. 479; also see *Troylokyanath v. Jyoti Prokash*, (1903) 30 Cal. 761; Followed *Fakir Muhd. v. Ghulam Hussain*, (1878) 1 All. 580; *Sarat Kumari v. Jagat Chandra*, (1897) 1 C.W.N. 260.

32. *Mochai Mandal v. Meseruddin*, (1911) 9 I.C. 213=13 C.L.J. 26.

33. *Thakur Ram v. Katwary Ram*, (1900) 22 All. 358.

34. *Trimbak Bapuji v. Kashinath*, (1897) 22 Bom. 722; also see *Mt.*

ing to the Court asking it to take some step-in-aid of execution of the decree or order is to be taken as the date from which the period of limitation should be computed and not the date of the petitioners taking some step-in-aid of execution.³⁵ The amendment made by Act IX of 1927, makes "*the date of final order passed on an application made*", as the starting point instead of "*the date of applying*"; and the effect of it is that since the 1st of January, 1928, time does not run from date of application, but now it runs from the date of final order passed on such application.³⁶ This includes applications for execution, as well as applications for taking some step-in-aid of execution.³⁷ The Amending Act, will not disturb rights already vested by the execution of decree becoming barred under the earlier law: and the right to execute would not be revived entitling the decree-holder to come in within 3 years from the date of the *final* order passed on the previous application.³⁸

TITLE II: ESSENTIAL REQUIREMENTS.

2565. **ESSENTIAL REQUIREMENTS OF CL. 5.**—It has been pointed out, by the Full Bench of Lahore High Court, in *Ghanayalal v. Nathuram*,³⁹ that the language of Cl. (5) makes it clear that the period of three years commences from (a) the date of the application for execution, or (b) the date of an application for taking some step-in-aid of execution.

"Two conditions are necessary to satisfy the law: (1) there must be an application in accordance with law asking the proper Court to take a step: (2) the step required to be taken by the Court must be one in aid of execution. When both these conditions are fulfilled, the requirements of the law are fully satisfied and nothing more is needed. It is not necessary that the proposed step should be actually taken, or that even an order should be passed by the Court on the application. As soon as an application of the above description is made, the period of limitation will run from the date of the presentation of the application".

Similarly, the Oudh Chief Court has observed that

"if we analyse this clause it will be quite clear that in order to bring the case under it, the essential conditions which must be satisfied are that there must be (a) an application in accordance with law; (b) the application must be made to the proper Court; and (c) the application must be to take some step-in-aid of execution of the decree".⁴⁰

Bhagwanta Kuer v. Dewan Zamir Ahmad, 1924 Pat. 221=3 Pat. 596=78 I.C. 766=2 P.L.R. 249.

35. *Krishna Pattar v. Seetharama Pattar*, (1926) 1926 Mad. 1178=50 Mad. 49=51 M.L.J. 480 and *Ghanyalal v. Nathu Ram*, 12 Lah. 153=1931 Lah. 81=131 I.C. 100=32 P.L.R. 84 (F.B.).

36. *Kanailal v. Purnachandra*, 34 C.W.N. 733; also see *Ram Bhargose v. Rammanlal*, 137 I.C. 768=9 O.W.N. 209=1932 Oudh 148 (F.B.).

37. *Sapani v. Damodar*, 1930 Pat. 207=127 I.C. 572.

38. *Ibid.*, 1930 Pat. 207.

39. 1931 Lah. 81=131 I.C. 100=12 Lah. 153=32 P.L.R. 84 (F.B.).

40. *Matadin v. Kausila*, 1931 Oudh 356=8 O.W.N. 769=132 I. C.

Thus, "according to Cl. (5), when an application for execution is made it is to be enquired (1) whether there was—

- (a) any previous application for execution;
- (b) any previous application to take some step-in-aid of execution;
- (2) Whether these previous applications were made in accordance with law;
- (3) whether they were made to the proper Court;
- (4) when was the *final order* passed on such application".⁴¹

SUB-TITLE I: APPLICATION FOR EXECUTION.

2566. I: APPLICATION FOR EXECUTION.—An application for execution is an application, made under O. 21, R. 10, Civil Procedure Code, 1908 (S. 230, para. 1, Civil Procedure Code, 1908), to the Court which passed the decree, or to the officer (if any) appointed in this behalf, or to the Court or the proper officer of the Court to whom it has been sent for execution under the provisions of the Civil Procedure Code. (*See* S. 37, Civil Procedure Code).

Who may apply. The Code does not bar a succession of applications for execution.⁴² The decree-holder whose name is on the record is entitled to apply for execution of the decree.⁴³ A stranger not a party to the suit cannot apply.⁴⁴ In a representative suit, any one who is represented in the suit by the decree-holder on record, can apply to be brought on record and to execute the decree.⁴⁵ The representatives of a deceased decree-holder can, similarly, apply to be brought on the record and to execute the decree.⁴⁶ A defendant in a partition suit is in the posi-

797; also see *Tilla Singh v. Tirbhuvan Singh*, 146 I.C. 805=1933 Oudh 564.

41. Dr. Pal's Limitation Act, p. 1230.

42. *Asin Mandal v. Raj Mohandas*, (1911) 11 I.C. 385 (386)=13 C. L.J. 532.

43. *Dilafza Begam v. Deputy Commissioner*, (1917) 37 I.C. 133 (135)=3 O.L.J. 570; *Durioo Roy v. Doola Roy*, (1879) 24 W.R. 10 (11) (Cal.); *Jasodha Devya v. Kritribash Das*, (1891) 18 Cal. 639 (641); *Khettur Mohan v. Issur Chunder*, (1869) 11 W.R. 271 (272).

44. *Ibid.*, 37 I.C. 133 (135)=3 O.L.J. 570; also see 24 W.R. 10 (Cal.).

45. *Lachman v. Patin Ram*, (1876) 1 All. 510 (511) (Decree in favour of a firm, through an agent: Another agent applying for execution); *Sreaminathan v. Kumaraswamy*, (1923) 72 I.C. 284=1923 Mad. 472=44 M.L.J. 282.

46. *Hulodhur v. Judoonath*, (1870) 14 W.R. 162; *Baluswami v. Venkataswamy*, 75 I.C. 219=1924 Mad. 95 (96)=32 M.L.T. 249.

tion of a decree-holder, and is entitled to apply for execution.⁴⁷ A

Succession certificate. A succession certificate has to be produced along with, or during the pendency of execution proceedings, where the decree-holder is dead⁴⁸; and the claim is not by a rule of survivorship.⁴⁹ But an application without certificate has been held to save limitation,⁵⁰ and, in any case, it is not a condition precedent.¹ An application by pleader after client's death is invalid.² However, a fresh authority is not required for a pleader to appear, act, and plead on behalf of the decree-holder in execution proceedings, if he was duly authorised to act in *suit* itself.³ In the case of a decree, which has been reversed, modified,

Appellate decree. or affirmed in appeal, the application must be for execution of the appellate decree in which the decree of the trial Court has been merged. (*See* notes on Cl. 2, *supra*).⁴ An application for execution only contemplates a relief which has been granted by the decree.⁵ An application for

In accordance with O. 20, R. 11. execution must be in accordance with the provisions of O. 20, R. 11 (S. 235, Civil Procedure Code, 1882), and the following sections of the Code. It may be **oral** in the case dealt with in

Oral application. Cl. (1) of R. 11, O. 20, Civil Procedure Code. Otherwise it should be in writing. Sub-rule (2), of R. 11, details the particulars a written application

Verification of application. for execution shall contain. The application for execution should be signed and verified by (a) the applicant, or (b) some other person acquainted with the facts of the case. Where there

47. *Chunilal Jamnadas v. Mulchand Harjiban*, 1923 Bom. 23=46 Bom. 937=67 I.C. 417=24 Bom. L. R. 440.

48. *Kalian Singh v. Ram Charan*, (1898) 18 All. 34 (35)=1895 A.W. N. 148; *Beharilal v. Majidali*, (1902) 24 All. 138 (142)=1897 A.W.N. 29.

49. *Raghavendra v. Bhima*, (1892) 16 Bom. 349 (350); *Pallamraju v. Bapanna*, (1899) 22 Bom. 380 (381).

50. *Mangalkhan v. Salimullah*, (1894) 16 All. 26=1893 A.W.N. 197.

1. *Kalian Singh v. Ram Charan*, (1898) 18 All. 34=1895 A.W.N. 148.

2. *Kallu v. Muhammad Abdul*, (1885) 7 All. 564 (565)=1895 A.W.N. 131.

3. *Raghubar Dayal v. Jadunandan*, (1912) 13 I.C. 365 (369)=15 C.L. J. 89=16 C.W.N. 736; *Gobind Pershad v. Hriday Thakur*, 1925 Pat. 692=91 I.C. 211=7 P.L.T. 220.

4. *Harilal Dalsukhram v. Mulchand Asharam*, 1930 Bom. 225 (227)=32 Bom. L. R. 300=127 I.C. 199.

5. *Pandari Nath v. Lilachand*, (1889) 13 Bom. 237 (240); *Shri Ram v. Majiduddin*, 98 P.R. 1901.

are *several* applicants, only some of them acquainted with the facts of the case need verify.⁶ The formalities required in this connection, if of an immaterial character, will not vitiate an application; and every omission to comply with the requirements of O. 20, R. 11, is not a fatal defect.⁷

Defective application.

SUB-TITLE II: APPLICATION TO TAKE A STEP-IN-AID.

2567. II: APPLICATION TO TAKE A STEP-IN-AID.

(i) Distinction between application for execution and application for taking step-in-aid of execution. —The Calcutta and Madras High Courts have drawn a distinction between an application to execute a decree, and an application to take a step-in-aid of execution.

“An application to execute a decree means an application within the terms of S. 235, Civil Procedure Code, 1882 (O. 20, R. 11, Civil Procedure Code, 1908), that is to say, an application setting the Court in motion to execute a decree in any manner set out in the section: but having so set the Court in motion any further application during the continuance of the same proceeding is an application to take a step-in-aid of execution within the terms of cl. 4 (cl. 5 of present Act) in the last column of Art. 179 (now Art. 182).”⁸

An application which, if successful, would facilitate execution, or prevent an obstacle being raised to the execution of a decree, whether an application for execution is pending or not, cannot be treated as coming within the words “step-in-aid” of execution.⁹ The article classes together an application for execution and an application to take some step-in-aid of execution, and the latter words appear to be intended to cover an application which is not an initial application for execution, but is an application to take some step to advance an execution application which is already pending, *e.g.*, an application to bring in sale properties already under attachment.¹⁰

6. *Bhagwat Prasad v. Dwarka Prasad*, (1924) 2 Pat. 809=74 I.C. 174=1924 Pat. 23 (25).

7. See Civil Procedure Code, O. 20, R. 11 and comments in Mulla's Civil Procedure Code, or Chitale's Civil Procedure Code; also see *Saligram Tahilram v. Tower*, 1922 Sindh 29 (30)=65 I.C. 14=15 S.L.R. 156 and *Saudamini Ghose v. Jessore R. L. Co.*, 1926 Cal. 1146 (1148)=96 I.C. 554; *Prosunna Kumar v. Jotindra*, 1924 Cal. 398=71 I.C. 1054 and *Abdul Salam v. Virbhadra*, 1929 Mad. 703=57 M.L.J. 97=52 Mad. 760=118 I.C. 72; *Srinivasa v. Tirumalai*, 23 I.C. 99 (Mad.); *Vithal v. Gopal Rao*, (1911) 1 I.C. 240 (242) (Nag).

8. *Paroosh Ram v. Kalipuddo*, (1889) 17 Cal. 53; *Venkataramanamma v. Purushottam*, (1900) 24 Mad. 188=10 M.L.J. 342.

9. *Kuppuswami v. Rajagopala*, 1922 Mad. 79=45 Mad. 466=42 M.L.J. 303.

10. *Ibid.*, 1922 Mad. 79=45 Mad. 466=42 M.L.J. 303; *Folld. in Krishna Pattar v. Seetharama*, 1926 Mad. 1178.

According to the above view, an application made at a time when no execution petition is pending cannot be said to take some step-in-aid of a petition which has not been initiated. The **Lahore High Court**,¹¹ however, and some later **Madras**¹² decisions take an opposite view. It is pointed out that

(ii) Step-in-aid of pending execution. “an application to take some step-in-aid of execution of the decree can be made when no application for execution at the instance of the particular decree-holder is pending in Court The words ‘*where the application next hereinafter mentioned has been made*’ apply both to an application for execution and an application to take some step-in-aid of execution, and both the applications are mentioned independently of each other in the clause with the result that each is sufficient to save limitation, and the second kind of application is not dependent on the first”.

An application to be a step-in-aid of execution need not be made in a pending execution petition.¹³ The word “execution” in step-in-aid of execution, is sometimes taken in the narrow sense of applying only to that which is about to take or is in the course of taking place, *i.e.*, only to steps-in-aid of execution to be had in future. But a somewhat broad and liberal construction has been put upon these words by the **Allahabad**,¹⁴ and **Calcutta**¹⁵ High Courts where, even an application by the decree-holder to be put in possession of the property which he purchased in execution of his decree, commenced and carried out in the past has been held to be a step-in-aid of execution of the decree. The **Bombay High Court** has held recently that an application to take a step-in-aid of execution is competent even if there is no pending application for execution.¹⁶ A step-in-aid in accordance with law must be some step taken in aid of execution, and when an application is made relating to the execution of a

11. *Ghanayalal v. P. N. Bank, Ltd., Lahore*, 1928 Lah. 7=111 I.C. 259; also see *Shankara v. Thangamma*, 1922 Mad. 247=45 Mad. 202; Folld. in *Rarichan v. Kunhamu*, 1934 Mad. 392 and *Kannan v. Avoolla Haji*, 1927 Mad. 288=50 Mad. 403=52 M.L.J. 1 (Per contra 1922 Mad. 79=45 Mad. 466=42 M.L.J. 303; also see *Jugdeo v. Bhubaneswari*, 7 Pat. 708=1928 Pat. 612 (613); *Sheo Sahai v. Jumna Prashad* (The application to take some step-in-aid of execution may be made in any other proceeding which affects the execution of the decree).

12. *Ibid.*

13. *Rarichan v. Kunhamu*, 1934 Mad. 392=39 L.W. 639=150 I.C. 113=57 Mad. 808=67 M.L.J. 762.

14. *Motilal v. Makund Singh*, (1897) 19 All. 477.

15. *Sariatoola v. Raj Kumar*, (1900) 27 Cal. 709.

16. *Gopal Shanker v. Raising Premji*, (1934) 151 I.C. 767=36 Bom. L. R. 570=1934 Bom. 266; Not Foll. 1922 Mad. 79=70 I.C. 324=45 Mad. 466; Folld. 1922 Mad. 247=45 Mad. 202.

decree but the applicant does not state what step he wishes to be taken, that application will not come under this clause.¹⁷

2568. This clause requires that the decree-holder should make a *direct and independent* application for execution of his own decree on his account.¹⁸ The application contemplated by that article is an application for some order of the Court in furtherance of the execution of the decree.¹⁹ Consequently, it has been held that the appearance of a decree-holder, by his pleader to oppose an application made by his judgment-debtor to set aside a sale in execution of a decree is not an application within the meaning of this clause.²⁰ Similarly, the mere consent by a decree-holder to the application made by the judgment-debtor for a postponement of the sale, is not an application to take a step-in-aid of execution.²¹ An application by the decree-holder to postpone a sale, not with a view to enable him to bring the property to sale more advantageously for him,²² but in opposition to the judgment-debtor's application to sell the properties in an order different from that in which they have already been directed to be sold,²³ is not an application coming under Art. 182, Cl. (5). However, it may be otherwise if the decree-holder's opposition is coupled with a prayer to sell the properties in a different order.²⁴ The resistance of the decree-holder to the judgment-debtor's application for insolvency,²⁵ or the mere appearance of the decree-holder in a proceeding under O. 21, R. 90, which was, however dismissed for default,²⁶ cannot amount to an application to take some step-in-aid of execution within the meaning of Art. 182 (5). However, where on the judgment-debtor's application under O. 21, R. 2, the decree-holder attends the Court with witnesses to contest the application inform-

17. *Ratanchand Bhalchand v. Chandulal Doshi*, 1934 Bom. 113 (2)=150 I.C. 866.

18. *Skiblal v. Radhakishen*, (1885) 7 All. 898.

19. *Umesh Chandra v. Soonder Narain*, (1889) 16 Cal. 747.

20. *Ibid.*, 16 Cal. 747; also see *Madho Pershad v. Ghanayalal*, 1929 Lah. 529=115 I.C. 24=30 P.L.R. 419.

21. *Sreenivasa Chariar v. Pannuswamy*, (1904) 28 Mad. 40.

22. *Troylokyanath v. Jyoti Prakash*, (1903) 30 Cal. 761; *Reld. on Abdul Hossein v. Fazilun*, 20 Cal. 255.

23. *Ibid.*, 30 Cal. 761.

24. *Dharmamma v. Subba*, 7 Mad. 306.

25. *Langtu Pandu v. Baijnath*, (1906) 28 All. 387.

26. *Baldeo v. Lachhman*, (1927) 6 Pat. 280=1927 Pat. 113=99 I.C. 869.

ing payment out of Court, the act can be construed to mean a step taken in aid of execution.²⁷

SUB-TITLE III: APPLICATION IN ACCORDANCE WITH LAW.

2569. III: APPLICATION IN ACCORDANCE WITH LAW.—The words “*in accordance with law*” in Art. 182, cl. (5) mean in accordance with the law relating to the execution of decrees²⁸; that is, an application made within the prescribed period.²⁹ The expression should be taken to mean that the application is one upon which execution could lawfully be ordered.³⁰ The words would

“ordinarily mean that a decree-holder must apply to the proper Court, that is, the Court having jurisdiction, observing the prescribed procedure, and asking that which it is within the legal competence of the Court to grant as a step-in-aid of the execution of its own decree. Then such an application must not ask for property which has not been decreed, or for its realization by means unknown to the law”.³¹

The expression does not mean an application prescribed or required by law. An application would be in accordance with law, even though it is not required by law, provided it does not contravene any express provision of law, or conflict with any principle of law.³²

An application for execution is in accordance with law, if it substantially complies with the requirements of O. 20, Rr. 11 to 14.³³ If the omission were such as to make it impossible for the Court to issue execution upon it, it should be held that such an application was not in accordance with law.³⁴ But, merely an omission from the execution petition of the particulars required by cls. (d) and (g) of O. 21, R. 11 (2), Civil Procedure Code, is not sufficient to make them otherwise than in accordance with law.³⁵

27. *Hatimullah v. Sukhamoy*, 1930 Cal. 304=124 I.C. 830; *Reld. on Brojendra Kishore v. Dil Mahmud Sarkar*, (1918) 22 C.W.N. 1027=44 I.C. 604.

28. *Balkishendas v. Bedmati*, (1892) 20 Cal. 388.

29. *Nilmoney Singh v. Ram Jeebun*, (1881) 8 C.L.R. 335.

30. *Ramgopal Shri Ram v. Ramgopal Bhutada*, 1934 Bom. 307=153 I.C. 273=59 Bom. 1=36 Bom. L. R. 648.

31. *Janardhan v. Narayan*, (1918) 46 I.C. 56=42 Bom. 420.

32. *Ram Chandra v. Uka*, 24 N.L.R. 36=103 I.C. 279=1927 Nag. 308 (309); *Annamalai v. Ramier*, 31 Mad. 234 (235).

33. *Pilwasao v. Mt. Khairunnissa*, 1935 Nag. 1=153 I.C. 955=31 N.L.R. 126; *Rama v. Varada*, 16 Mad. 142; *Abdul Rafi v. Maula Baksh*, 37 All. 527.

34. *Ramgopal Shri Ram v. Ramgopal Bhutada*, 1934 Bom. 307=153 I.C. 273=59 Bom. 1=36 Bom. L. R. 648.

35. *Vittala Hegde v. Paniyur Hosamane*, (1933) 147 I.C. 386=1933 Mad. 872=1933 M.W.N. 929=38 L.W. 877.

The language of the clause ought not to be strained in favour of the judgment-debtor who has not paid his debt.³⁶ Art. 182 of the

Fair and liberal construction. Limitation Act should receive a fair and liberal, and not too technical construction, so as to enable the decree-holder to obtain

the fruits of his decree, and the language of the article should not be strained in the judgment-debtor's favour.³⁷ Technical defects of no importance should not be allowed to save defaulting debtors from paying the money which they owe.³⁸ It is only material defects

Material defects. that can vitiate an application, *i.e.*, defects which if not corrected or removed render the application invalid, and the Court cannot proceed to execution unless they are amended. It was held in *Gopal Sah v. Janki*,³⁹ that if the application does not comply with the requirements of O. 21, Rr. 11-14, the application is not one made in accordance with law; and if not amended within the period fixed by the Court, it cannot give a fresh starting point for limitation. However, it has been held in later **Calcutta** cases,⁴⁰ and also by the **Madras High Court**, in a number of decisions,⁴¹ that where an application has been returned for amendment for correction of minor errors, but not represented, such application would be sufficient to save limitation. It should be remembered that it is not every defect that would invalidate an application and take it out of the clause.⁴² A trivial defect of form or informality will not vitiate an application.⁴³ The **Sind Judicial Commissioner's Court** has observed that in order to see whether an application is in accordance with law all that has to be seen is whether it is in accordance with the requirements of law.⁴⁴

36. *Sriram v. Sheobain*, 1934 Pat. 289=149 I.C. 102; Reld. on *Pitamber Jana v. Damodar Gachait*, 1926 Cal. 1077=98 I.C. 166=58 Cal. 664.

37. *Ramchandra v. Uka*, 103 I.C. 279=1927 Nag. 308; Folld. *Varadaraja v. Murugesam*, 30 I.C. 707=39 Mad. 923=30 M.L.J. 460; also see *Adhar Chandra v. Lal Mohun*, 24 Cal. 778; *Kunbi v. Seshagiri*, 5 Mad. 141; *Pachiappa v. Poojali*, 28 Mad. 557 (559).

38. *Kadiresan Chettyar v. Maung Sanya*, 1933 Rang. 87=142 I.C. 435.

39. 23 Cal. 217 (223).

40. *Mathura Prosad v. Anurago Koer*, 5 I.C. 579=14 C.W.N. 481; *Gopal Chunder v. Gosain Das*, 25 Cal. 594=2 C.W.N. 556 (F.B.).

41. *Rama v. Varada*, 16 Mad. 142; Folld. *Rama Nadan v. Peria-thambi*, 6 Mad. 250; also see *Seshayya v. Venkatasubbiah*, (1915) 29 I.C. 26; *Kamakshi v. Pichu*, (1916) 35 I.C. 876; *Natesan v. Ganapathia*, (1917) 40 Mad. 949=38 I.C. 136; *Thirupathi v. Yegnammal*, 1934 Mad. 568=143 I.C. 844.

42. *Gopal Chunder v. Gosaindas*, 25 Cal. 594; *Keshavcesarindra v. Rani Debendra*, 4 P.L.J. 213 (233); *Abdul Rauf v. Maula Baksh*, 37 All. 527 (528).

43. *Ibid.*

44. *Acharj Singh v. Acharj Ram*, 1933 Sind 78 (81)=142 I.C. 489=27 S.L.R. 109.

"Now what the law requires in an application for execution is given in O. 20, R. 11, Civil Procedure Code. If any of the material particulars required to be given by that rule has been left out and the defect not repaired in time, it may be said that such an application is not in accordance with law. The defect, however, must be such as would take the application out of the category of applications for execution contemplated by O. 21, R. 11. If, on the other hand, all the particulars required to be given by cl. 2 of the Rule are given, the application cannot be said to be defective or not in accordance with law."⁴⁵

Such an application will save limitation, whether admitted, rejected, returned, or allowed to be amended.⁴⁶ An order of rejection in order to be a conclusive order must contain a finding that the application is not in accordance with law.⁴⁷

An application for a relief which was not given in the decree, or which is not competent, cannot be considered an application "in accordance with law," and would not, therefore, save limitation.⁴⁸ The expression "applying in accordance with law" means applying to the Court to do something which by law that Court was competent to do⁴⁹; and not to do something which the decree-holder presumes that the Court is competent to do.⁵⁰ Therefore, an application for execution made to a Court which has no jurisdiction to entertain is not an application in accordance with law.¹ An application for execution of a decree to be in accordance with law must ask for something *within* the decree and not outside it.² An application asking for relief partly granted by the decree and partly for relief outside the decree, though it may be void as to the latter, would be good in law at least as to the former, and therefore would be in accordance with law as a step-in-aid of execution. The question of the *bona fide* intention of the applicant does not arise in such proceedings.³ The *onus* is on the judgment-creditor to prove that his application is within time; and

The onus.

45. *Acharj Singh v. Acharj Ram*, 1933 Sind 78 (81).

46. *Ramgopal Shriram v. Ramgopal Bhutada*, 1934 Bom. 307; also see *Gobardhandas v. Jung Bahadur*, 1926 Oudh 616=1 Luck. 569.

47. *Ghulam Ali v. Raj Kumar*, (1935) 142 I.C. 762 (Nag.).

48. *Padarinath Bapuji v. Lilachand Hathibai*, (1888) 13 Bom. 237; also see *Bando Krishna v. Narasimha*, (1912) 37 Bom. 42.

49. *Munawar Hussain v. Jani Bijai Shankar*, (1905) 27 All. 619=1905 A.W.N. 132=2 A.L.J. 376; *Purnachandra v. Radhanath*, 33 Cal. 867; *Stevens v. Kamta Prasad*, 10 C.L.J. 19=2 I.C. 941; *Langtu v. Baijnath*, 28 All. 387; also see *Chattar v. Newalsingh*, (1889) 12 All. 64=1889 A.W.N. 200; *Khet Singh v. Onkar Singh*, 1 N.L.R. 61.

50. *Ramraj Dasaundhi v. Mt. Umraji*, 1926 All. 345=93 I.C. 292.

1. *Ibid.*

2. *Nathubhai Kishendas v. Pranjivanlal*, (1909) 34 Bom. 189.

3. *Kayastha Co. v. Sitaram Dube*, 1929 All. 625=118 I.C. 17=52 All. 11 (F.B.); *O. R. Sheq Prashad v. Narainbai*, 1926 All. 95=90 I.C. 938=48 All. 468.

that his application is in accordance with law.⁴ Whatever the difficulties of a judgment-creditor, the words "*in accordance with law*" cannot be stretched to cover a case where the application could not result in any relief being granted, and where the applicant apparently knew that no relief could be given.⁵ An application for execution not in accordance with the terms of the decree is not a step-in-aid of execution.⁶ However, where a decree directs that the decree-holder should be entitled to a certain *relief*, in a certain *event*, or on a certain *condition*, an application before the **happening of that event**, or before fulfilling that condition, may not be successful as a remedy, but it is not an application for relief which is outside decree, and therefore can save time as being an application in accordance with law.⁷ Any *incorrectness* or *superfluity* as to the reliefs asked for in the application does not vitiate the application to such an extent as to debar the decree-holder from claiming it to be a step-in-aid of execution.⁸ However, whether an application which is defective should be treated as an application in accordance with law must depend on the facts of each particular case, and no

hard and fast rule can be laid down in
that behalf.⁹ It has been observed by the
Oudh Judicial Commissioner's Court, that

"No general principle can be laid down as to what applications returned for amendment would be legal ones and what would be illegal ones by reason of the defects. An execution application may be so defective as not to be an application according to law at all, but in each case the question is one of fact as to what would constitute such defect. Therefore one case cannot be a guide in another case".¹⁰

also see *Ram Bharose v. Rammanlal*,¹¹ where it is stated that

"it is not possible to lay down any rule of thumb which might constitute a criterion in all cases for determining whether a particular proceeding is or is not a step-in-aid of execution. The question must depend upon the circumstances of each case".

4. *Volkart Brothers v. Acharj Ram Sahni*, 1931 Sind 160; also see *Rajkumar v. Rajlakhi*, (1885) 12 Cal. 441 (443).

5. *Ibid.*, 1931 Sind 160.

6. *Sriram v. Majiduddin*, 98 P.R. 1901.

7. *Nathubhai v. Pranjivan*, 34 Bom. 189; cf. *Syed Husain v. Rajagopala*, 30 Mad. 28; *Budhram v. Mushtaq Shah*, 1935 Pesh. 129 and *Mt. Bhuri v. Rahmate*, 122 I.C. 438 (Nag.).

8. *Kishore Mal v. Jagdish Narain Singh*, 1924 Pat. 471=3 Pat. 42.

9. *Deoraj Multani Sahai v. Fatchchand Ramchand*, 1933 Sind 341=147 I.C. 470=27 S.L.R. 314.

10. *Durga Prasad Singh v. Jakhooram*, (1925) 86 I.C. 591=1925 Oudh 399=28 O.C. 382=2 O.W.N. 70.

11. 1932 Oudh 148=137 I.C. 768=7 Luck. 590 (F.B.).

2570. ILLUSTRATIVE CASES.—

2571. (1) An application for execution by transferee of

(i) **Application by transferee of decree.** decree, under an assignment in writing, although he may be merely a *benamidar* is sufficient to keep the decree alive.¹² An application by transferee decree-holder to be recognised as such is an application in accordance with law, and a step-in-aid of execution.¹³ An application by a transferee of a decree to bring his name on the record and for execution held to be an application which revived limitation¹⁴; but it would not be considered to be a proper application unless the transferee of the decree applied for execution.¹⁵ Where a transferee decree-holder does not take steps to get himself recognised as the decree-holder, the transferee can execute the decree, and his intervening insolvency does not alter the position if the official assignee had no interest in the decree on the date of the application, and the transferee's rights in such a case are against the transferor alone and not against the judgment-debtor.¹⁶

2572. (2) An application made after the period prescribed by the law then in force cannot constitute

(ii) **Application after period of limitation.** a fresh starting point of limitation.¹⁷ Where the prior application for execution which was barred by time was admitted by the executing Court and execution was ordered to issue thereon, the order although erroneously made is nevertheless valid, unless reversed upon appeal, and the judgment-debtor cannot object to a subsequent application for execution on the ground that the previous application was barred by time.¹⁸ Where the judgment-debtor had notice of the application for execution and raised no objection to it and the execution had been ordered in pursuance of it, by a Court having jurisdiction to determine whether the decree was barred, it was held that it must be considered to have been determined that

12. *Balkishendas v. Bed Mati*, (1892) 20 Cal. 388.

13. *Annamalai Mudaliar v. Ramier*, (1907) 31 Mad. 234; cf. *Ramachandra Aiyar v. Subramaniah*, (1903) 14 M.L.J. 393; *Somamma v. Basammah*, (1912) 14 I.C. 704 and *Palaniappa v. Subramania*, (1925) 85 I.C. 409=48 Mad. 553=1925 Mad. 701 (No provision for a transferee to bring his name on record).

14. *Rajitagiri Pathy v. Bhawani Sankaran*, 1924 Mad. 673=80 I.C. 103=47 Mad. 641.

15. *Ayyaru Pillai v. Varadaraja*, 1926 Mad. 431=92 I.C. 770; *Devraj v. Fatehchand*, 1933 Sind 341.

16. *Nayin Sikh Jayanarayana v. Seerapu Pollayya*, (1935) 159 I.C. 589=1935 Mad. 383=68 M.L.J. 392.

17. *Nilmony v. Ram Jeebun*, (1881) 8 C.L.R. 335.

18. *Desiappa v. Dundappa*, (1920) 55 I.C. 329=22 Bom. L. R. 76=44 Bom. 227; *Reld. on Mungul Pershad Dichit v. Grija Kant Lahiri*, 8 I.A. 123=11 C.L.R. 113=8 Cal. 51 (P.C.).

it was not barred.¹⁹ An application for execution which is accepted by the Court, although it is out of time, starts a fresh period of limitation.²⁰ Once a Court has decided either directly or indirectly that an execution case is a fit one to try and, therefore, not barred by limitation, there is an end to the matter, and it is not open to either of the parties thereafter to raise the same question in a fresh execution.²¹ Although the execution of a decree may have been actually barred by time for its execution, yet if an order for execution is made by a competent Court, having jurisdiction to try whether such execution is barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.²² However, a judgment-debtor, who was not a party to a previous application for execution of a decree or to any order made upon it, is not precluded from showing that the said application was barred by limitation, and that, therefore, it was not in accordance with law.²³ An application filed on the last date of limitation which had been returned for certain amendments, which were not carried out properly within the time allowed, was held to be barred by limitation, as it was a mere scrap of paper when it was originally filed.²⁴

(iii) **Unsuccessful application.**

2573. (3) In *Bando Krishna v. Narasimha*,²⁵ it was observed that

“where a decree gives certain reliefs, and the application for execution seeks some or all of them, it may be that, after going into the merits of the application and considering on evidence all the circumstances and equities of the case, the Court comes to the conclusion that the particular relief or reliefs sought shall not be granted. But that decision of the Court on the merits cannot affect the application for the purpose of the question whether it is by itself in accordance with law, provided it meets in substance the requirements of the Code of Civil Procedure or any other law relating to execution”.

An application by the judgment-creditor for substitution of the heirs of the deceased judgment-debtor, though disallowed, is an application in accordance with law to take some step-in-aid of

19. *Lakshmanan Chetti v. Kuttayan*, (1901) 24 Mad. 669; Folld. 8 Cal. 51 (P.C.).

20. *Gulappa v. Erava*, (1921) 63 I.C. 844=23 Bom. L. R. 1013=1922 Bom. 118=46 Bom. 269 (271); *Prabhuling v. Gurnath*, (1920) 45 Bom. 453 (459).

21. *Jago Mahton v. Khirodhar*, (1923) 74 I.C. 130=1924 Pat. 122=2 Pat. 759; Folld. 8 Cal. 51 (P.C.).

22. *Sheoraj Singh v. Kamesharnath*, 24 All. 282=A.W.N. (1902) 63.

23. *Harendralal v. Shamlal*, (1899) 27 Cal. 210.

24. *Bhupendra Narain v. Janeswar*, (1925) 90 I.C. 761 (Pat.).

25. (1912) 37 Bom. 42 (49)=14 Bom. L. R. 861; Folld. in *Subramanian Chetty v. Ramaswami*, 1926 Mad. 179=49 M.L.J. 753=91 I.C. 11; also see *Shankar v. Narsingh Rao*, 11 Bom. 467; *Gulappa v. Erava*, 46 Bom. 269=1922 Bom. 118=63 I.C. 844.

execution.²⁶ An application to the Court to do an act in aid of execution, even though it is refused, is an application within Art. 182, Limitation Act, for the purpose of saving limitation.²⁷ An application for execution of a decree which was dismissed on the ground that the decree itself was already under attachment is an application in accordance with law so as to save limitation.²⁸ An application praying for a relief which perhaps the Court would not have granted is still treated as an application in accordance with law for the purposes of Art. 182, Limitation Act.²⁹ An application for execution would be in accordance with law, if it is in accordance with the rules of procedure prescribed therefor, and it does not cease to be such an application even though on an adjudication on the merits of the case the Court rejects the relief for which it prays.³⁰ An application dismissed as defective, is none the less an application in accordance with law.³¹

2574. (4) In the case of *Brojonath Sarma v. Iswar Chandra Dutt*,³² it was held by the **Calcutta High Court**, that an application to execute, although unaccompanied by a certificate, was a good application in law. This view was entirely concurred in by the **Allahabad High Court** in *Mangal Khan v. Salimullah Khan*,³³ where it was held that though under certain circumstances a Court may be prohibited from granting execution of a decree unless a succession certificate as provided by the Act is produced before it, it does not therefore follow that under such circumstances an application for execution is a bad application because it is unaccompanied by a certificate. Where at the time of an application for execution of a decree by the heirs of a deceased, they had neither taken out a succession certificate nor had they applied for substitution of their names on the record, the Court directed the applicants to obtain a certificate, and on their failing to do so, he

26. *Adharchandra v. Lal Mohun*, (1897) 24 Cal. 778; also see *Aptabuddin v. Jogendra*, 55 I.C. 231 (Cal.).

27. *Narsingh Dayal v. Kalicharan*, (1910) 5 I.C. 147=14 C.W.N. 486.

28. *Mullaseri v. Krishebi*, (1912) 13 I.C. 179=22 M.L.J. 146; also see *Adharchand v. Lal Mohun*, 24 Cal. 778.

29. *Subramanian v. Ramaswami*, 1926 Mad. 179=49 M.L.J. 753=91 I.C. 11; also see *Appathurai v. Panayapan*, 57 M.L.J. 468=1929 Notes 27 (c)=122 I.C. 526.

30. *Gobardhan v. Jang Bahadur*, 1 Luck. 569=3 O.W.N. 749=98 I.C. 33=1926 Oudh 616.

31. *Gobardhan v. Satish Chandra*, 1 Pat. 609 (611); *Vasudevapatta Narayanapani*, 31 I.C. 853=1916 M.W.N. 112; *Subramania v. Ramchandra*, 26 Mad. 197 (199).

32. 19 Cal. 482.

33. (1893) 16 All. 26.

rejected their application for execution, it was held that the application was one made in accordance with law, and it saved limitation under Art. 182 (5), Limitation Act.³⁴ The **Bombay High Court** has followed the Allahabad and Calcutta view in holding that an application for execution of a decree made by the legal representatives of a deceased decree-holder, without the production of a certificate under the Succession Certificate Act (VII of 1889), is nevertheless one made in accordance with law within the meaning of Art. 182, cl. 5 of the Limitation Act.³⁵ According to the **Patna High Court**, where an application contains the particulars required by O. 21, Rr. 11 to 14, it is in accordance with law,³⁶ and the fact that it was presented without a succession certificate makes no difference, as an application without a succession certificate is perfectly in order: only no relief can be granted until the succession certificate is produced.³⁷ A recent ruling by the **Judicial Commissioner's Court, Nagpur**, has likewise held that the want of a succession certificate cannot vitiate the application itself, though it may deprive the applicants of their remedy, nevertheless it may be treated as a step-in-aid of execution.³⁸

2575. (5) If the applicant asked the Court to sell property not in the decree, then it might well be said
 (v) Application for a relief not competent. that such an application was not in accordance with law in the execution of that decree.³⁹ Similarly, if the Court was asked to do something which it was incompetent to do under the law⁴⁰; but if the applicant merely added some other property, it might be competent to the Court to cut out the added property. The application before the Court to be executed would be held proper, although the relief sought has been exaggerated.⁴¹ Where application was made to execute the whole of a decree against the surety and judgment-debtors, although it had been held in objection proceedings that the surety was liable to the extent of one-sixth of the decree, it was held that the decree-

34. *Hafizuddin v. Abdool Aziz*, (1893) 20 Cal. 755.

35. *Balkishan v. Wagar Singh*, (1894) 20 Bom. 76; Folld. 19 Cal. 482; 20 Cal. 755; 16 All. 26.

36. *Jogendra Prasad v. Mangal Prasad*, 1926 Pat. 160; Folld. in *Mt. Bibi Aisha v. Mahabir*, 1927 Pat. 324=6 Pat. 440.

37. *Mt. Bibi Aisha v. Mahabir*, 1927 Pat. 324=6 Pat. 440; Reld. on (1893) 20 Cal. 755.

38. *Phizvasao v. Mt. Khairunnissa*, 1935 Nag. 1=153 I.C. 955=31 N.L.R. 126.

39. *Jamibunnissa Bibi v. Mathura Prasad*, (1921) 43 All. 550 (552)=63 I.C. 262.

40. *Chattar v. Nermal Singh*, (1889) 12 All. 64; *Munawar Husain v. Jani Bijai Shankar*, (1905) 27 All. 619; *Monorath Das v. Ambika Kanta*, (1909) 9 C.L.J. 443.

41. *Jamilunnissa v. Mathura Prasad*, (1921) 43 All. 550=63 I.C. 262.

holder's application being for a relief which could not be given under law was not an application "in accordance with law" so as to save limitation.⁴² When in an application for execution of a decree, the relief asked for, to sell property not situated within the jurisdiction of the Court, is such as the Court cannot grant, the application is not in accordance with law. The same principle applies in the case of moveable property of the judgment-debtor and there is no moveable property of the judgment-debtor within the jurisdiction of the Court.⁴³ An application by a decree-holder not for acts within jurisdiction, *e.g.*, to receive poundage fees from him in respect of some of his judgment-debtor's property purchased by himself, or an application for the return to the decree-holder of a decree, made to a Court to which it has been transferred for execution, by which it has been partly executed, is not in accordance with law, to serve as a step-in-aid of execution within Art. 182 (5), Limitation Act.⁴⁴ An application to transfer a decree to a Court which is not competent to execute⁴⁵; or an application for execution of a decree by attachment of property beyond the local jurisdiction of the executing Court, is not one in accordance with law.⁴⁶ A decree entitling plaintiff to a

Conditional relief. certain relief in a *certain* event, or on a certain condition, which remains unfulfilled is not executable before the event happens or the condition is fulfilled, but it does not follow that the application is not one in accordance with law.⁴⁷ An application for execution of a decree dependent on the payment by the decree-holder of a sum of money is an application for execution made in accordance with law even though the money has not been deposited.⁴⁸

2576. (6) Where an application for execution was made by one of two joint decree-holders, without any proved assignment of the interests of the other decree-holder in the decree, but the other decree-holder made a statement that he had no objection if the decree were executed by the applicant alone; and the application ultimately failed for want of prosecution, it was held that the statement made by the other

42. *Durga Prasad v. Mt. Powdharo*, 1931 Pat. 274=10 Pat. 183=131 I.C. 815; Reld. on 13 Bom. 237 and 27 All. 619.

43. *Volkart Brothers v. Acharj Ram Sahai*, 1931 Sind 160; Reld. on 12 All. 64; also see *Sheo Prasad v. Narain*, 48 All. 468=1926 All. 95=90 I.C. 938.

44. *Aghore Kali Debi v. Prosunno Kumar*, (1895) 22 Cal. 827.

45. *Amritlal v. Murlidhar*, 1 Pat. 651=1922 Pat. 188.

46. *Sheo Prasad v. Narainbai*, 48 All. 468; O.R. in *Kayasta Co. v. Sitaram Dube*, 1929 All. 625=118 I.C. 17=52 All. 11 (F.B.), on another point.

47. *Nathubhai v. Pranjivan*, 34 Bom. 189=5 I.C. 601.

48. *Budhram v. Mushtaq Shah*, 1935 Pesh. 29; Reld. on 30 Mad. 28.

decree-holder did not amount to a relinquishment or assignment, and the application in question was mistaken. However, it was an application made by a person entitled to make it, and was thus in accordance with law.⁴⁹ An application by one of several decree-holders for execution of the *whole* decree, though not purporting to be on behalf of all, and as such liable to be dismissed, would still be an application in accordance with law.⁵⁰ An application made by the pleader of the decree-holder after the decree-holder's death has not the effect of saving limitation, as the authority of the pleader ceases on the death of his client.¹ An application for execution made by *A*, as guardian on behalf of *B*, who was a major at the time the application was made is not an application in accordance with law; and will not operate as a bar to limitation, though it may perhaps be a good application for other purposes.² Neither can such an application be considered an application under O. 21, R. 11, Civil Procedure Code (S. 235, Civil Procedure Code, 1882).³ An application for execution by the widow of the deceased decree-holder, who is entitled without being brought on the record to apply under O. 21, R. 16 (S. 232, Civil Procedure Code, 1908), is an application in accordance with law.⁴ An application by one member of a firm who has obtained a decree though defective is still an application in accordance with law.⁵ An application by a *benamidar* for execution of a decree and for substitution of his name as decree-holder is not an application made in accordance with law within the terms of this article.⁶

Where an application for execution is made by a transferee of the decree after he has been restrained by injunction from "executing it or otherwise realizing the decree-debt," he being a person who, at the time of making it, was on the face of the decree the only person entitled to execute it, the application will operate to save the bar of limitation in respect of a later application for execution made by persons held to be legally entitled to execute the decree.⁷

49. *Babamiya v. Abdul Karim*, 1934 Bom. 216=58 Bom. 428=153 I.C. 176=36 Bom. L. R. 437.

50. *Vasudeva Patta v. Narayanapani*, 31 I.C. 853=1916 M.W.N. 112 (Application by some only of the decree-holder's representatives, though not purporting to be on behalf of others, held to be an application in accordance with law).

1. *Kallu v. Muhammad Abdul*, 7 All. 564.

2. *Saramma v. Seshayya*, (1905) 28 Mad. 396; also see *Saratchandra v. Bibhabati*, 34 C.L.J. 302 (308)=1921 Cal. 584.

3. *Ibid.*, (1905) 28 Mad. 396.

4. *Alagirisami v. Venkatachellapathy*, 31 Mad. 77.

5. *Gobardhan v. Satish Chandra*, 1 Pat. 609 (611).

6. *Gour Sunder v. Hem Chunder*, 16 Cal. 355; *Denonath v. Lalit*, 9 Cal. 633.

7. *Hari Krishnamurthi v. Suryanarayanamurthi*, (1919) 43 Mad. 424.

An application for execution made **against persons whose whereabouts are not known** is an application in accordance with law.⁸ An application for execution of a decree **against a dead person**, under a *bona fide* mistake, is not to be acted upon, but the application is nevertheless one made in accordance with law and is a step-in-aid of execution.⁹ However, where, with knowledge of the death of the judgment-debtor, an application was made by attachment of the estate, as if the decree was in *rem*, and no legal representative was brought on the record, the application was held not one in accordance with law.¹⁰ Where a decree was passed **against** certain persons as **trustees**, but **who had been removed** from trusteeship, the same principle applied, and an execution petition against them was not held invalid as a step-in-aid, where the decree-holder applied for execution under a *bona fide* mistake of fact.¹¹ Similarly, where an application for execution was made, under a *bona fide* mistake, **against the minor judgment-debtor**, described under the guardianship of a dead person, it was held to be an application in accordance with law, available as a step-in-aid of execution.¹² An application made **against persons** wrongly, but *bona fide* believed to be the legal representatives of the deceased judgment-debtor is an application in accordance with law.¹³ Where, however, an application for execution was made against certain persons alleged to be the legal representatives of the deceased judgment-debtor, the application was held to be not one in accordance with law, where those persons were subsequently found not to be the legal representatives of the deceased judgment-debtor.¹⁴ An application against a minor represented by his mother, without any application to the Court for an order appointing the mother as guardian *ad litem* is an application in accordance with law.¹⁵ Where a decree was obtained against a minor represented in suit by his mother as guardian, but the decree-holder took out execution wrongly against the mother described personally as the widow of her deceased husband, and not as guardian of her son, and the application was granted, and a property belonging to the minor was

8. *Mahmud Hossain v. Enayat*, 36 All. 482.

9. *Bepin v. Bibi Zohra*, 35 Cal. 1047 (1049); *Samia v. Chokalinga*, 17 Mad. 76=4 M.L.J. 8.

10. *Madho Prasad v. Kesho Prasad*, 19 All. 337 (339).

11. *Parakhat Devaswam v. Venkatachalam*, 1926 Mad. 321=92 I.C. 709=50 M.L.J. 153.

12. *Puran Mal v. Dilwa*, 1924 Pat. 333=72 I.C. 1003=4 P.L.T. 54; *Ghulam Husain v. Narayan Singh*, 1931 Lah. 636.

13. *Ganeshwar v. Than Mall*, 1927 Pat. 92=99 I.C. 501; *Balkishen v. Bedmati*, 20 Cal. 388 (396); *Ramaswami v. Oppilamani*, 33 Mad. 6; *Ghaneshwar v. Thanmull*, 8 P.L.T. 217; *Hari Mahadev v. Balkrishna*, 33 Bom. L. R. 622.

14. *Ganendra v. Rani Nihalo*, 32 All. 404 (409).

15. *Keshwa Surendra v. Mulukrani*, 4 P.L.J. 35=48 I.C. 415.

attached, it was held that the application, under the circumstances, was one in accordance with law, notwithstanding the technical defect therein.¹⁶

2577. (7) DEFECTIVE APPLICATION.—Material defects in an application for execution are those, which if not corrected, render the application invalid, and the Court cannot proceed to execution unless they are amended. According to **Allahabad** view, the failure of a decree-holder to annex an application for attachment of immoveable property in execution of a decree an inventory of the property to be attached, with a reasonable description of the same, as required by O. 21, R. 12, Civil Procedure Code, makes the application one not in accordance with law within the meaning of Art. 182 (5), Limitation Act.¹⁷ A **Full Bench of the Calcutta High Court** has held that an application for execution made in terms of O. 21, R. 11 (2) (S. 235, Civil Procedure Code, 1882) which does not contain a list of property as prescribed by O. 21, R. 13 (S. 237, Civil Procedure Code, 1882) was defective, and as it was not amended within due time, the decree-holder was barred.¹⁸ The **Patna High Court** has held that an application filed on the last day of limitation with a heading in blank, and not mentioning the names of the decree-holders, nor giving a list of the properties sought to be attached was a mere scrap of paper, and did not amount to an application for execution, where the opportunity given by the Court to remove the defects had not been availed of by the decree-holders.¹⁹ However, the **Bombay High Court** has taken the view that the fact that a copy of the decree, and an inventory of the property had not been annexed to an application for execution of a decree did not render it not in accordance with law.²⁰ An application to the Court by a decree-holder asking for the return of the copy of a decree filed with a former *darkhast* held not a step-in-aid of execution²¹: but now see O. 21, R. 11 (cl. 3) which enacts that

16. *Hari v. Narayan*, 12 Bom. 427.

17. *Abdul Rauf Khan v. Maula Baksh*, (1915) 37 All. 527; Reld. on *Airalal v. Dulari Kuer*, A.W.N. (1892), p. 3; and *Mangal Sen v. Baldeo Prasad*, A.W.N. (1892) 70.

18. *Asgar Ali v. Troilokyanath*, (1890) 17 Cal. 631 (F.B.); O.R. *Macgregor v. Tarinicharan Sarkar*, 14 Cal. 124 (So much as decided that an application may be amended after admission and registration).

19. *Bhupendra Narain v. Janeswar*, (1925) 90 I.C. 761=1926 Pat. 533=7 P.L.T. 350.

20. *Hassan Hassan v. Ramchandra Appayya*, 1929 Bom. 196=117 I.C. 526=31 Bom. L. R. 355; also see *Birdichand v. Badesaheb*, 1927 Bom. 52=98 I.C. 941=28 Bom. L. R. 1322 (Decree against estate of deceased, no inventory required).

21. *Rajaram v. Bavaji*, (1898) 23 Bom. 311.

“the Court to which an application is made under sub-R. (2) may require the applicant to produce a certified copy of the decree. The rules of the High Court require a copy of the decree.²² It is the

Non-production of copy of decree. practice of Court officers in Madras Presidency to require a copy of the decree to be furnished before execution is issued, but

the Civil Procedure Code makes no provision for such practice, and the application for execution without production of the copy would be “according to law” as provided by Art. 182 (5), Limitation Act.²³ According to **Calcutta** the mere fact of an application for a copy of the decree cannot fairly be construed as an application to the Court to take a step in furtherance of the execution of the decree, within Art. 182, cl. (5), Limitation Act.²⁴ The Allahabad High Court takes the view that an omission to supply a copy does not affect the contents of the application, and it would be taken as made in accordance with law.²⁵

Application not stating mode of assistance. An application not stating the mode in which the assistance of the Court is required is defective, and if not amended in time, must be rejected.²⁶ Such an application is essentially defective according to the **Calcutta High Court**,²⁷

but this view is not shared by the **Allahabad**²⁸ and **Bombay High Courts**.²⁹ An application for execution which omits to mention a previous application for execution as required by O. 21, R. 11 (f) is materially defective, and is not an application in accordance with law.³⁰ An application for partial execution of a decree is not in accordance with law. But the judgment-debtor may be estopped from pleading against such execution in not having objected to or appealed a previous order for execution of a portion of the decree.³¹

Signature and verification. In *Raghunatha v. Venkatesa*,³² an unverified application was held not to be in accordance with law. Similarly, where an appli-

22. *Sadashiva v. Ramchandra*, 5 Bom. L. R. 394; Not Folld. in *Ramchandra v. Lakshman*, 31 Bom. 163; cf. *Pachiappa v. Poojali*, 28 Mad. 557.

23. *Gopilandhu v. Domburu*, (1888) 11 Mad. 336.

24. *Rajkumar Banerji v. Rajlakhi*, (1885) 12 Cal. 441.

25. *Raghunandan v. Badan Singh*, 40 All. 209.

26. *Shakharam Chand v. Ghelabbhai*, 19 Bom. 34.

27. *Maharaj Bahadur v. Basiruddi*, 1925 Cal. 1135=93 I.C. 364=41 C. L.J. 607.

28. *Beharilal v. Salikram*, 1 All. 675.

29. *Govind v. Appayya*, 5 Bom. 246.

30. *Tahil Ram v. Tower*, 1922 Sind 29=65 I.C. 14=15 S.L.R. 156.

31. *Dalichand v. Bai Shivkar*, 15 Bom. 242; *Babagowda v. Tanibai*, 76 I.C. 1041=1924 Bom. 112; *Nepal v. Amritlal*, 36 Cal. 288.

32. 26 Mad. 101 (103); Followed in *Sangilia v. Mathu*, (1931) 61 M.L.J. 516.

cation only by the vakil who did not seem to be fully acquainted with the facts of the case was held not to be one in accordance with law. But, in *Ramayyan v. Kadir Bacha*,³³ even an unverified application under S. 89 of the Transfer of Property Act for an order absolute for sale has been treated as an application for execution made in accordance with law.³⁴ An application for execution presented by the vakil of the decree-holder, duly authorised, is an application "in accordance with law," though the *vakalat* be not dated.³⁵ But an application in execution of a decree is not one in accordance with law when it is made by a general attorney of the decree-holder at a time when the decree-holder himself is resident within the jurisdiction.³⁶ An execution application filed by a vakil, who had no vakalat from the decree-holder is not one in accordance with law, and therefore is null and void and is also not a step-in-aid which will save limitation.^{36-a} If the Court fixes no time under O. 20, R. 17 (1) for amending the material defects, but merely 'permits' the list of immoveable property to be filed, and the list is filed on a date when the period of limitation has already run, the execution proceedings would be time-barred.³⁷ An application to have the

Application in contravention of law. the judgment-debtor arrested in contravention of the terms of S. 58 (S. 341, Civil Procedure Code, 1882), and an application to bring the mortgaged property to sale in contravention of O. 34, R. 14 (S. 99 of the Transfer of Property Act) are not applications in accordance with law within the meaning of the clause.³⁸ An application for attachment of defendant's property was held not "in accordance with law," where it was forbidden by S. 22 of the Dekhan Agriculturist's Relief Act.³⁹ An application for execution filed without leave of the Insolvency Court against a person whose property has vested in the Official Receiver appointed by the Court is not an application in accordance with law.⁴⁰ There is nothing in law to prevent simultaneous applications in execution of the same decree, and it is perfectly lawful for the decree-holder to ask that a second piece of property should be attached before the pro-

33. *Ramayya v. Kadir Bacha*, 31 Mad. 68.

34. *Hassan Hassan v. Ramchandra*, 1929 Bom. 196=117 I.C. 526=31 Bom.L.R. 355.

35. *Subramania Chettiar v. Ram Chandra Ayyar*, (1902) 26 Mad. 197 (199).

36. *Murarilal v. Umrao Singh*, (1901) 23 All. 499; *Kasumri v. Beni Prasad*, (1903) 26 All. 19.

36-a. *Modono Mohono Deo v. Kunju Behari*, 1935 Mad. 786=158 I.C. 891.

37. *Salimullah v. Sainuddi Sarkar*, (1914) 22 I.C. 337 (Cal.); also see *Bhupendra Narain v. Janeswar*, 90 I.C. 761=7 P.L.T. 350=1926 Pat. 533.

38. *Chatter Singh v. Newal*, 12 All. 64.

39. *Chatur Khushalchand v. Mahadu Bhagoji*, 10 Bom. 91 (93).

40. *Jagadisan Pillai v. Narayana Chettiar*, (1936) 162 I.C. 376=1936 Mad. 284=1936 M.W.N. 364.

ceedings in execution upon the first piece of property has been brought to a conclusion.⁴¹

2578. (8) Where the date of the decree is not correctly re-produced in the application, that is an obvious error not constituting a material irregularity on account of which it can be said that the application is not in accordance with the requirements of law.⁴² Similarly, an omission to state what form of notice is wanted is not a defect so vital as to warrant the application being termed not in accordance with law.⁴³ Where a decree was passed against a minor, represented by his mother as guardian, and through mistake execution was sought against the guardian in her personal capacity, the defect was taken to be merely technical, followed as it was, within limitation by the second application for execution against the minor as represented by his mother as guardian.⁴⁴ Where previous application for execution which misspelt the name of the judgment-debtor was dismissed on the ground of gross carelessness, it was held that it could save limitation.⁴⁵ A mere misstatement of the amount of the decretal money in a lesser sum,⁴⁶ or the date of the decree wrongly shown,⁴⁷ would be an immaterial irregularity not affecting the validity of the application. A mere mistake in calculating interest or even deliberately calculating more interest than is due does not make an application for execution one not "*in accordance with law*". The additional interest charged may be struck out as surplusage.⁴⁸ Where an application for execution in substantial compliance with the law is preferred to the Court, such an application will be effectual to stay the progress of limitation whether the Court admits or returns the application to be amended.⁴⁹ It has been held in several cases, by different High

41. *U Nyo v. U Po Hlaing*, 1934 Rang. 101.

42. *Acharj Singh v. Acharj Ram*, (1933) 142 I.C. 489=1933 Sind 78 (81)=27 S.L.R. 109.

43. *Kadiresan v. Moung San Ya*, 1933 Rang. 87=142 I.C. 435.

44. *Hari v. Narayan*, (1887) 12 Bom. 427; also see *Keshwa Surendra v. Mulkurani*, 4 P.L.J. 35.

45. *Sriram v. Sheobeni*, (1934) 1934 Pat. 289.

46. *Gopal v. Janki*, 23 Cal. 217; see also and cf. *Gopal v. Gosain*, 25 Cal. 594 (F.B.).

47. *Gopal v. Gosain*, 25 Cal. 594 (F.B.); *Jiwat v. Kali*, 20 All. 478; *Abdul Rauf v. Maula Baksh*, 37 All. 527 (528)=29 I.C. 479; *Kalka v. Bisheshar*, A.W.N. (1901) 31=23 All. 162; *Keshasarindra v. Ram Debendra*, 4 P.L.J. 213 (233); *Saligram v. Tower*, 1922 Sind 29=65 I.C. 14=15 S.L.R. 156.

48. *Jamilunnissa v. Mathuraprasad*, (1921) 43 All. 550; cf. *Nathuram v. Tufail Ahmad*, A.W.N. (1890) p. 93 (Application struck out because applicant refused to amend as directed by the Court).

49. *Pitambar v. Damodar*, 53 Cal. 664=98 I.C. 66=1926 Cal. 1077; also see *Bhagwat Parsad v. Dwarka Prosad*, 74 I.C. 174=2 Pat. 809.

Courts, that where an application has been returned for amendment in minor particulars, and it has not been re-presented, such application would still be sufficient to save limitation.⁵⁰ An application for execution of a decree which does not comply in *every* particular with the requirements of O. 21, R. 11 (2) (S. 235, Civil Procedure Code) and which, having been returned to the judgment-creditor for amendment has not been proceeded with, is not necessarily one not in accordance with law for purposes of Art. 182, Limitation Act.¹ The **Madras High Court** takes the view that an application for execution if defective in matters which cannot be said to be material, or substantial, should be considered to be an application "in accordance with law".² This is supported by the Calcutta decision in *Mathura Prasad v. Anurago Koer*,³ and by the Full Bench decision in *Gopal Chunder v. Gosain Das*,⁴ where it was held that the defective application which did not contain the right number of the suit and the date of the decree, even if returned for amendment and not re-filed, could be considered to be an application in accordance with law. Where a decree was passed by additional Munsiff but execution was filed before first Munsiff, it was held that the Court of an additional Munsiff is a Court of the Munsiff; and the application for execution was one made in accordance with law, and saved limitation.⁵ A defective application when amended within the time fixed by the Court, has a retrospective effect, and under provisions of O. 21, R. 17 (2), Civil Procedure Code, 1908, the amendment relates back to the date of the original presentation of the application.⁶ But, such an application may be treated as one in accordance with law, and giving a fresh starting point of limita-

50. *Bhagwat Parshad v. Dwarka Prasad*, 2 Pat. 809; also see *Jogendra v. Mangal*, 7 P.L.T. 330=1926 Pat. 160 (161)=90 I.C. 847; *Bibi Aisha v. Mahabir*, 6 Pat. 440=1927 Pat. 324 (325)=104 I.C. 218=8 P.L.T. 671; *Amin Chand v. Khiali*, 28 P.L.R. 93=100 I.C. 475=1927 Lah. 106 (107) (Application for execution defective for reasons other than non-compliance with O. 21, Rr. 11-14).

1. *Ramanadan Chetty v. Periatambi*, (1883) 6 Mad. 250 (Wrong calculation of interest and costs—Application not invalid).

2. *Rama v. Varada*, 16 Mad. 142; Followed *Ramanadan v. Periatambi*, 6 Mad. 250; also see *Seshayya v. Venkata Subbiah*, (1915) 29 I.C. 26; *Kamakshi Ammal v. Pichu Ayyar*, (1916) 35 I.C. 876; *Natesan Pillai v. Gunapathia*, (1917) 40 Mad. 949=38 I.C. 136; *Thirupathi v. Yegnammal*, 1933 Mad. 563=143 I.C. 844.

3. 5 I.C. 579=14 C.W.N. 481; cf. 23 Cal. 217.

4. 25 Cal. 594=2 C.W.N. 556 (F.B.).

5. *Manogilal v. Jogsah*, 1934 Pat. 199 (1)=13 Pat. 5=15 P.L.T. 215=151 I.C. 375.

6. *Kalka v. Bisheshar*, 23 All. 162; *Jivat v. Kalicharan*, 20 All. 478; *McGregor v. Tarini*, 14 Cal. 124; *Harichurn v. Subedar*, 12 Cal. 161 and *Bishan v. Gangaram*, 27 P.R. 1905.

tion as a step-in-aid of execution, from the date of the final order passed on the application.⁷

2579. SUB-TITLE IV: APPLICATION TO PROPER COURT.

2580. The word "application" in Art. 182 (5), Limitation Act means a document containing a request. But, it has been held that the word application in this clause is used neither in a restricted sense as excluding a plaint, nor in antithesis to a plaint or to any other legal document such as a memorandum of appeal.⁸ This clause contemplates an *application* to take a step and not suit.⁹ A plaint in a suit under O. 21, R. 63, Civil Procedure Code, can be treated as an "application" within the meaning of Art. 182, cl. 5, Limitation Act. The effect of a suit under O. 21, R. 63 is to keep execution proceedings, which have given rise to it, pending till the decision of the suit. If the suit succeeds, proceedings continue; and if the suit fails the proceedings fail simultaneously.¹⁰ A suit by a decree-holder for a declaration that the property released from attachment on the claim of a third party is liable to be attached and an appeal to the High Court from the decision of the lower Court, are not steps-in-aid of execution.¹¹

2581. An application (whether for execution or to take some step-in-aid of execution) must also be made to the proper Court, that is, it must be made to the Court whose duty or business it then is, either by transfer or otherwise to execute the decree.¹² The Court which passed the decree is ordinarily the Court entrusted with the duty to execute the decree. For a definition of "*the Court which passed a decree*" see S. 37, Civil Procedure Code, 1908. Section 38, Civil Procedure Code, indicates the Courts by which decrees may be executed. A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. It may also be executed by the Court to which it is transferred under S. 24, Civil Procedure

7. See "Step-in-aid of execution" and "Final order".

8. *Sheoram v. Ram Bharosey*, (1922) 69 I.C. 660=1923 Oudh 9=26 O.C. 71.

9. *Raghunandan v. Bhuggoo*, 17 Cal. 268; cf. *Laxmiram v. Bhala-shanker*, 39 Bom. 20=26 I.C. 262.

10. *Hassanshah v. Mohd. Amir Mirza*, (1930) 128 I.C. 728=1930 Oudh 468.

11. See 17 Cal. 268, *supra*.

12. *Prokash Chunder v. Purno*, 21 W.R. 410; also see *Maharaja v. Narasayya*, 39 Mad. 640 (P.C.) (On appeal from 37 Mad. 231).

Code.¹³ From a perusal of Ss. 37 and 38, Civil Procedure Code, Mulla has deduced the following rules:—

“I. Where the decree to be executed is a decree of a Court of first instance, the proper Court to execute it is the Court of First instance.”

“II. Where the decree to be executed is a decree passed by a Court of first appeal, the proper Court to execute it is also the Court of first instance.”

“III. Where the decree to be executed is a decree passed by the High Court in Second appeal, then also the proper Court to execute it is the Court of first instance.”¹⁴

[Under the Code of 1889, S. 649, para. 2, the proper Court was “the Court which passed the decree against which was preferred”, i.e., the Court of first appeal:]

“IV. Where the Court of first instance has *ceased to exist*, the only Court that can execute the decree is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree was passed. A Court vested with the powers of a Court of Small Causes ceases to exist as a Court of Small Causes when those powers are withdrawn.¹⁵ A Court does not cease to exist merely because its head-quarters are removed to another place, or because the local limits,¹⁶ or the pecuniary limits of its jurisdiction,¹⁷ are altered.”

Territorial jurisdiction is a condition precedent to a Court executing a decree.¹⁸

“V. Where the Court of first instance has ceased to have jurisdiction to execute the decree—In this case the Court of execution is the Court which at the time of the application would have jurisdiction to entertain the suit in which the decree was passed. But the jurisdiction of the Original Court is not entirely excluded.”¹⁹

According to Calcutta decisions both the Courts would have jurisdiction to *entertain* the application for execution, but the original Court should, however, not itself make an order for the sale of the property, but transfer the application to the other Court for disposing of the petition.²⁰ According to an earlier decision of the

13. *Muhammad v. Tikam Chand*, (1925) 47 All. 57 (58)=85 I.C. 746=1925 All. 276.

14. *Dayakishen v. Nanhi Begam*, 20 All. 304 (307).

15. *Zamindar of Vellur v. Adinarayadu*, (1896) 19 Mad. 445.

16. *Latchman v. Madan Mohan*, (1881) 6 Cal. 513 (517); *Seeni Nadan v. Muthusami Pillai*, 42 Mad. 821 (F.B.); *Jahar v. Kamini Debi*, 28 Cal. 238.

17. *Isvari Prasad v. Farkat Hussain*, (1917) 2 P.L.J. 113=39 I.C. 63.

18. *Premchand v. Mokhada*, 17 Cal. 699 (F.B.); *Begg Dunlop & Co. v. Juggannath*, 39 Cal. 104; *Ambikaranjan v. Manickganj Loan Office*, 33 C.W.N. 848=1929 Cal. 818=57 Cal. 67.

19. See S. 50, Civil Procedure Code and *Runganatha v. Hanumantha*, 46 Mad. 1; *Mouma Guruswami v. Sheikh Muhd.*, 46 Mad. 83; cf. *Subramania v. Swaminatha*, 1928 Mad. 746=28 L.W. 885.

20. *Latchman v. Madan Mohan*, (1881) 6 Cal. 513; *Premchand v. Mokhada*, (1890) 17 Cal. 699 (F.B.); *Jahar v. Kamini*, (1901) 28 Cal. 238; *Udit v. Mathra*, (1908) 35 Cal. 974.

Madras High Court, the original Court has jurisdiction to *entertain* the application for execution, but the question whether it could itself order the sale of the property was not decided.²¹ In later cases, the opinion was expressed that original Court had no jurisdiction to *entertain* the application for execution.²² This view has since been overruled by a **Full Bench** of the same High Court, following the Calcutta view.²³ But, in *Subramania v. Swaminatha*,²⁴ it has been held that the new Court is not competent to execute the decree. The original Court would on the interpretation of S. 150, Civil Procedure Code, by Wallis, C.J., have power of sending the decree to another Court, but its power of entertaining the application could not be taken away.²⁵ However, the Court to which a decree is transferred for execution has no jurisdiction to order either the attachment or sale of immovable property, if at the time of the order such Court had no territorial jurisdiction over the property.²⁶

2582. A Court does not cease to have jurisdiction to execute its decree, because it is abolished and re-established²⁷; or merely because its business is transferred by the District Judge under the Act constituting it to another Court²⁸; or because the area in which the judgment-debtor resides is transferred from its jurisdiction to that of another Court.²⁹ Nor can it be said that a Court competent at the time of the institution of the suit, ceases to have jurisdiction to *execute* the decree, because at the date of the application for execution, the total amount of the decree exceeds the pecuniary limits of its jurisdiction.³⁰ If

21. *Panduranga v. Vythilinga*, 30 Mad. 537=17 M.L.J. 417.

22. *Subbiah v. Ramanathan*, 26 M.L.J. 189=37 Mad. 462; *Pennugonda Rattan v. Korasika Jhetta*, 31 M.L.J. 90; *Doorvas v. Anantha*, (1917) M.W.N. 788=42 I.C. 671.

23. *Seeni Nadan v. Muthuswami*, 42 Mad. 821=37 M.L.J. 284 (F. B.); also see *Sivaskanda Raju v. Rajah of Jeypore*, 50 Mad. 882; *Jagannath Nathu v. Ichharam*, 1925 Bom. 414; *Pramanatha Nath v. Low & Co.*, 57 Cal. 964.

24. 28 L.W. 885=1928 Mad. 746.

25. *Muthukaruppa v. Paiya*, (1923) 45 M.L.J. 210=73 I.C. 956=1924 Mad. 32; *Raja Setracherlu v. Jeypore*, (1927) 50 Mad. 882=103 I.C. 245=1927 Mad. 627.

26. *Veerappa v. Ramasami*, (1920) 43 Mad. 135=53 I.C. 579.

27. *Mt. Khodaijatal v. Harihar*, (1925) 4 Pat. 688; also see and cf. *Ramanathan Chettiar v. Muthayyan*, 1935 Mad. 849 (Temporary Court established for one year and continued thereafter).

28. *Kali Pado v. Dinonath*, (1898) 25 Cal. 315; *Jagannath v. Sheonandan*, (1921) 6 Pat.L.J. 304=62 I.C. 487.

29. *Muthukaruppa v. Peria Kavundan*, (1923) 45 M.L.J. 210=73 I.C. 956=1924 Mad. 32.

30. Mitra's Limitation Act, Vol. II, p. 2069, citing, *Ranganatha v. Hanumantha*, 46 M. 1; *Arogya Udayan v. Apachi*, 25 Mad. 543=12 M.L.

the amount of the decree transferred exceeds the pecuniary limits of the Court of transfer, the **Madras High Court** is in favour of the jurisdiction of the Court of transfer to execute the transferred decree.³¹ But the other High Courts take the contrary view.³² As to the jurisdiction of the Court of transfer, *see* S. 41, Civil Procedure Code, and comments in Mulla's Civil Procedure Code or Chitale's Civil Procedure Code.³³ Section 42, Civil Procedure Code deals with powers of Court in executing transferred decrees. It has the same powers as if the decree had been passed by itself.

"The transferee Court can decide all questions arising in execution as if it were its own decree,³⁴ but it cannot entertain an objection to the legality or correctness of the decree,³⁵ or that the decree is defective,³⁶ or that it was obtained by fraud,³⁷ or that it directs a sale of property which is not saleable under S. 6 of the Code.³⁸ It cannot alter, vary or add to the terms of the decree, it cannot allow future interest where none is allowed by the decree.³⁹ Nor can it question the right of a transferee of a decree whose name is on the record as the person entitled to execution.⁴⁰ The transferee Court has no power to question the jurisdiction of the Court which passed the decree.⁴¹ If the Court which passed the decree has made an

J. 35; *Sham Rao v. Niloji*, 10 Bom. 200; *Sudarsan v. Ram Prasad*, 33 All. 97; *Panchuram v. Kino*, 40 Cal. 56; *Rameswar v. Dilu*, 21 Cal. 550; *Bidyadhar v. Manindranath*, 53 Cal. 14 and *Sheikh Mahomed v. Mahtab*, 2 P.L.J. 394; *Dinonath v. Mt. Mayawati*, 6 P.L.J. 54.

31. *Narasayya v. Venkatakrishnayya*, 7 Mad. 397; *Shanmuga v. Ramanathan*, 17 Mad. 309.

32. *Sham Sundar v. Anath Bandu*, 37 Cal. 574; *Gopal Kristochunder v. Auphilchunder*, 16 Cal. 457; *Sidheswar v. Harihar*, 12 Bom. 155; *Amritlal v. Murlidhar*, 1 Pat. 651.

33. *Jang Bahadur v. Bank of Upper India*, 3 Luck. 314=55 M.L.J. 545 (P.C.); *Pierce Leslie & Co. v. Perumal*, 33 M.L.J. 130=40 Mad. 1069 (F.B.); *Saligram v. Ishardas*, 1930 Lah. 508; *Mahomed Noorulla v. Hasarath*, 51 M.L.J. 554; cf. *K. B. Deb v. Choudhury*, 5 Rang. 397 (Simultaneous executions).

34. *Sital v. Clements, Robson & Co.*, (1921) 43 All. 394 (398)=61 I.C. 401; *Sanwal Das v. Collector of Etah*, (1924) 46 All. 560=83 I.C. 848=1924 All. 700.

35. *Maharaja v. Rani*, (1901) 23 All. 181; *Kashi v. Jamuna*, (1904) 31 Cal. 922; *Subramania v. Panjamma*, (1882) 4 Mad. 324; *Lakshmibai v. Ravji*, (1929) 31 Bom. L. R. 400=118 I.C. 700=1929 Bom. 217; Mulla's Civil Procedure, S. 42, Comments.

36. *Rajcrav v. Nanrav*, (1887) 11 Bom. 528.

37. *Parvata v. Digambar*, (1891) 15 Bom. 307.

38. *Sadasiv v. Jayanti*, (1884) 8 Bom. 1853; *Madholal v. Katwari*, (1888) 10 All. 130.

39. *Gajadhar v. Firm Manulal*, (1925) 4 Pat. 440=93 I.C. 257=1925 Pat. 807.

40. *Ramchander v. Mohendro Nath*, (1874) 21 W.R. 141; *Mt. Dhunesh v. Oolfat*, 21 W.R. 219.

41. *Hari v. Narsingrao*, (1914) 38 Bom. 194=23 I.C. 123; *Sheopat*

order for execution, the transferee Court cannot question the legality or propriety of that order.⁴² It cannot, therefore, entertain an objection that the execution of the decree was barred by limitation at the time when the order for execution was made.⁴³ But, if the transferor Court which passed the decree has made no order for execution, the Court of execution has power to decide whether execution is barred by limitation⁴⁴; or it may stay execution and leave the objection to be decided by the Court which passed the decree."⁴⁵

2583. The Courts of British India have no authority to send their decrees for execution to Courts not in British India.⁴⁶ Therefore, no decree by a Court in British India can be sent for execution into a territory such as Mayoorebhunj, which is a tributary mahal.⁴⁷ Long practice cannot be relied on to justify the transmission of a decree of a Court in British India to a Court of a Native State, as the Code of Civil Procedure does not sanction such transmission.⁴⁸ The execution contemplated by the Civil Procedure Code and Art. 182 of the Limitation Act being execution by British Courts in India on application made to such Courts, an application to a British Court in India to send a decree of such Court for execution to a Native State (Travancore) is neither an execution application nor a step-in-aid of execution within Art. 182 (5), Limitation Act.⁴⁹ According to **Bombay High Court**, a well-founded application to a British Court to transmit its decree for execution to a foreign Court which has agreed to execute decrees of British Courts, is an application to take a step-in-aid of execution within the meaning of Art. 182, Limitation Act, and operates to save limitation.⁵⁰ An application to a District Magistrate to restrain the members of a sect from acting contrary to a decree determining

v. Harakchand, (1919) 46 I.C. 419=22 P.R. 1919; *Zamindar of Ettiyapuram v. Chidambaram*, (1920) 43 Mad. 675 (687)=58 I.C. 871.

42. *Mulla Abdul v. Sukhinabboo*, (1897) 21 Bom. 456; *Ramlal v. Radhey*, (1885) 7 All. 330; *Beerchunder v. Mayamana*, (1880) 5 Cal. 736.

43. *Husein v. Saju*, (1891) 15 Bom. 28.

44. *Chhotay Lal v. Puran Mal*, (1896) 23 Cal. 39 (41); *Leake v. Daniel*, (1868) 10 W.R. 10 (F.B.); *Nachimai v. Subramaniam*, (1928) 5 Rang. 775=106 I.C. 857=1928 Rang. 40; cf. *Ramu Rai v. Dayal Singh*, (1894) 16 All. 390.

45. *Sri Hari v. Murari*, (1886) 12 Cal. 257.

46. *Kasturchand v. Parsha Mahar*, (1887) 12 Bom. 230.

47. *Ratan Mahanti v. Khatoo Sahoo*, (1902) 29 Cal. 400.

48. *Chidambaram v. Ramanathan*, (1917) 41 I.C. 41=32 M.L.J. 487.

49. *Pierce Leslie v. Perumal*, (1917) 40 Mad. 1069 (F.B.); Doubted in *Srinivasa v. Narayan*, 45 Mad. 1014=43 M.L.J. 700.

50. *Janardhan Govind v. Narayan Krishnaji*, (1918) 46 I.C. 56=42 Bom. 420=20 Bom. L. R. 421; Reld. on *Nawab Saadat Ali v. Nawab Muhammad Ali Khan*, 107 P.R. 1881; also see *Fatehchand v. Jitmal*, 1929 Bom. 418=53 Bom. 844; Not. Foll. 40 Mad. 1069 (F.B.).

rights of rival religious sects, was not an application in accordance with law, not being addressed to the proper Court in a matter capable of execution by that Court.¹ A conciliator appointed under the Dekhan Agriculturists' Relief Act, XVII of 1879 is not a Court. The presentation, therefore, to a conciliator of an application for execution of a decree within the period of limitation does not save the limitation, if the application to the proper Court be time barred.² However, a proceeding to enforce a decree taken in a Court which was erroneously believed by the decree-holder to have jurisdiction is a *bona fide* proceeding within the terms of S. 14 of the Limitation Act, though it is not an application to *proper* Court.³ An application made under S. 28 (2) of the Provincial Insolvency Act for leave to execute the decree is not an application made to a "proper Court".⁴ The prosecution of an appeal from an order in the course of proceedings in execution of a decree cannot be looked on as an application in accordance with law to the proper Court for execution or to take some step-in-aid of execution within the meaning of S. 182, Cl. (5), Limitation Act.⁵ Similarly defending an appeal preferred by the judgment-debtor in an execution proceeding is not a step-in-aid of execution within the meaning of Art. 182, Limitation Act.⁶

2584. Where the law does not require a writing, an oral application satisfies its requirements.⁷ It has been held by several High Courts that an application written, or oral to take some steps-in-aid of execution forms a fresh starting point, and saves limitation under Art. 182 (5), Limitation Act.⁸ An application to take a step-in-aid of execution need not be in writing.⁹ An oral application to the Court to pay out

1. *Sadagopachari v. Krishnamachari*, (1889) 12 Mad. 356.

2. *Manohar v. Gebiapa*, (1881) 6 Bom. 31.

3. *Jahar v. Kamini Debi*, (1900) 28 Cal. 238; also see and cf. *Hiralal v. Badri Das*, 2 All. 792=7 I.A. 167 (P.C.) (*Bona fide* application to a wrong Court held sufficient to keep alive a decree under Act XIV of 1859).

4. *Rarichan v. Kunhamu*, 57 Mad. 808=150 I.C. 113=1934 Mad. 392=67 M.L.J. 762.

5. *Kristo Coomar v. Mahabat Khan*, (1880) 5 Cal. 595; Folld. in *Nand Kishore v. Sipahi Singh*, (1904) 26 All. 608.

6. *Brijnath Sahai v. Haricharan Ray*, (1918) 48 I.C. 187 (Pat.).

7. *Trimbak v. Kashinath*, (1897) 22 Bom. 722; *Somasundaram v. Shwe Thit*, (1929) 7 Rang. 132=1929 Rang. 192.

8. *Sekharipuram v. Nammiassan*, 1922 Mad. 30=15 L.W. 14; *Amar Singh v. Tika*, (1880) 3 All. 139.

9. *Abdul Kader v. Krishnan Nair*, 23 I.C. 533=38 Mad. 695=26 M. L. J. 433; Reld. on *Amar Singh v. Tika*, (1880) 3 All. 139 and *Maneklal v. Nasia*, (1891) 15 Bom. 405.

money in satisfaction of a decree is a step-in-aid of execution.¹⁰ Similarly an oral application to Court to enter partial satisfaction of the decree comes under Art. 182 (5), Limitation Act.¹¹ Likewise, an oral application made to Court to proceed with the sale is one in aid of execution,¹² as so is an application for issue of a warrant of attachment and sale of certain property.¹³ An oral application by the decree-holder to make inquiries as to the legal representatives of a deceased judgment-debtor constitutes a step-in-aid of execution.¹⁴ A verbal prayer for amendment of an application for execution which is already in proper form is not a step-in-aid of execution.¹⁵ Where a decree-holder made a *bona fide* oral application to the Court to have the form of the sale-proclamation corrected, and to have a date fixed for settling the terms of the proclamation under O. 21, R. 66, Civil Procedure Code, and requested that notice should issue for a specified date, it was held that the application amounted to a step-in-aid of execution and operated to save limitation under Art. 182 (5), Limitation Act.¹⁶ The Court cannot, however, presume any *oral* application,¹⁷ except in cases where the order made in execution is of such a nature that the Court would not have it without an application for that purpose.¹⁸ The fact that an order for issue of a warrant was made shows conclusively that the Court must have acted on *some* application or other of the *decree-holder*.¹⁹ Where, when the warrant of arrest is returned unexecuted, the decree-holder asks the Court that fresh warrant might be issued, he asks the Court to take a step-in-aid of execution proceedings.²⁰

2585. V: STEP-IN-AID OF EXECUTION.

2586. We have noticed under heading "Application to take a step-in-aid", as one of the essential requirements of Art. 182, Cl. (5), that there is a clear distinction between an application

Preliminary observations.

10. *Mulchand Manaji v. Jamanbi*, (1925) 89 I.C. 228=1925 Bom. 443 =27 Bom. L. R. 673.

11. *Adimuthu v. Adiappa*, (1919) 52 I.C. 656 (L.B.); Reld. on 22 Bom. 722.

12. *Gulsari v. Rambhajan*, 22 O.C. 76.

13. *Ramlal v. Udit Narain*, 2 Luck. 419=1927 Oudh 134=100 I.C. 308.

14. *Gopal Shanker v. Raising Premji*, (1934) 151 I.C. 767=1934 Bom. 266.

15. *Hatim Ullah v. Sukhamoy*, 124 I.C. 830=1930 Cal. 304.

16. *Surajmal v. Sarjug Prashad*, (1917) 38 I.C. 540=2 P.L.J. 5; *Amar Singh v. Tika*, 3 All. 139 (Oral application for sale proclamation).

17. *Kara Pasi v. Ramnath Singh*, 1927 Pat. 323=8 P.L.T. 670=103 I.C. 37; *Ramulu v. Varadaraja*, 1921 Mad. 532 (1)=62 I.C. 480.

18. *Adinatha v. Adiappa*, (1919) 52 I.C. 656 (L.B.).

19. *Mohanlal v. Kasimuddin*, 109 I.C. 588=1928 Cal. 302.

20. *Hanumanlala v. Sheonarain*, (1935) 156 I.C. 114=1935 Nag. 131 =31 N.L.R. 333.

for execution, and an application for a step-in-aid of execution.²¹ The word "execution" is sometimes taken in the narrow sense of applying only to that which is about to take place or in the course of taking place, *i.e.*, only to steps-in-aid of execution to be had in future; but a broader and more liberal view is taken by other High Courts.²² The clause requires a direct and independent application for some order of the Court in furtherance of the execution of decree,²³ and not a mere opposition or resistance to judgment-debtor's application to set aside a sale in execution of a decree.²⁴

2587. The phrase "in accordance with law" is adjectival both to the words "to the proper Court for execution", and to the words "to take some step-in-aid of execution"²⁵; such an application may be made orally: see "**Oral application**", *ante*.

2588. Article 182, Cl. (5) has been held to mean that the party should make an application to the proper Court to take the step, and not that the party himself should take or has taken the step.²⁶ Thus, an application by the legal representative of a deceased decree-holder for a succession certificate is a mere preparation or preliminary to the execution of a decree and is not an application asking the Court to take some step-in-aid of execution.²⁷ To bring a case under this article it is not sufficient for the decree-holder to show that he has taken a step-in-aid of execution of the decree: he has to establish that an *application* to the Court has been made to take some step-in-aid of execution.²⁸ Thus the

21. *Paroosh Ram v. Kali Padoo*, (1889) 17 Cal. 53; *Venkatarama v. Purushottam*, (1900) 24 Mad. 188; *Kuppuswami v. Rajagopala*, (1922) 45 Mad. 466; *Krishna Pattar v. Seetharama*, 50 Mad. 49=1926 Mad. 1178=51 M.L.J. 480.

22. *Ghanaylal v. P. N. Bank*, 1928 Lah. 7=111 I.C. 259; *Gopal Shanker v. Raisin*, (1934) 151 I.C. 167 (Bom.); *Shankara v. Thangamma*, 1922 Mad. 247=45 Mad. 202; *Khanna v. Ardulla Haji*, 1927 Mad. 288=50 Mad. 403=52 M.L.J. 1.

23. *Shiblal v. Radhakishen*, (1885) 7 All. 898; *Umesh Chandra v. Soonder Narain*, (1889) 16 Cal. 747.

24. *Madho Prasad v. Ghanaya Lal*, 1929 Lah. 529=115 I.C. 24; *Srinivasa v. Ponnuswamy*, (1904) 28 Mad. 40; *Troylokyanath v. Jyoti Prakash*, (1903) 30 Cal. 761; *Langton v. Baijnath*, (1906) 28 All. 387; *Baldeo v. Lachman*, (1927) 6 Pat. 280=1927 Pat. 113 and *Sariatulla v. Raj Kumar*, 27 Cal. 709 (712, 713).

25. *Bhagwan v. Dhondi*, 22 Bom. 83;; also see *Janardhan v. Narain*, (1918) 46 I.C. 56=42 Bom. 420.

26. *Harsahai v. Shamlal*, A.W.N. 1900, p. 88.

27. *Murgeppa v. Baswant*, 37 Bom. 559=15 Bom. L. R. 557=20 I.C. 252.

28. *Madan Mohan v. Ganga Chandra*, (1912) 13 I.C. 189=17 C.L.J. 422; Diss. from *Radha Prasad v. Sunderlal*, 9 Cal. 644; also see *Toree*

mere payment of Nazir's fees,²⁹ or the mere payment of fees for the issue of a sale proclamation does not extend the time under Art. 182 (5).³⁰ The mere act of the Court confirming a sale in execution, which act is not shown to have been performed at the instance of the decree-holder upon petition or application, is not an application to the Court to take some step-in-aid of execution.³¹ A mere order by the Court, without any *application* to the Court, that the decree-holder should take the necessary steps will not bring the application for execution within time.³²

2589. Under the present Limitation Act, an application for execution, which is otherwise in accordance with law, cannot be held to be not in accordance with law merely because the applicant does not in good faith wish to secure execution but presents the application only with a view to give a fresh starting point for limitation.³³ The opposite view taken in *Sheo Persad v. Narainbai*,³⁴ has been overruled in the **Full Bench** decision of **Allahabad High Court** in *Kayastha Coy. v. Sitaram Dube*,³⁵ which has been approved by their Lordships of the Privy Council in *Khalilul Rehman v. Collector of Etawah*.³⁶ Their Lordships have held that under Art. 182 (5) it is sufficient to show that an application was made in accordance with law to the proper Court for execution or to take some steps-in-aid of execution; and it is not further necessary to show that such application had been made with a *bona fide* intention to execute the decree or to take such step and not merely to keep the decree alive. The **Allahabad Full Bench** view has been adopted by the **Sind Judicial Commissioner's Court** in *Valkart Brothers v. Acharj Ram Sahni*,³⁷ and in *Acharj Singh v. Acharj Ram Sahni*.³⁸ The legal position is that if the application fulfils the requirements of O. 21, R. 11, Civil Procedure Code it is operative for the purpose of saving limitation under Art. 182 (5), Limitation Act, and it is immaterial whether the decree-holder was anxious to have immediate execution, or merely wanted to make

Mahomed v. Mahomed Maboob, 9 Cal. 730=13 C.L.R. 91; *Ananda Mohan v. Hara Sundari*, 23 Cal. 196 and *Raghunandan v. Kali Dutt*, 23 Cal. 690.

29. *Madan Mohan v. Ganga Chandra*, 13 I.C. 189 (Cal.).

30. *Rangachariar v. Subramania*, 58 I.C. 536=12 L.W. 9.

31. *Motendro v. Mohendro*, 10 C.L.R. 330.

32. *Kara Pasi v. Ram Nath*, 8 P.L.T. 670=1927 Pat. 323=103 I.C. 37.

33. *Mt. Ruqia Bibi v. Prag Tewari*, (1928) 110 I.C. 704=5 O.W.N. 353=1928 Oudh 337=3 Luck. 580.

34. 90 I.C. 938=48 All. 468=24 A.L.J. 137=1926 All. 95.

35. 118 I.C. 17=52 All. 11=1929 All. 625 (F.B.).

36. 147 I.C. 323=38 C.W.N. 229=66 M.L.J. 79=11 O.W.N. 41=1934 P.C. 14 (P.C.).

37. 1931 Sind 160.

38. 1933 Sind 78.

his application with a view to keep his decree alive.³⁹ To fulfil the conditions of Art. 182, Cl. (5), it is not necessary that the proposed step should be actually taken or that even an order should be passed on the application. As soon as an application for execution, or step-in-aid is made, the period of limitation will run from the date of the presentation of the application.⁴⁰

2590. We shall now discuss what constitutes a step-in-aid, according to authorities, and what does not constitute step-in-aid. The subject is unusually complex because of the extraordinary conflict of view on this question. In fact the learned Judge Venkatasubba Rao, J., has gone the length of observing in *Vappu v. Sivakataksham*,⁴¹ as follows:—

“The decided cases on the subject of step-in-aid of execution reveal an extreme conflict of view; they fail to disclose even a principle of general or uniform application. The wording is so uncertain that it leads to the spending of efforts in barren and fruitless discussion, and a good deal of time of the Court is wasted. Such a large body of case-law has now grown up on the point that the legislature may well with the aid of decided cases catalogue the applications which in its opinion ought to serve as steps-in-aid of execution. This is a suggestion which I venture to make with a view to make the law more certain.”

2591. The **Allahabad High Court** assumes that the grant of permission always aids the execution and takes the view that an application by the decree-holder for leave to bid at the sale in execution of his own decree is an application to take a step-in-aid of execution.⁴² The **Bombay High Court** has followed the Allahabad view.⁴³ The **Calcutta High Court** has conflicting rulings.⁴⁴ An application for leave to bid would certainly constitute a step-in-aid of execution where the application contains the prayer to set off the price of the property against the decretal amount.⁴⁵ But it

39. *Rupai Rai v. Murat Tewari*, (1931) 131 I.C. 678 (All.); *Ramnath v. Ram Sahai*, 1930 All. 814; also see *Hanumanlala v. Sheonarain*, 156 I.C. 114=1935 Nag. 131=31 N.L.R. 333.

40. *Ghanayalal v. Nathu Ram*, 12 Lah. 153=1931 Lah. 81=32 P.L.R. 84=131 I.C. 100 (F.B.).

41. 1930 Mad. 588=123 I.C. 577=53 Mad. 390.

42. *Bansi v. Sikhri Mal*, (1890) 13 All. 211=1890 A.W.N. 260; Approved in *Dalal Singh v. Umrao Singh*, (1900) 22 All. 399=1900 A.W.N. 129.

43. *Vinayak Rao v. Vinayak Krishna*, (1897) 21 Bom. 331; Folld. 13 All. 211.

44. *Jogendra Prosad Mitra v. Asutosh Goswami*, (1916) 37 I.C. 788; cf. *Troylokya v. Jyoti Prakash*, 30 Cal. 761 (769); also see and cf. *Hiralal Bose v. Dwija Charn Bose*, (1906) 3 C.L.J. 240=10 C.W.N. 209.

45. *Nabadip Chandra v. Bepin Chandra Pal*, (1908) 12 C.W.N. 621.

cannot be inferred as an inflexible rule that the granting of leave to bid must in every case amount to a step-in-aid of execution: nor can it be said that it may not in any case aid the execution.⁴⁶ Accordingly, whether it belongs to one category or the other must depend upon the circumstances of each case. The **Lahore High Court** agrees with this view, so far as the opinion of majority Judges is concerned.⁴⁷ The minority view is that it is necessarily a step-in-aid in each case.⁴⁸ The learned Judges of the **Madras High Court** are not quite agreed on the question of following the Allaha-bad view.⁴⁹

2592. According to the **Bombay High Court**, an application to the Court under S. 248, Civil Procedure Code, 1882, (O. 21, R. 22) to issue notice for the heir and legal representative of a deceased judgment-debtor, to show cause why the decree should not be executed against him is a step-in-aid of execution within the meaning of Art. 182 (5), Limitation Act.⁵⁰ The **Calcutta High Court** observed in *Jagannath Khan v. Brojonathpal*,¹ that it does not appear that it is the duty of a decree-holder under the law to apply for the issue of a notice. He has only to apply for execution, and it is the duty of the Court in certain circumstances to issue the notice. An application for a seal warrant to the Calcutta Small Causes Court is an application made in accordance with law for execution or to take steps-in-aid of execution of a decree.² An early Full Bench decision.³ held that the mere service of notice on the judgment-debtor after the decree was barred, was not a proceeding in execution merely because the judgment-debtor did not come in and oppose it: and this has been relied upon in *Umed Ali v. Abdul Karim*,⁴ and *Sripati Charan v. Belchambers*.⁵ A later **Full Bench**

46. *Hiralal Bose v. Dwija Charn Bose*, (1906) 3 C.L.J. 240=10 C.W.N. 209.

47. *Ghanayalal v. Nathu Ram*, 12 Lah. 153=1931 Lah. 81 (F.B.) (Per Shadilal, C.J. and Broadway, J.)

48. See Jailal, J., in 12 Lah. 153=1931 Lah. 84 (F.B.); also see and cf. *Muhammad Shafee v. Badri Mull*, 88 P.R. 1884 and *Salig Ram v. Rai Chand*, 60 P.R. 1912=14 I.C. 168.

49. *Vappu Rowther v. Sivakataksham Pillai*, 1930 Mad. 588=123 I.C. 577=53 Mad. 390; Folld. 12 C.W.N. 621.

50. *Keshavlal v. Pitamber*, (1894) 19 Bom. 261.

1. (1901) 29 Cal. 580.

2. *Ibid.*

3. *Bissesshur Mullick v. Maharaja Mahtab*, (1868) 10 W.R. (F.B.). 8.

4. (1908) 35 Cal. 1060=8 C.L.J. 193.

5. (1910) 8 I.C. 22=15 C.W.N. 661=15 C.L.J. 123 (*Held*, that when no order for execution has been made after the service of notice the judgment-debtor is not debarred from urging the objection that an application for execution is barred by limitation).

decision, in *Gopal Chunder v. Gosain Das*,⁶ has held that an informal and defective application for execution of decree, which contained a prayer to issue a notice under S. 248, Civil Procedure Code, 1882 (O. 21, R. 22), was at any rate an application to take some step-in-aid of execution, and where a notice was issued according to the prayer made in the application, the application and the notice were held sufficient to keep the decree alive. This has been followed by the **Madras High Court**, in *Kamakshi v. Ramasami*,⁷ where it was held that an application for execution, though defective in form, may help to save limitation, if it contains a prayer for the issue of a notice under O. 21, R. 22, in a case in which such a notice is necessary, in order to enable execution to proceed. However, where after transfer of the execution to another Court, an application for notice was made to the original Court, and not to the transferee Court, the application was not a step-in-aid of execution.⁸ The Court which transfers a decree has no power to issue the notice.⁹ The **Nagpur Court** took the view in one case that an application praying only for the issue of a notice, without stating the mode in which the assistance of the Court is required is not sufficient to give a fresh start¹⁰; but a different view is taken in a later case.¹¹ The **Punjab Chief Court** has held that an application merely asking for notice to be issued under O. 21, R. 22, Civil Procedure Code, is one in accordance with law; and that the conditions of cl. 5, Art. 182, Limitation Act, are satisfied when the fact of issuing such a notice is established.¹² According to the **Madras High Court**, where the decree is more than one year old, and the application prays for the issue of a notice under O. 21, R. 22, to the judgment-debtor, such application, in the absence of any provision prescribing the form, contents or accompaniments of an application for issuing notice will be a step-in-aid.¹³

6. (1898) 25 Cal. 594 (599) (F.B.); Reld. on *Beharilal v. Salik Ram*, (1878) 1 All. 675 and *Dhonkal v. Phakkar*, (1893) 15 All. 84.

7. (1907) 18 M.L.J. 14; Reld. upon in *Sadiya Chandra v. Paresnath*, 1922 Cal. 44=64 I.C. 571=35 C.L.J. 82; Reld. in *Jogendra Prasad v. Mangal Prasad*, 1926 Pat. 160=7 P.L.T. 330=90 I.C. 847.

8. *Hazarilal v. Baidyanath*, 1922 Cal. 3=26 C.W.N. 292=63 I.C. 116; also see *Nandolal v. Chutterput*, 29 Cal. 235; cf. *Nachimai Achi v. Subramaniam Chetty*, 1928 Rang. 40=5 Rang. 775=106 I.C. 857 (Held, that a notice under O. 21, R. 22 will be issued by the Court executing the decree and objections by the judgment-debtor on the score of execution being barred by limitation should be taken before and heard and determined by the Court to which the decree is transmitted).

9. *Ibid.*

10. *Mukund v. Lyba Maban*, 9 C.P.L.R. 15.

11. *Mukund Ram v. Har Narain*, 11 C.P.L.R. 157.

12. *Muhammad Nawaz Khan v. Ram Dass*, 22 P.R. 1905=57 P.L.R. 1905; also see *Shanker v. Zorazwar*, 116 P.R. 1907.

13. *Pachiappa v. Poojali*, (1905) 28 Mad. 557; also see *Kamakshi v. Ramaswami*, (1907) 18 M.L.J. 14.

A *Batta* Memorandum which mentions payment for the issue of notice to the judgment-debtor under O. 21, R. 22, is an application to take a step-in-aid of execution.¹⁴ The **Patna High Court** generally regards an application by the decree-holder for notice to be a step-in-aid of execution¹⁵; but in *Biswambhar v. Mahesh Sahi*, the view was taken that the service of notice on the judgment-debtor under O. 21, R. 22, and a subsequent order for attachment of the properties would save a subsequent application for execution from the bar of limitation.

2593. An application for sale of property under an attachment,¹⁶ or an application by the judgment-creditor for sale of property attached subject to mortgage of a claimant is an application merely in aid of execution then proceeding, and falls under Art. 182, cl. 5 of the Limitation Act, as giving a fresh starting point of limitation.¹⁷ Similarly an application by the decree-holder, made during the continuance of a previous application for execution under which the mortgaged property was attached and placed under the management of the Collector to receive each year's payment of the proceeds was but a partial step-in-aid of execution of the decree.¹⁸ An application by the decree-holder that the money attached as belonging to the judgment-debtor should be paid to the petitioner,¹⁹ or an application by the son of a deceased decree-holder to be made a party to the record and to have money levied and paid has been held to be a step-in-aid of execution.²⁰ Payment of *batta* for an auction-sale of property is step-in-aid of execution and is sufficient to save limitation.²¹

14. *Alagamuthu v. Devasaga*, 3 L.W. 34=1916 M.W.N. 78=32 I.C. 484.

15. *Ram Chandra v. Krishenlal*, 1 Pat. 328=1922 Pat. 301=65 I.C. 332 (Application for a notice and a certificate); also see *Jogendra v. Mangal Prasad*, 1926 Pat. 160=7 P.L.T. 330=90 I.C. 847 (Defective application sufficient as a step-in-aid when notice issued under O. 21, R. 22, Civil Procedure Code); also see *Gobardhan v. Satischandra*, 1 Pat. 609=1922 Pat. 597=69 I.C. 668.

16. *Chowdhry Paroosh Ram v. Kali Puddo Banerjee*, (1889) 17 Cal. 53; *Subba Chariar v. Muthuveeran*, (1912) 36 Mad. 553=24 M.L.J. 545.

17. *Lal Reddi v. Kala Chand*, (1888) 15 Cal. 363.

18. *Keshavlal Bechar v. Pitamberdas*, (1894) 19 Bom. 261; Reld. on *Maneklal v. Nasia*, 15 Bom. 405 and *Ambica Pershad v. Surdhari*, 10 Cal. 851.

19. *Venkataramanamma v. Purushottam*, (1900) 24 Mad. 188.

20. *Gobind v. Shanbhog*, 5 Bom. 246; also see *Keshavlal v. Pitamber*, *supra*.

21. *Nataraja Mudaliar v. Official Assignee, Madras*, 1933 Mad. 438; Reld. on *Vijiaraghavulu v. Srinivasalu*, (1905) 28 Mad. 399; *Govindaswamy v. Govinda*, 1925 Mad. 880=89 I.C. 894; cf. *Raman Chetty v. Ramaswamy*, 1928 Mad. 563=110 I.C. 205; also see *Arunachalam v. Laxman*, 1924 Mad. 906.

2594. Their Lordships of the **Privy Council** have observed in *Rajeshri Prakash v. Allahabad Bank*,²² that under O. 21, R. 2 (1), Civil Procedure Code, the decree-holder does not really make an application to the Court at all. What he does is to report that a payment towards the decree has been made out of Court. Thereupon the Court, whether the decree-holder applies to the Court to do so or not, is obliged to record satisfaction, partial or complete as the case may be. It is not necessary for the decree-holder to ask the Court to do anything. The **Madras High Court** has held, accordingly that the Calcutta decisions to the effect that an application by a decree-holder certifying payments made by the judgment-debtor out of Court is sufficient to save limitation have lost their binding force.²³ A **Full Bench** of the **Calcutta High Court** in *Amar Krishna v. Jagat Bandhu*²⁴ has overruled all the earlier decisions to the contrary, and has held that certification of a payment by a decree-holder is not and cannot be treated as an application to the Court to take some step-in-aid of the execution of the decree. A Full Bench of the **Allahabad High Court** had held in *Sujan Singh v. Hira Singh*,²⁵ that an application made by a decree-holder under O. 21, R. 2 (S. 258, Civil Procedure Code, 1882), to enter up part satisfaction of the decree is a step-in-aid of execution. But this view would now be unsustainable, and recent **Allahabad** decisions in *Hari Ram v. Himanlal*,²⁶ *Adya Prasad Singh v. Girjish Bahadur*²⁷ and in *Jaikaran v. Panchaiti*,²⁸ have held that a certificate of payment out of Court is not a step-in-aid of execution and would not extend limitation. In *Chathukutty v. Raman*,²⁹ it was observed that a mere payment by a defendant not certified by the decree-holder did not constitute a step-in-aid, and that it is only the petition put in to certify such payment that can constitute a step-in-aid such as will give a fresh starting point of limitation under Art. 182 (5), Limitation Act. This remark will

22. 1929 P.C. 19=114 I.C. 581=56 I.A. 30=3 Luck. 684 (P.C.).

23. *The President, Union Board v. Thirumala*, (1935) 159 I.C. 544=42 L.W. 588.

24. 1931 Cal. 719 (F.B.); O.R. *Tarim Bandhopadhyaya v. Bishtoolal Mukhopadhyaya*, 12 Cal. 608; *Wasi Imam v. Poonit*, (1893) 20 Cal. 696; *Rakhal Das v. Jogendra*, (1909) 3 I.C. 391; *Jotindra v. Gagan Chandra*, (1919) 46 Cal. 22=45 I.C. 903.

25. (1889) 12 All. 399 (F.B.); Reld. on 12 Cal. 608; 9 All. 9 (*Mohammad Husain v. Ram Sarup*).

26. (1935) 157 I.C. 1052=1935 All. 259.

27. 1933 All. 364=55 All. 393=146 I.C. 836.

28. (1932) 143 I.C. 324=1932 All. 49=1932 A.L.J. 1035; *Chote Singh v. Ishwari*, (1910) 32 All. 257=5 I.C. 295 and *Prakash Singh v. Allahabad Bank, Ltd.*, (1911) 10 I.C. 925 are no longer good law.

29. 1933 Mad. 674=147 I.C. 586; cf. (1935) 159 I.C. 544 and 1929 P.C. 19, *supra*.

have to be taken now as not laying a sound proposition in view of the Privy Council pronouncement, and the later Madras decisions. The **Rangoon High Court**, in *Maung Tun Hlaing v. U Aung Gyaw*,³⁰ and a **Full Bench** of the **Oudh Chief Court** in *Ram Bhargose v. Rammanlal*³¹ have, likewise, held that mere certification by the decree-holder of a payment of money under the decree is not an application to take some step-in-aid of execution of the decree within the meaning of sub-cl. (5) of Art. 182, Limitation Act. The **Sind Judicial Commissioner's Court** has held that a certification of payment made by decree-holder, after the decree is statute-barred is not a step-in-aid of execution within the meaning of Art. 182, and cannot revive limitation.³²

According to the **Madras High Court**, a counter statement by the decree-holder in answer to an application by the judgment-debtor to enter up satisfaction of the decree which he claims to have discharged, though it may tend to prevent the Court from placing an obstacle in the way of future execution, does not ask the Court to take any step-in-aid of execution and as such would not avail within cl. 5 of Art. 182, Limitation Act.³³

2595. The **Allahabad High Court** has held that an application to the Court which passed a decree that it may be sent for execution to another Court is an application to take a step-in-aid of execution.³⁴ Even an application for the transfer of the execution of a decree made at a time when the judgment-debtor is dead is a valid application to take a step-in-aid of execution.³⁵ An application made under S. 39, Civil Procedure Code, for the transfer of the execution of the decree is not an application for execution within the meaning of O. 21, R. 10, Civil Procedure Code, but an application to take a step-in-aid of execution.³⁶ An application

30. 1930 Rang. 64; Diss. from 10 I.C. 925.

31. 1932 Oudh 148=137 I.C. 768=7 Luck. 590 (F.B.); Diss. from 10 I.C. 925; Folld. in *Mt. Suraiya Begam v. Triloki Nath*, 1934 Oudh 426=9 Luck. 288.

32. *Kaliandas Balchand v. Mahomed Khan*, 1933 Sind 365=147 I.C. 30.

33. *Kuppuswami v. Rajagopala*, 45 Mad. 466 (470)=42 M.L.J. 303; *Krishna v. Seetharama*, 50 Mad. 49=51 M.L.J. 480; cf. *Sheo Sahay v. Jamuna*, 4 Pat. 202; *Jagdeo v. Rani Bhubaneshwari*, 7 Pat. 708=1928 Pat. 612 (613).

34. *Collins v. Maula Bux*, (1879) 2 All. 284; *Todar Mal v. Phola Kunwar*, (1913) 35 All. 389=19 I.C. 664; also see *Mansaram v. Badri Prasad*, (1936) 163 I.C. 231=1936 All. 369=1936 A.L.J. 254.

35. *Mt. Ram Kali v. Bir Bhadrman*, (1934) 148 I.C. 1131=1934 All. 463.

36. *Mt. Sahoda v. Bhagwandas*, 1926 All. 473=94 I.C. 482 (Residuary Art. 181 applied).

for execution can in no sense of the words be regarded as an application for the transfer of a decree from one Court to another.³⁷ According to **Bombay High Court**, an application for transfer of a decree to another Court under S. 39, Civil Procedure Code, made by the decree-holder in ignorance of the judgment-debtor's death constitutes a step-in-aid of execution.³⁸ The **Calcutta High Court** has taken a similar view in several cases holding that an application for transfer of a decree is a step-in-aid of execution.³⁹ The expression "step-in-aid" is taken as intended to cover such applications made by the decree-holder in accordance with law, setting the Court in motion to execute the decree and in furtherance of the proceeding in execution.⁴⁰ In *Nilmony Singh v. Birreswar Banerjee*,⁴¹ it was held that an application to the Court which passed a decree for a certificate to allow execution to be taken out in another Court, is not an application for execution of the decree, within the meaning of S. 230, Civil Procedure Code, 1882 (O. 21, R. 10, Civil Procedure Code, 1908). This section makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution. The issue of a notice under S. 248 (O. 21, R. 22) does not by itself operate as a revivor of the decree.⁴² Similarly, it has been held by their Lordships of the **Privy Council**, that an application for transmission of a decree from the High Court to the District Court is not by itself a revival of the decree within the meaning of the Act inasmuch as it is a mere ministerial act of an officer of the Court and not the judicial act of a Judge.⁴³ According to the **Patna High Court** an application for a certificate is a step-in-aid of execution and it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the

37. *Khetpal v. Tikam Singh*, (1912) 34 All. 396; Reld. on *Sundar Singh v. Doru Sankur*, (1897) 20 All. 78; also see *Atherton & Co. v. Habib Baksh*, 1929 All. 390=115 I.C. 865.

38. *Gopal Shankar v. Raisin Premji*, 1934 Bom. 266=36 Bom. L. R. 510=151 I.C. 767; Reld. on *Samia Pillai v. Chokhalinga*, 17 Mad. 76=4 M.L.J. 8 and *Bipin Bihari Mitter v. Bibi Zohra*, 35 Cal. 1047; also see and cf. *Shivlingappa v. Shidmalappa*, 1924 Bom. 359=80 I.C. 752.

39. *Latchman v. Maddan Mohun*, (1880) 6 Cal. 513; *Raj Balabh v. Joy Kishen*, (1892) 20 Cal. 29; *Chundernath v. Gurroo Prosunno*, (1895) 22 Cal. 375; *Suja Hossein v. Monohar*, (1896) 24 Cal. 244; also see *Ramanath v. Gouri*, 2 C.W.N. 415 and *Bhabani v. Partap*, 8 C.W.N. 575.

40. *Ahad Bux v. Kinkar Chandra*, 1935 Cal. 640=158 I.C. 590.

41. (1889) 16 Cal. 744.

42. *Chutterput Singh v. Sumari Mull*, (1916) 43 Cal. 904 (F.B.) (*Per Mookerjee, J.*); also see and cf. *Hasari Lal v. Baidyanath*, 1922 Cal. 3=63 I.C. 116=26 C.W.N. 292 (Application for issue of a notice under O. 21, R. 22 to the Court, to which an application had already been made for transfer of decree to another Court, could not be treated as a step-in-aid).

43. *Banku Bihari v. Narain Das*, (1927) 54 Cal. 500=101 I.C. 24=54 I.A. 129=1927 P.C. 73 (P.C.).

jurisdiction of the Court which made the decree.⁴⁴ In *Gopal Tewari v. Ramdhari Pandey*,⁴⁵ Wort, J., purporting to follow the Privy Council ruling, has held that an application for transfer of decree for execution is not a step-in-aid of execution; and that an application under O. 21, R. 16 is *not* a step-in-aid of execution. But it has been held recently that the application for transferring the decree from one Court to another and the order thereon is in fact a step-in-aid of execution, and gives a fresh start of limitation under Art. 182, Cl. (5) of the Limitation Act.⁴⁶ An application by the decree-holder to the Court which passed the decree for transfer of that decree to a Court having no jurisdiction to execute it is not a step-in-aid of execution.⁴⁷ A **Full Bench** of the **Lahore High Court** has held by a majority, that where a money decree has been transferred by the Court which passed it for execution to another Court, an application to the first Court to transfer it for execution to the same Court is a valid application even if such an application is made before the proceedings taken in the other Court have first been reported and certified by that Court, and is a step-in-aid of execution.⁴⁸ The observations of their Lordships of the Privy Council, were held applicable to its own facts: and the later decision in *Maharaja of Bobilli's case* was not taken to lay down a rule inconsistent with the earlier decision in 14 M.I.A. 529. The **Calcutta decision** in *Sreenath v. Priyanath*,⁴⁹ was distinguished and the ruling in *Jateendra Kumar Das v. Mahendra Chandra*,⁵⁰ was not followed, as placing a strained interpretation on the Privy Council decision in *Maharaja of Bobbili's case*, 1916 P.C. 16, which had merely decided that the parent Court could not order the sale of property attached by the transferee Court, and nothing more. In *Sarasti Prasad v. People's Industrial Bank*,¹ the **Allahabad High Court** held that where a decree has been transferred for execution to another Court, the Court which passed it, is competent to execute the decree concurrently. In *Mohadam Beg v. Mohd. Meera Saheb*,² a Division Bench of the **Madras High Court** held

44. *Ramchandra v. Krishenlal*, 1922 Pat. 301=1 Pat. 328=65 I.C. 332=3 P.L.T. 298.

45. 1934 Pat. 662=152 I.C. 987 (*Per* Wort, J.).

46. *Bhagwat Sahai v. Ram Sukrit Ram*, (1936) 162 I.C. 984=1936 Pat. 313 (*Per* Wort, J.).

47. *Sital Prasad v. Babulal*, 1932 Pat. 309=11 Pat. 785.

48. *Kanti Narain v. Madan Gopal*, 1935 Lah. 465=157 I.C. 488; Dist. *Maharaja of Bobbili v. Narasaraju*, 1916 P.C. 16=36 I.C. 682=43 I.A. 238=39 Mad. 640 (P.C.); Reld. on *Saroda v. Luchmeeput*, 14 M.I.A. 529=17 W.R. 289 (P.C.).

49. 1931 Cal. 312=132 I.C. 149=58 Cal. 832;; Folld. in *Acharj Singh v. Acharj Ram*, 1933 Sind 78.

50. 1933 Cal. 906=149 I.C. 17=60 Cal. 1176.

1. 1917 All. 129=39 I.C. 729.

2. 1928 Mad. 493=110 I.C. 829.

that where a decree is transferred for execution to another Court, an application for transfer of the decree to a second Court can be validly made to the Court which passed it. The learned Judges accepted as correct the interpretation placed on the *Maharaja of Bobbili's* case by the **Lahore High Court** in *Harilal Anant Ram v. Sherumal Chainamal*.³ The same view was taken by another Bench in *Subba Rao v. Levu Ankammal*.⁴ In *Deb v. Chowdhry*,⁵ the **Rangoon High Court** held that the Court which passed the decree retains control of the execution proceedings even after transfer of the decree to another Court, and that there is nothing in the Civil Procedure Code to prohibit the sending of a decree for execution to two Courts: and that the Court which passed the decree can, after sending the decree to one Court for execution, have jurisdiction to send it to another Court for execution. All these cases have been noticed and discussed in the **Lahore Full Bench case**.⁶ It may be noticed that the **Sind Judicial Commissioner's Court** has held in *Achraj Singh v. Acharj Ram Sahni*,⁷ that an application for transfer of a decree is a step-in-aid of execution; and that where a decree was ordered to be transferred by the executing Court to another Court but it was not actually transferred, that the executing Court remained seized of the proceedings: and an application for execution to it was to proper Court.

2596. The **Madras High Court**, has held that where a decree has been transferred by the Court which passed it to another Court for execution, an application to the latter Court to return the decree to the Court which passed it for further execution is a step-in-aid of execution.⁸ Where a decree is transferred to another Court for execution, the transferring Court can again transfer the decree to a third Court. But, it is necessary for a Court, after transfer of a decree for execution, to take precaution in complying with a second request for transfer or execution: it may be advisable that the Court should always send orders

3. 1926 Lah. 113=89 I.C. 958; see and cf. *Rulia Ram v. Diwan Chand*, 1934 Lah. 728=152 I.C. 128=16 Lah. 80.

4. 1933 Mad. 110=140 I.C. 591.

5. 1927 Rang. 258=5 Rang. 397=104 I.C. 133.

6. 1935 Lah. 465=157 I.C. 488.

7. 1933 Sind 78=142 I.C. 489=27 S.L.R. 109; also see *Shanta Dutt v. Mahomed Asgar*, 1933 Oudh 131=143 I.C. 678=10 O.W.N. 363; Reld. on 1922 Pat. 301; 35 All. 389 (*Held*, that an application made to the Court passing a decree to transfer it for execution to another Court is an application to take a step-in-aid of execution).

8. *Krishnayyar v. Venkayyar*, (1882) 6 Mad. 811; also see *Chandranath v. Bhudhar*, 2 C.W.N. 271 notes.

for stay of execution to the transferee Court before taking such further actions.⁹ There is nothing in the present Code any more than there was in the Code of 1859 which prohibits the sending of a decree for execution to two Courts at the same time.¹⁰ In *Saroda Prosad Mullick v. Luchmeeput*¹¹ their Lordships of the Privy Council have clearly held that a decree could be transmitted to three Courts concurrently for the purpose of execution and the later decision in *Maharaja of Bobbili's case* is not to be taken as inconsistent with the earlier decision.

2597. Where a decree-holder applied to Court to transmit the decree to another Court, and paid postage stamps for costs of the transmission of the records, it was held that, if there was an application at the time of filing postage stamps to take some steps, it would give fresh start.¹²

2598. An application by a judgment-creditor to the Court which passed the decree for a certificate that a copy of a Revenue Register of the land is necessary, to enable him to obtain such copy from the Collector's Office and thereupon to execute the decree by attaching the land is a step-in-aid of execution.¹³ This view agrees with the observations in *Chunder Coomar Roy v. Bhogabatty*,¹⁴ that any application in furtherance of an application to put a decree into execution may be held to be an application to enforce the decree. Innes, J., observed in the Madras case that

"the right to execute a decree had been much curtailed by the provisions of the Civil Procedure Code, and the provisions of the *Limitation Act* should be construed as far as possible to prevent the defeat of *bona fide* endeavours to secure the fruits of a decree once obtained".

Where the decree-holder made an application to the executing Court that the original records of the case should be sent for as they were necessary in order to get rid of the objections raised by the judgment-debtor, and the executing Court sent for the

9. *Gobind v. Laxman*, 1928 Nag. 29=23 N.L.R. 126=101 I.C. 279; Follid. *Gorakhram v. Sivaiya*, (1900) 13 C.P.L.R. 169.

10. *E. K. Deb v. N. L. Choudhry*, 1927 Rang. 258 (2)=5 Rang. 397=104 I.C. 133; Expl. *Maharaja of Bobbili v. Narasaraju*, 1916 P.C. 16=39 Mad. 640=43 I.A. 238 (P.C.).

11. (1871) 14 M.I.A. 529=17 W.R. 289 (P.C.).

12. *Vellaya v. Jagannatha*, (1883) 7 Mad. 307.

13. *Kunhi v. Seshagiri*, (1882) 5 Mad. 141.

14. 3 Cal. 238.

record, it was held that the application was a step-in-aid of execution.¹⁵

If a decree-holder applies to the executing Court to send the records to the Court which passed the decree, that application is a step-in-aid of execution and saves limitation¹⁶; and it has been held, that if an assignee decree-holder, wanting to have his claim recognised by the Court which passed the decree applies to the executing Court that the papers should be sent back to the Court which passed the decree, the application for that purpose comes within the expression of "step-in-aid of execution".¹⁷ But an application by a decree-holder for a list of the properties attached to execution of his decree has been held not a step-in-aid of his execution.¹⁸ The obtaining of a certificate of search of certain documents from the office of the Sub-Registrar cannot by any stretch of language be called a step-in-aid of execution¹⁹; nor can the fact that the decree-holder got back certain documents filed by her in the previous execution of decree case be looked upon as a step-in-aid of execution of the decree.²⁰

Application to send a precept. An application to the Court passing a decree to send a precept to another Court which is competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept is an application for a step-in-aid of execution being taken.²¹

2599. The granting of an application under S. 206 (O. 20, R. 6), Civil Procedure Code to bring a decree into conformity with the judgment does not form the starting point of a fresh period of limitation in favour of the decree-holder: nor is such an application a "step-in-aid of execution" within the meaning of Art. 182, Cl. (5), Limitation Act.²² However, the first paragraph of the third column of Art. 182 only applies where there is a decree or order which can at its date be executed. The paragraph necessarily contemplates the existence of a decree capable of being

15. *Raghunath v. Lachmi Narain*, 47 All. 667=23 A.L.J. 422=1925 All. 394=88 I.C. 271.

16. *Krishnayyar v. Venkayyar*, 6 Mad. 81.

17. *Ayyaru Pillai v. Varadaraja*, 1926 Mad. 431=92 I.C. 770=50 M. L. J. 116.

18. *Ranga Chariar v. Balaramaswami*, (1897) 21 Mad. 400.

19. *Mt. Suraiya Begam v. Triloki Nath*, (1934) 147 I.C. 766=10 O. W.N. 1251.

20. *Ibid.*

21. *Ramji v. Ramji*, (1933) 146 I.C. 991=1933 All. 841.

22. *Kallurai v. Fahiman*, (1890) 13 All. 124.

executed at the date of the decree.²³ The application under Art. 182, Cl. (5), must be one in accordance with law, made to "proper Court", meaning the Court whose duty it is to execute the decree. The executing Court cannot amend the decree or alter it in any way. Consequently the view is held that an application under O. 20, R. 6 (S. 206, Civil Procedure Code, 1882) does not give a fresh starting point for limitation.²⁴ According to **Allahabad High Court** an order granting an application for amendment of decree is not an order passed upon review of judgment within the meaning of Art. 182, and has not the effect of extending the period of limitation for execution of the decree.²⁵ This dissents from the Calcutta view in *Kali Prosunno v. Lalmohan Guha*,²⁶ which rests on an earlier Allahabad decision, not followed in later cases.

2600. The application by a decree-holder for a copy of a decree with intent to apply for execution is not a step-in-aid of execution.²⁷ An application to the Court by a decree-holder asking for the return of the copy of a decree filed with a former *darkhast* is, likewise, not a step-in-aid of execution within Art. 182 (5), Limitation Act.²⁸ A mere application for a copy of a decree, which was not proceeded with, cannot be said to be a step-in-aid of execution of a decree. To come within Art. 182, a decree-holder must make some application to the execution Court itself.²⁹ An application without a copy of decree is an application in accordance with law.³⁰

2601. An application for a certificate of heirship, or an application for probate or letters of administration not being an application to the Court *executing* the decree cannot keep alive the decree or give a new start.³¹ An applica-

23. *Muhammad Suleman Khan v. Muhammad Yar Khan*, (1894) 17 All. 39.

24. *Dayakishan v. Nanhi Begam*, (1898) 20 All. 304 (307); *Folld. Tarsi Ram v. Man Singh*, 8 All. 492.

25. *Ahsanullah v. Dakhini Din*, (1905) 27 All. 575; *Folld. 8 All. 492*; 13 All. 124 and 20 All. 304; and *Diss. from 25 Cal. 258*; *Not Foll. 4 All. 137*.

26. 25 Cal. 258; *Folld. 4 All. 137*; *Diss. from in 27 All. 575*.

27. *Gopibandhu v. Domburu*, (1881) 11 Mad. 336; *Gunga Pershad v. Debi Sundari*, (1885) 11 Cal. 227; *Raj Kumar v. Raj Lakhi*, (1885) 12 Cal. 441; also see *Pachiappa v. Poojali*, 28 Mad. 557.

28. *Rajaram v. Banaji*, (1898) 23 Bom. 311.

29. *Narayandas v. Mt. Taravati*, 1933 All. 756 (1)=1933 A.L.J. 1126 =145 I.C. 915; *Folld. Puthia Veetil Mohidin v. Raman Nayar*, 39 M.L.J. 572=1920 Mad. 224=60 I.C. 117.

30. *Ram Chandra v. Laxman*, 31 Bom. 162.

31. *Virbhadra v. Ramayya*, 4 M.H.C.R. 148 and *Lakshmana v. Venkataragava*, 4 M.H.C.R. 89; *Murugeppa v. Baswantrao*, 37 Bom. 559.

tion for execution, unaccompanied by a Succession Certificate, is maintainable³²; and such a certificate can be produced later during the proceedings.³³ Only no relief can be granted until the succession certificate is produced.³⁴ An execution application otherwise in accordance with law as complying with O. 21, Rr. 11-14 but filed without necessary succession certificate,³⁵ even though rejected, being one made in accordance with law, is sufficient to save limitation.³⁶

2602. An application for execution does not abate on the death of the decree-holder pending the application. An application for substitution of the legal representatives of judgment-debtor is a step-in-aid of execution.³⁷

Application for recognition or substitution.

An application under O. 21, R. 16, Civil Procedure Code, made during the pendency of execution proceedings is not an application for fresh execution, but such an application would be an application to take a step-in-aid of execution.³⁸ An application by a transferee-decree-holder for recognition of the transfer, and to execute the decree saves the bar of limitation of a later execution petition by the decree-holder notwithstanding the fact that in certain subsequent proceedings the title of the transferee decree-holder on that date is negatived.³⁹ An application asking for time to find out the address of the judgment-debtor and to serve notice on him of the application for substitution is also a step-in-aid of execution.⁴⁰ An application by the judgment-creditor for substitution of the heirs of the deceased judgment-debtor, though disallowed, is an application in accordance with law to take some step-in-aid of execution.⁴¹ The Nagpur Judicial Commissioner's Court has

32. *Hafizuddin Chowdhry v. Abdool Aziz*, (1893) 20 Cal. 755.

33. *Brojonath v. Iswar Chandra*, (1892) 19 Cal. 482.

34. *Balkishen v. Wagar Singh*, (1894) 20 Bom. 76; *Mangal Khan v. Salimullah*, (1893) 16 All. 26.

35. *Bibi Aisha v. Mahabir Prasad*, 1927 Pat. 324=6 Pat. 440=8 P.L.T. 671=104 I.C. 218.

36. *Hafizuddin v. Abdool Aziz*, (1893) 20 Cal. 755.

37. *Mohan Singh v. Jagat Singh*, (1928) 109 I.C. 412=50 All. 621=1928 All. 299=26 A.L.J. 417; *Folld. Pitam Singh v. Tata Singh*, 29 All. 301=4 A.L.J. 184=A.W.N. (1907) 74.

38. *Mt. Bhagwanta Koer v. Zamir Ahmed*, (1924) 78 I.C. 766=5 P.L.T. 451=3 Pat. 596=2 Pat. L. R. 249; also see *Moidoo v. Muhammed*, (1933) 144 I.C. 310=1933 Rang. 55.

39. *Rajilagiripathy v. Bhawani Shankaran*, 80 I.C. 103=19 L.W. 650=47 M.L.J. 4=47 Mad. 641=1924 Mad. 673; also see *Sreepada v. Parasuramayya*, 12 M.L.J. 348.

40. *Ibid.*

41. *Adhar Chandra Das v. Lal Mohan Das*, (1897) 24 Cal. 778; *Saday Chandra v. Parash*, 35 C.L.J. 82=1922 Cal. 44; *Chinna Vel Naick v. Venkatarama Naick*, 34 L.W. 231.

held that an application for substituting the legal representative of a deceased judgment-debtor is a step-in-aid for it must ultimately assist in the realization of the decree.⁴² An application by a legal representative of a decree-holder for an order recognising him is not prohibited by the Civil Procedure Code, and consequently such an application is a step-in-aid of execution.⁴³ There being nothing in Civil Procedure Code to prohibit a transferee decree-holder from applying for and obtaining an order under the Code to bring in the representative of a defendant on record, an application for the purpose is a step-in-aid of execution within Art. 182 (5).⁴⁴ The principle of these rulings has been followed by the **Madras High Court** in *Varadiah v. Rajkuamara*,⁴⁵ where it has been held that an application for execution praying for the legal representative of the judgment-debtor to be brought on the record is sufficient to give a fresh starting point for limitation even if it contains errors in the matter of proper reliefs, etc. Art. 182, Limitation Act, seems to be framed precisely in order to admit a case where the decree-holder has put in an application in accordance with law to the proper Court to bring on legal representatives as a step-in-aid to execution.⁴⁶ In *Annamalai Mudaliar v. Ramier*,⁴⁷ an application made to the Court which passed the decree for recognition by the Court of the petitioner's right to execute, which recognition it was open to the Court to grant or withhold was held to be in accordance with law as the Court made the order prayed for, instead of returning the petition to him for amendment into an application for execution. An application for recognising assignment of decree and for execution is a step-in-aid.⁴⁸ An application by the heir or the assignee of a decree-holder to execute the decree is a good application, even though no application has been made for substitution of his name on the record.⁴⁹ In the case of an assignment by operation of law of a share in a decree, an application for execution of the *whole* decree by the assignee of even a *part* of the decree keeps alive the whole decree.⁵⁰

42. *Ramchandra v. Uka*, 1927 Nag. 308=103 I.C. 279=24 N.L.R. 36.

43. *Appaniangar v. Dhani Mudaly*, 17 M.L.J. 475; Reld. on 29 All. 301=4 A.L.J. 184.

44. *Mahalinga v. Kuppanachariar*, 17 M.L.J. 485=3 M.L.T. 21=30 Mad. 541; Folld. in *Saday Chandra v. Poresmath*, 64 I.C. 571=1922 Cal. 44=35 C.L.J. 82.

45. (1913) 21 Mad. 782; Reld. on 30 Mad. 541; 31 Mad. 68; 17 M.L.J. 475 and 18 M.L.J. 14.

46. *Chinna Vel Naik v. Venkatarama*, (1931) 134 I.C. 59=54 Mad. 852.

47. 31 Mad. 234=18 M.L.J. 24=4 M.L.T. 72.

48. *Kallepalli v. Kallepalli*, (1924) 47 Mad. 641=1924 Mad. 673.

49. *Hafizuddin v. Abdul*, 20 Cal. 755 (757); also see *Alagirisami v. Venkata*, 31 Mad. 76; and cf. *Mahalinga v. Kuppanachariar*, 30 Mad. 541.

50. *Ramasami v. Anda Pillai*, (1890) 14 Mad. 252=1 M.L.J. 240.

According to **Madras High Court**, approving of the **Bombay and Allahabad** view, where a decree of one Court has been transferred to another Court for execution, an application by the decree-holder to execute the decree against the representatives of the deceased judgment-debtor must be made to the Court which passed the decree and not to the Court executing the same.¹ The **Allahabad High Court** holds that it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative.² But a different view is taken by the **Calcutta**³ and **Lahore High Courts**,⁴ to the effect that an application for the substitution of the names of the legal representative of a deceased judgment-debtor on the record in place of the deceased may be made to the Court to which the decree has been transferred for execution, and operates to extend limitation under cl. (5) of Art. 182, Limitation Act. In any case the omission to make it is only an irregularity which does not affect the merits of the case. This view has been accepted by their Lordships of the Privy Council in *Jang Bahadur's* case.⁵

2603. An application to enforce or keep in force a decree by the attachment of a portion of the property of the defendant will keep the decree alive against the residue of his property or person.⁶ Even under the old law, applications to attach property were applications to enforce or keep in force the decree or order, and there is no doubt that, under the present law, an application to attach property when not itself the application for execution of the decree is an application to take a step-in-aid of execution.⁷ Where a decree-holder stated in his process application that *batta* was paid to attach the moveables in the house of the judgment-debtor, with a prayer that money may be received for the purpose, and there was a reference in the application to an order for attachment under O. 21, R. 43, Civil Procedure Code, it was held that the application amounted to a step-in-aid of execution,

1. *Swaminatha Ayyar v. Vaidyanatha Sastri*, (1905) 28 Mad. 466 (F.B.); also see *Hirachand v. Kasturchand*, (1893) 18 Bom. 224.

2. *Shapurji v. Shankar Datt*, (1895) 17 All. 431.

3. *Sham Lal v. Madhusudan*, 22 Cal. 558.

4. *Mt. Begum Bibi v. Bulaqi Shah*, (1925) 90 I.C. 1050=1926 Lah. 34; *Reld. on Bipin Behari v. Bibi Zohra*, 35 Cal. 1047.

5. *Jang Bahadur v. Bank of Upper India*, 1928 P.C. 162=3 Luck. 314=55 M.L.J. 545 (P.C.).

6. *Jamnadas v. Lalit Ram*, (1877) 2 Bom. 294; also see *Shanker Bisto v. Narsingh Rao*, (1887) 11 Bom. 467.

7. *Lakhmidas v. Gobind Ram*, (1882) 105 P.R. 1882.

and operated to extend limitation.⁸ An application to *continue the attachment* of property is ordinarily not a step aiding or advancing the execution.⁹ But, an application to *continue the sale* in order to secure the attendance of more bidders is held to be a step-in-aid of execution.¹⁰ A prior application will be regarded as a step-in-aid of execution so as to save limitation in respect of a subsequent application, even though the properties sought to be attached in the subsequent application are different from those attached in the prior application.¹¹

2604. An application asking the proper Court to execute the entire decree by the arrest of a surety who has made himself liable for the satisfaction of the decree, amounts to asking the execution Court to take a step-in-aid of the execution of the decree as against the principal whose liability the surety has taken upon himself.¹² The **Bombay** decision in *Narayan v. Timmaya*¹³ is to be distinguished, as it was a case under the former Code, where the surety had rendered himself liable before the passing of the decree for the due performance of the same. Where a judgment-debtor who has been arrested and sent to jail in execution of a decree obtains an *interim* release, but is not discharged, is re-arrested in execution of the decree, the application for that purpose is one in accordance with law, and saves limitation.¹⁴

2605. An application to execute an attached decree is a step-in-aid of the execution of the original decree, inasmuch as its object is to obtain money in order to pay off the judgment-debtor.¹⁵ A person attaching a decree is a representative of the decree-holder within the meaning of S. 47, Civil Procedure Code¹⁶;

8. *Govindasami Pillai v. Govinda Padayachi*, (1925) 87 I.C. 894=1925 Mad. 880=48 M.L.J. 678; *Folld. Vijayaraghavalu v. Srinivasalu*, 28 Mad. 399; *Reld. on Alagamuthu v. Devasagayya*, 32 I.C. 484=3 L.W. 34=19 M.L.T. 146.

9. *Abdul v. Fazilan*, 20 Cal. 255.

10. *Desireddi v. Pitchaiah*, 1 L.W. 573.

11. *Keshweswarindra v. Debendra Bala*, 4 P.L.J. 213=48 I.C. 245.

12. *Muhammad Hafiz v. Muhammad Ibrahim*, (1920) 58 Cal. 794=18 A.L.J. 988=43 All. 152; on appeal, *Badraddin v. Muhammad Hafiz*, (1923) 77 I.C. 129=1922 All. 481=44 All. 743.

13. 31 Bom. 50; see *Cholappa v. Ram Chandra*, 53 I.C. 187=44 Bom. 34=21 Bom. L. R. 861.

14. *Suraj Din v. Mahabir Prasad*, (1910) 33 All. 279; *Reld. on Shamji Deokaran v. Poonja Jairam*, 26 Bom. 652; *Diss. from Secretary of State v. Judiah*, 12 Cal. 652.

15. *Lachman v. Thondiram*, (1885) 7 All. 382.

16. *Peary Mohun Chowdhry v. Romesh Chunder Nundy*, (1888) 15 Cal. 371; also see *Sahman Mull v. Kanaga Sabapathi*, (1892) 16 Mad. 20 and *Krishnan v. Venkatapathy*, (1905) 29 Mad. 318.

and in every case is entitled to enforce execution of the decree which he has attached. When the decree attached has been passed by the same Court as the decree in execution of which it has been attached, the Court has jurisdiction to execute the attached decree on the application of the attaching creditor.¹⁷ An attachment of the attached decree cannot terminate where execution proceedings in the attached decree still continue¹⁸; and, at any rate, the application for the execution of the attached decree by the attaching decree-holder is a step-in-aid of execution of the decree in execution whereof the attachment has been made.¹⁹

2606. An application to a Court to issue a proclamation of sale in respect of property already attached in execution of a decree is an application to take some step-in-aid of execution, within the meaning of Art. 182, cl. 5, Limitation Act.²⁰ In *Chunder Coomar Roy v. Bhogobutty*,²¹ the Full Bench held that the payment into Court of costs of a proclamation of sale by *challans* within the three years coupled with an application for sale, which was made beyond the three years, was not a step-in-aid within the meaning of cl. 4 of Art. 167 of Act of 1871. This was under the old Act, and the language of the judgment was unduly narrow. Under the present Act, an application for sale of property under attachment is an application merely in aid of an execution then proceeding.²² An application for the issue of a fresh proclamation of sale is an application which saves limitation.²³ A so-called "*batta-memorandum*", which applies for the issue of a sale proclamation and on which a sale proclamation is issued accordingly is a step-in-aid, although an order for the issue of such proclamation might have been made previously.²⁴ An oral application for the fixing of a fresh date for the sale proclamation is a step-in-aid of execution.²⁵ An

17. *Peary Mohun Chowdhry v. Romesh Chunder Nundy*, 15 Cal. 371.

18. *Bishen Sahai v. Amir Singh*, 1931 Lah. 705=132 I.C. 667; Reld. on 7 All. 382; 24 Cal. 778; also see *Gya Loan Office Co. v. Dhirit Kundanlal*, (1910) 8 I.C. 675.

19. *Ibid.*; Reld. on *Muhammad Amirul Hasan v. Wasir Bibi*, 48 I.C. 786 (Pat.) and *Premal v. Mohammad Habibullah*, 24 I.C. 795.

20. *Ambica Pershad Singh v. Surdharial*, (1884) 10 Cal. 851 (F.B.).

21. 3 Cal. 235=1 C.L.R. 23 (F.B.).

22. *Chowdhry Paroosh Ram v. Kalipuddo Banerjee*, (1889) 17 Cal. 53; *Maneklal v. Nasia*, (1890) 15 Bom. 405.

23. *Raj Kishore v. Gurcharanlal*, (1911) 9 I.C. 634 (All.).

24. *Vijiaraghavalu v. Srinivasulu*, (1905) 28 Mad. 399; Folld. 10 Cal. 851 (F.B.) and cf. *Sheo Pershad v. Indar Bahadur*, (1908) 30 All. 179 and 25 Bom. 639. (See next paragraph.)

25. *Amar Singh v. Tika*, (1880) 3 All. 139.

application made for the purpose of having the sale proclamation corrected, and having a date fixed for settlement of the terms of the sale proclamation is one to take a step-in-aid of execution.²⁶ An application for postponement of sale maintaining attachment on some of the properties and releasing others is not a step-in-aid.²⁷

2607. According to the **Bombay High Court**, the mere payment of process fee for the service of notice,²⁸ or the mere payment of *batta* for issue of a sale proclamation²⁹ cannot constitute a step-in-aid of execution. The **Madras High Court** has held that a mere payment of postage stamps in Court for the transmission of the records, without an accompanying application made to take some step-in-aid of execution would not be sufficient to give a new point of limitation.³⁰ The mere payment of process fee for issue of warrant of arrest in execution of a decree without a formal application, oral or written, for the issue of such warrant, is not a step-in-aid of execution so as to save limitation.³¹ The **Allahabad High Court** also takes the view that the mere payment of costs for the issue of a proclamation of sale, unaccompanied by any application, will not operate to give a fresh starting point of limitation under Art. 182, cl. 5.³² Mere deposit into Court of the process fee or the diet money cannot be held to be an application to the Court to take a step-in-aid of execution within the meaning of Art. 182, cl. 5, Limitation Act.³³ A different view was taken by the **Calcutta High Court** in *Radha Proshad v. Sunderlal*,³⁴ which was a case for deposit of *Nilamee* fees, but it has not been followed in the Calcutta case of *Toree Mahomed v. Mahomed Mabod*,³⁵ where the mere payment of Court-fee in connection with execution proceedings, with a view to obtain leave to bid for pro-

26. *Suraj Mal v. Sarjoog Prasad*, 2 Pat. L. J. 5.

27. *Abdul Hossein v. Fazilun*, 20 Cal. 255; *Fakir Muhammad v. Ghulam*, 1 All. 580 (F.B.).

28. *Dwarkanath v. Anandrao*, (1894) 20 Bom. 179.

29. *Trimbak v. Kashinath*, (1897) 22 Bom. 722; *Maluk Chand v. Becharnatha*, (1900) 25 Bom. 639.

30. *Vellaya v. Jagannatha*, (1883) 7 Mad. 307.

31. *Arunachallam v. Latchmanan*, (1924) 82 I.C. 497=1924 Mad. 906=47 M.L.J. 537.

32. *Thakur Ram v. Katwaru Ram*, (1900) 22 All. 358; *Folld. Harsai v. Shamal*, A.W.N. (1900), 88 and 20 Bom. 179, *supra*; also see *Sheo Prasad v. Indar Bahadur*, (1908) 30 All. 179=5 A.L.J. 258=A.W.N. (1908) 74.

33. *Bhawani Prasad v. Iftikhar Hossein*, (1910) 7 I.C. 759 (All.).

34. (1883) 9 Cal. 644; Diss. in 22 All. 358.

35. (1883) 9 Cal. 730.

property then up for sale in execution of a decree, was held not to constitute a step-in-aid of execution. According to the **Calcutta High Court** neither an application by a decree-holder to receive a poundage fee from him in respect of the judgment-debtor's property purchased by himself, nor an application by him to be allowed to set off the purchase-money against the decree, instead of paying it into Court, is a step-in-aid of execution within the meaning of Art. 182, Cl. (5), Limitation Act.³⁶ An application for issue of a sale proclamation when *talbana* or process fee is paid by the decree-holder for service of the sale proclamation, is an application to the Court to take some step-in-aid of execution,³⁷ and this view is supported by the decision of the **Full Bench** of the **Calcutta High Court** in the case of *Ambica Pershad Singh v. Surdharilal*.³⁸ To bring a case within Art. 182, Cl. (5), it is not sufficient for the decree-holder to show that he has taken a step-in-aid of execution of the decree: he has to establish that he has applied to the Court to take some step-in-aid of execution. The mere payment of Nazir's fees cannot by itself bring the case within this clause.³⁹ The payment of process fee and the filing of a notice of sale, have been taken to import a request to the Court to proceed in the matter of execution, and as equivalent, therefore, to an application to take some step-in-aid of execution.⁴⁰ The **Oudh Chief Court** has also held that the mere payment of process-fee is a not a step-in-aid of execution.⁴¹ The payment

Application to take a step-in-aid essential. of maintenance charges of a judgment-debtor who is in jail is not a step-in-aid of execution, as Art. 182, Cl. (5) requires an application to take a step-in-aid of execution.⁴² However, it has been held that a remittance by the decree-holder through postal money order to the Superintendent of jail of subsistence allowance necessary for the detention of the judgment-debtor in prison is sufficient to save limitation as a step-in-aid of execution. An application to the Superintendent of Jail should in the circumstances be considered to be an application made to the

36. *Ananda Mohan v. Hara Soondari*, (1895) 23 Cal. 196 (Application by decree-holder to pay Nilamce fees).

37. *Nobendranath v. Bhupendra Narain*, (1895) 23 Cal. 374 (387).

38. 10 Cal. 851 (F. B.).

39. *Madan Mohun Roy v. Ganga Chandra Roy*, (1912) 13 I.C. 189 (Cal.) (Not followed 9 Cal. 644; and 28 Mad. 399; Followed 22 All. 358 and 30 All. 179).

40. *Bhupendra Narain v. Rajendra Nath*, (1913) 18 I.C. 455 (Cal.).

41. *The People's Industrial Bank, Ltd., Allahabad v. Mahesh Charan*, 93 I.C. 631=1926 Oudh 289=1 Luck. 153.

42. *Ramudu Chetty v. Varadaraja*, (1921) 62 I.C. 480=1921 Mad. 532 (1).

Court.⁴³ But, where with reference to an order for attachment of moveables, the decree-holder stated in his process application that *batta* was paid, the application was held to constitute a step-in-aid of execution.⁴⁴ Where a step has been taken, or an order has been passed without any application at all, the bar of limitation in respect of a subsequent application is not saved.⁴⁵ Mere order by Court to take necessary steps, in the absence of evidence of an application is no step-in-aid.⁴⁶ The starting point under Art. 182, Cl. (5), is not the taking of a step-in-aid of execution, but the application to take such a step.⁴⁷ An application by the decree-holder for confirmation of sale is not a step-in-aid, for the Court is bound to confirm a sale under O. 21, R. 92 in the absence of an application to set aside sale.⁴⁸ In any case a mere order confirming the sale, by the Court of its own motion is not sufficient to give a fresh starting point under Art. 182 (5).⁴⁹

2608. It has been held by the **Calcutta and Patna High Courts**, that where on an application for execution being registered a notice is duly served, and an affidavit of the service of notice is sworn in and filed in Court, the decree-holder's act of filing the service of the notice is equivalent to applying to the Court to take a step-in-aid of execution, namely, whether on contest or *ex parte*, to order that the decree should be executed.⁵⁰ The filing of an affidavit of service of notice in the Court to which the notice is sent by the executing Court for service is, however, not a step-in-aid of execution.¹ But, the filing of an affidavit of service which is the same thing as proving service of notice

43. *Rajeswara Sethupathi v. Kuppusami*, (1932) 140 I.C. 498=1933 Mad. 83=56 Mad. 320.

44. *Govindasami v. Govinda*, (1925) 87 I.C. 894=1925 Mad. 880=48 M. L.J. 678.

45. *Rajkumar Banerji v. Rajlakhi Debi*, (1886) 12 Cal. 441 (445); *Madan Mohan v. Ganga Chandra*, (1912) 13 I.C. 189=17 C.L.J. 422, *supra*; *Ramudu v. Varadaraja*, (1912) 62 I.C. 480 (Mad.) *supra*.

46. *Kara Rasi v. Ramnath*, 1927 Pat. 323=8 P.L.T. 670=103 I.C. 37; *Arunachallam v. Latchman*, (1924) 82 I.C. 497=47 M.L.J. 537.

47. *Rangachariar v. Subramaniam Chetty*, (1920) 58 I.C. 536=12 M. L.W. 9.

48. *Ananda v. Hara*, 23 Cal. 196 (199).

49. *Motendro v. Mohendro*, 10 C.L.R. 330.

50. *Ramkrishna Das v. Protap Chandra*, (1917) 38 I.C. 536=21 C.W. N. 423; *Mohanlal v. Nasimuddin*, 1928 Cal. 302=109 I.C. 588; *Thakur Singh v. Sheo Bhanjan Singh*, (1919) 49 I.C. 892=4 P.L.J. 521; cf. *Fateh Bahadur Singh v. Parmeshwar Prasad*, 1928 Pat. 145=6 Pat. 694=108 I.C. 430 (*Held*, that the mere filing of the affidavit cannot amount to step-in-aid. Dist. 38 I.C. 536 and 4 P.L.J. 521).

1. *Krishna Prasad v. Dharendra Nath*, (1920) 54 I.C. 1=24 C.W.N. 55=30 C.L.J. 518.

on the judgment-debtors is a step-in-aid of execution.² The application may be oral or in writing, and the fact that an order for issue of warrant was made shows conclusively that the Court must have acted on some application or other of the decree-holder, and such an application is a step-in-aid of execution within the meaning of Art. 182, Cl. (5).³

2609. The mere consent by a decree-holder to the judgment-debtor's application is not an application by decree-holder and is not a step-in-aid.⁴ However, where a judgment-debtor applied to Court in execution proceedings to postpone sale of some properties till some others were sold, and the decree-holder's vakil consented in part, but insisted that certain other land should also be sold in the first instance, it was held that this was a step-in-aid of execution.⁵ Similarly, where prior to the date fixed for the sale of the judgment-debtor's property, the debtor applied for two months' time, and the decree-holder assented to postponement for that length of time only, and the application was granted, and the Court thereupon struck the case off the file, it was held that the application was a step taken in aid of execution.⁶

An application by a judgment-debtor stating that the proceedings in execution had been adjusted, and he had paid the decree-holder in part, and would pay him the balance of the decretal amount subsequently, and praying that the execution might be struck off, is a step-in-aid of execution.⁷ However, where in execution of a decree certain property was attached and the sale proclamation issued and served, an application by the decree-holder stating that he had, at the request of the judgment-debtor, decided not to proceed with the sale, and releasing certain property, asked that the sale might be postponed, maintaining the attachment of part of property, and the case struck off the file, it was held that the ap-

2. *Mohanlal v. Kasimuddin*, 1928 Cal. 302=47 C.L.J. 362=109 I.C. 588; cf. *Mohanlal v. Bapuji Guelahbai*, 11 Bom.L.R. 729=3 I.C. 771 (*Held*, that the affidavit certified only the service of notice on the judgment-debtor and cannot be regarded as an application at all; and that the endorsement was not a step-in-aid).

3. *Ibid*.

4. *Sreenivasa v. Ponnuswamy*, (1904) 28 Mad. 40.

5. *Dharmamma v. Subba*, (1883) 7 Mad. 306.

6. *Raj Lukhy v. Rash Munjury*, (1879) 5 C.L.R. 515; cf. *Barrow v. Javerchand*, 19 Mad. 67 (Application to sanction an agreement to give time for the satisfaction of the judgment-debtor is not a step-in-aid of execution).

7. *Ghansam v. Mukha*, (1880) 3 All. 320 (Doctor Stokes doubts if such an application could be a step-in-aid of execution—Anglo-Indian Code, Vol. II, pp. 951, 1002); also see and cf. *Sujan v. Hira*, 12 All. 404 (Consent of both parties, treated as an application by decree-holder).

plication was not a step-in-aid but had rather the effect of temporarily retarding the execution.⁸ An application by a decree-holder

Application postponing sale. for the postponement of a sale, on the ground that he has allowed the judgment-debtor time is not a step-in-aid of execution.⁹

An application made by both parties to the Court to postpone the execution with a view to a compromise being arrived at between the parties was held not a step-in-aid.¹⁰ On the other hand the application was similar to the application in *Abdul Kader Rowther v. Krishnan Malaval Nair*,¹¹ which was called an application to get an order in retardation.

Application for partial execution.

2610. An application for partial execution, though not in accordance with law is a step-in-aid of execution.¹²

2611. An application to the Court to do an act in aid of execution, even though it is refused, is an application within the meaning of Art. 182 (5), Limitation Act.¹³ Therefore, an application, which is not an ordinary application for adjournment but an application for time to adduce evidence to prove that notice under O. 21, R. 22 (S. 248, Civil Procedure Code, 1882) had been duly served, though refused, is an application within the meaning of the article.¹⁴ A *bona fide* application made by a decree-holder praying for extension of time for the purpose of ascertaining the whereabouts of his judgment-debtor is an application to take a step-in-aid of execution and saves limitation.¹⁵ Similarly, an application by a decree-holder for time to ascertain the share of the judgment-debtor in certain property attached in execution of the decree, is an application to take a step-in-aid.¹⁶ But, an application by the decree-holder to be allowed some time to enable him to take steps is not a step-in-aid of execution.¹⁷

8. *Abdul Hossein v. Fazilun*, (1892) 20 Cal. 255.

9. *Kartick v. Juggernath*, 27 Cal. 285; also see *Rama v. Gourie*, 2 C. W.N. 415.

10. *Vishnu Nagappa v. Narasimha*, 1923 Bom. 461=25 Bom.L.R. 490=73 I.C. 1011; also see *Bindeswari v. Awadh Behari*, 6 I.C. 366.

11. (1913) 38 Mad. 695=1 L.W. 271=1914 M.W.N. 563=26 M.L.J. 433=15 M.L.T. 305=23 I.C. 533.

12. *Dalichand v. Bai Shiv Kour*, (1890) 15 Bom. 242; *Nepal v. Amrita*, (1899) 26 Cal. 888.

13. *Narsingh Dyal Singh v. Kalicharn Singh*, (1910) 5 I.C. 147=14 C.W.N. 486.

14. *Ibid.*

15. *Bhairan Pershad v. Amina Begam*, (1916) 38 All. 690.

16. *Vishwanath Parsharam v. Narsu Tulsidas*, (1921) 60 I.C. 916=23 Bom.L.R. 107=1921 Bom. 33.

17. *Umed v. Abdul*, 12 C.W.N. 216, notes; 8 C.L.J. 193.

An application for time to enable the applicant to obtain copies of decree and judgment made after prosecuting a *darkhast* to execute a decree, is a step-in-aid of execution.¹⁸ Similarly, an application for time to obtain certified copies required by O. 21, R. 14 (S. 238, Civil Procedure Code, 1882) is a step-in-aid of execution.¹⁹ An application for execution of a mortgage-decree for sale, wrongly returned for want of a certificate under O. 21, R. 14, although not represented is a step-in-aid of execution.²⁰ An application by the decree-holder for an adjournment to enable him to produce records or evidence necessary to effectively conduct the execution proceedings further is an application to get an order in aid of execution.²¹ However, a decree-holder's request for extension of time for filing the necessary papers has been held not an application for a step-in-aid of execution.²² Similarly, an application by the decree-holder for extension of time to file an encumbrance certificate cannot be said to be a step-in-aid of execution.²³

In decrees where the decree-holder has to make a payment before obtaining execution, an application for extension of time for payment is a step-in-aid of execution, though the application does not aid the particular kind of relief sought for ultimately.²⁴ The proper test in such cases is whether the step aids the execution of the decree as a whole.²⁵

2612. An application by a decree-holder in the course of an investigation into an objection to the attachment of property to have his witnesses summoned is an application within Art. 182, Cl. (5), Limitation Act.²⁶ An application presented by the decree-

18. *Haridas Nanabhai v. Vithaldas Kisandas*, (1912) 36 Bom. 638; Followed *Kunhi v. Seshagiri*, (1882) 5 Mad. 141; Diss. from *Kartick Nath v. Juggernath*, (1899) 27 Cal. 285.

19. *Sheshadasa Charya v. Bhimacharya*, (1912) 37 Bom. 317=14 Bom. L.R. 1204.

20. *Mootha v. Kandan Sankunni*, 27 I.C. 811.

21. *Abdul Kader v. Krishnan*, (1913) 38 Mad. 695; Relied on 36 Bom. 638; 37 Bom. 317; 29 All. 301 and 5 Mad. 141.

22. *Amiduddin v. Muhd. Ghous*, (1926) 98 I.C. 163=1926 Mad. 1197=51 M.L.J. 489.

23. *Ramaswamy v. VCCRANNA*, 1928 Mad. 143=106 I.C. 648; cf. *Abdul Kadir v. Krishnan*, (1913) 38 Mad. 695, *supra*.

24. *Sankara Narayana v. Puthia Vectil Thangamma*, (1922) 70 I.C. 333=1921 M.W.N. 391=41 M.L.J. 374=30 M.L.T. 252=45 Mad. 202=1922 Mad. 247.

25. *Ibid.*, 70 I.C. 333=45 Mad. 202=1922 Mad. 247.

26. *Ali Mahomed Khan v. Gurprasad*, (1883) 5 All. 344.

holder to summon his witnesses to resist objections to execution is an application to take a step-in-aid of execution.²⁷ The same view has been held in the case of *Shugan Chand v. Ramjas*,²⁸ though the actual application in that case was one asking the Court to examine witnesses produced by the decree-holder and to reject the objection. Where the decree-holder had put a list of witnesses, who were present in Court, intimating to the Court his readiness to repel the objection of the judgment-debtor, it was held that the conduct of the decree-holder amounted to take a step-in-aid of execution.²⁹ A *batta* application under O. 16, R. 1 for summoning witnesses to attend and give evidence required by the decree-holder for the purpose of showing that the judgment-debtor's objection that the decree had been satisfied was untrue, has been held to be a step-in-aid of execution.³⁰ An application for summoning witnesses in furtherance of a substantive application for execution, namely, for determining the standard of measurement without which he could not, in the opinion of the Court, obtain execution of the decree by delivery of possession, has been held to be a step-in aid.³¹ A decree-holder is entitled to regard any step taken by him to remove an obstacle thrown by the judgment-debtor in his way to the realization of his decree as a step-in-aid of execution, and an application to the Court, whether written or verbal, to take such a step falls within the purview of Art. 182 (5), Limitation Act.³² Accordingly, an oral application by the decree-holder to the Court to examine a witness in order to enable the decree-holder to resist an objection filed by the judgment-debtor to the execution of the decree, is an application to take a step-in-aid of execution.³³ Similarly, the filing of a list of witnesses by the decree-holder in the course of proceedings under O. 21, R. 90, Civil Procedure Code, to set aside a sale held under a decree is an application to take a step-in-aid of execution which will give a fresh start to the period of limitation for execution of the decree.³⁴ Filing of objections to the re-hearing of an application to set aside a sale

27. *Muhd. Siddiqkhan v. Misrilal*, (1922) 1922 All. 432=64 I.C. 524=19 A.L.J. 843.

28. (1910) 5 I.C. 292.

29. *Brojendra Kishore v. Dil Muhd.*, (1918) 22 C.W.N. 1027=44 I.C. 604; Relied on *Prankrishnadas v. Protapchandra*, 38 I.C. 536=21 C.W.N. 423; also see and cf. *Hatimullah v. Sukhamoye*, 1930 Cal. 304=124 I.C. 830.

30. *Veerappa Setti v. Sarkaru Munisami Achari*, 1934 Mad. 710=1934 M.W.N. 896.

31. *Kedarnath v. Lakhi Kanta*, (1917) 40 I.C. 1005=21 C.W.N. 868=26 C.L.J. 115.

32. *Sheo Sahay v. Jamuna Prasad Singh*, (1925) 88 I.C. 807=4 Pat. 202=1925 Pat. 459=6 P.L.T. 777; Relied on 40 I.C. 1005; 44 I.C. 604.

33. *Ibid.*

34. *Jagdeo Narain Singh v. Bhubaneswari*, (1928) 113 I.C. 582=7 Pat. 708=1928 Pat. 612=9 P.L.T. 817.

which has been dismissed, and the filing of a list of witnesses in the proceedings for re-hearing are also steps-in-aid of execution.³⁵

2613 It has been noticed already that Art. 182, Cl. (5), requires that the decree-holder should make a direct and independent application; and a mere opposition or resistance of the judgment-debtor's application is not an application to take a step-in-aid of execution.³⁶ Resistance to an appeal preferred by the judgment-debtor or prosecution of an appeal by the decree-holder against an order made in execution of a decree is not an *application* to the proper Court to take a step-in-aid of execution.³⁷ However, an application by mortgagee-decree-holder in execution of his decree, opposing the insolvency proceeding of the mortgagor judgment-debtor, is a step-in-aid of execution.³⁸

2614. An application to the Court executing a decree asking that certain objections to the execution of the decree be dismissed is a step-in-aid.³⁹ Similarly, an application by decree-holder praying that objections taken by the judgment-debtor to the sale of property in execution of the decree should be disallowed is a step-in-aid.⁴⁰ However, the mere act of the Court confirming a sale in execution, which act is not shown to have been performed at the instance of the decree-holder upon petition, or application, is not an application to the Court to take some step-in-aid.⁴¹ An application by the decree-holder for sale confirmation, has not been held as a step-in-aid of execution, as no such application is required to move the Court to do that which its duty requires to be done in certain circumstances.⁴²

2615. An application made by a judgment creditor to take out of Court certain monies there deposited by his judgment-debtor, cannot be considered to be an application to the Court to take a step-in-aid of execution, and is not, therefore, within Art. 182,

35. *Jagdeo Narain Singh v. Bhubaneswari*, (1928) 113 I.C. 582 (Pat.) *supra*.

36. *Shiblal v. Radhakishen*, (1885) 7 All. 898; *Umesh Chandra v. Soonder Narain*, (1889) 16 Cal. 747; *Madho Pershad v. Ghanyalal*, 1929 Lah. 529=115 I.C. 24=30 P.L.R. 419; *Troylokyanath v. Jyoti Prokash*, (1903) 30 Cal. 761; *Langtu Pande v. Baijnath*, (1906) 28 All. 387.

37. *Kristo Coomar v. Mahabat*, 5 Cal. 595.

38. *Joshi Laxmiram v. Balashankar*, (1914) 39 Bom. 20.

39. *Tamijunmissa v. Najju*, 40 All. 668=16 A.L.J. 704=48 I.C. 38.

40. *Kewal Ram v. Khadim Husain*, 5 All. 276; *Gobind v. Runglal*, 21 Cal. 23.

41. *Motendro v. Mohendra*, 10 C.L.R. 330.

42. *Umesh Chandra v. Shib Narain*, 31 Cal. 1011; *Panchanna v. Narasimha*, 11 C.L.J. 356; *Triloknath v. Bansman*, 2 Pat. 249.

Cl. (5) of the Limitation Act.⁴³ Where a legal representative applied for execution of a decree in which the deceased decree-holder had obtained an order for payment out to him of certain attached monies in Court which belonged to his judgment-debtor, it was held that the application made at a time when the legal representative had not applied for substitution, was not under the circumstances a step-in-aid of execution.⁴⁴ The **Calcutta** view is opposed by the High Courts at **Madras** and at **Allahabad** in the cases of *Venkatarayalu v. Narasimha*,⁴⁵ *Kerala Varma v. Shangaram*,⁴⁶ *Koormayya v. Krishnamma*,⁴⁷ and *Paran Singh v. Jawahir*.⁴⁸ According to this view an application by a decree-holder, paid in by judgment-debtor is an application to take a step-in-aid of execution.⁴⁹ But, as observed by the **Calcutta High Court**

"when the sale of the property attached in execution has been completed, and the purchase-money has been paid into Court; nothing more remains to be done in respect of the execution of the decree as against that property and no application as regards the purchase-money, either to draw it out of Court or set it off against the decree when the decree-holder is himself the purchaser, can be properly said to be an application to the Court to take some step-in-aid of the execution of the decree".⁵⁰

The **Punjab Chief Court** has followed the **Calcutta** view.¹ The **Madras High Court** takes the view that an application for payment of money realised by attachment (though such application is dismissed for non-payment of process charges) is a step-in-aid of execution.² The mere drawing out money is not a step-in-aid of execution unless there was an application either before or after to draw money so that such application might be construed as a step-in-aid of execution.³ The **Nagpur Judicial Commissioner's Court** has followed the **Madras** view.⁴ The **Allahabad High Court** held that an application to take monies deposited by the judgment-debtor in Court, or realised by the sale of his property

43. *Hemchunder Chowdhry v. Bhrojo Soondury*, (1881) 8 Cal. 89; *Fazal Imam v. Metta Singh*, (1884) 10 Cal. 549; Followed in *Apurba v. Chandromoni*, 10 C.W.N. 354 (358).

44. *Gunga Pershad v. Sundari*, (1885) 11 Cal. 227; Followed in *Ananda Mohan v. Harasundari*, (1895) 23 Cal. 196 (199).

45. 2 Mad. 174.

46. 16 Mad. 452.

47. 17 Mad. 165=3 M.L.J. 296; cf. 1933 Mad. 597.

48. 6 All. 366; also see *Sujan v. Hira*, 12 All. 399 (406).

49. *Kishorilal v. Shankaran*, A.W.N. (1882) 184; also see *Dharmamma v. Subba*, 7 Mad. 306.

50. *Ananda Mohan v. Hara Soondari*, (1895) 23 Cal. 196 (199).

1. *Kasu v. Attar Singh*, 207 P.L.R. 1908 (F.B.).

2. *Kerala v. Shangaram*, 16 Mad. 452.

3. *Ramanathan Chettiar v. Estate Collector*, 1933 Mad. 597=144 I.C. 66=38 L.W. 205.

4. *Lachman v. Hira*, 11 C.P.L.R. 161.

is an application which is intended not only to aid execution, but to acquire the fruits of execution, namely, the recovery of fruits which in execution of decree become the property of the decree-holder.⁵ The **Bombay High Court** agrees with the Allahabad and Madras view.⁶ But, Jardine, J., has observed in *Keshavlal v. Pitamberdas*,⁷ that the Calcutta cases in which it was ruled that mere receipt of money by the decree-holder, or payment of *bhatta* by him in Court, does not extend the period of limitation, were all cases of mere money decrees in which the execution by attachment was never intended to be a permanent arrangement. He agreed that "mere receipt of money under such circumstances is not a step-in-aid of execution," but distinguished the case before him where the payments were made almost every year, and it could not be presumed that the plaintiff took no steps to move the Court in this behalf. Where the attachment is not ineffectual,⁸ and the payments from year to year are *bona fide*, execution of the decree,⁹ applications made by the judgment-creditor to receive the proceeds of the attached property in part-execution of the decree would extend the period of limitation as being steps-in-aid of execution.¹⁰ The **Madras High Court** draws a distinction between money which has been the proceeds of execution, and the money which is in Court to the credit of the suit.¹¹ And, it has been held that in the latter case, an application for payment out cannot be said to be an execution application or an application in aid of execution. In such a case the plaintiff has only to apply to the Court for payment, and the Court makes the payment without reference to the judgment-debtor in the suit.¹² The **Bombay High Court** draws no such distinction.¹³

5. Per Mahmood, J., in *Sujan v. Hira*, 12 All. 399 (406).

6. *Bapuchand v. Maguttrao*, 22 Bom. 340; also see *Mulchand v. Jamanbi*, 1925 Bom. 443=27 Bom.L.R. 671.

7. (1894) 21 Bom. 261 (267).

8. *Jibhai Mahipati v. Parbhu Bapu*, 1 Bom. 59 (Ineffective or informal attempts not deemed sufficient); also see and cf. *Prabhacar Rowe v. Potannah*, 2 Mad. 1.

9. *Shankar Bisto v. Narsinghrao*, 11 Bom. 467.

10. *Nukanna v. Ramasami*, 2 Mad. 218; *Pardu Singh v. Jazwahir Singh*, 6 All. 366; *Jogesh Prakash v. Kale Coomar*, 8 W.R. 274; and *Choredhry Paroosh Ram v. Kali Puddo*, 17 Cal. 53.

11. *Balaguruswami v. Guruswami*, 48 M.L.J. 506=1925 Mad. 703=87 I.C. 989; cf. *Appasami v. Jotha*, (1899) 22 Mad. 448.

12. *Ibid.*, 87 I.C. 989; Relied on *Kuppuswami v. Rajagopala*, 70 I.C. 324=45 Mad. 466=1922 Mad. 79=42 M.L.J. 303 and *Narayanan Nair v. Raman*, 82 I.C. 743=1925 Mad. 131=1924 M.W.N. 674=20 L.W. 1907.

13. *Mulchand v. Jamanbi*, 1925 Bom. 443=27 Bom.L.R. 671.

2616. An application by a decree-holder for rateable distribution of the assets is an application for execution in accordance with law, within the meaning of Art. 182, cl. 5, Limitation Act, inasmuch as rateable distribution of assets is one of the modes of execution of a decree for payment of money.¹⁴ Where such an application was made, and distribution was granted without fixing the amounts, a second application made for an order to be paid the money so ordered to be distributed, was held to be a step-in-aid of execution.¹⁵ But if the order granting the distribution fixed the precise amounts to be paid to the decree-holders, an application for an order of withdrawal of the amounts which was a mere ministerial order was not a step-in-aid of execution.¹⁶

2617. An application made by a decree-holder to be put into possession of property which he had purchased at an auction sale held in execution of his decree is a "step-in-aid of execution" of that decree, and gives a fresh starting point for limitation.¹⁷ A Full Bench of the Allahabad High Court has held that a decree-holder whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree.¹⁸ If after confirmation of sale in his favour the auction purchaser fails to obtain from the judgment-debtor possession of the property purchased, he may claim possession not only by an application under S. 318 or S. 319, Civil Procedure Code, 1882 (O. 21, Rr. 95, 96), but also by suit. Section 47, Civil Procedure Code, 1908, is not a bar to such suit, and does not apply to such an application.¹⁹ In *Babu Ram v. Piarilal*,²⁰ it was observed that the Division Bench ruling in *Motilal v. Makund Singh*,²¹ was not overruled on the question of limitation which was certainly not before the Full Bench when they pronounced the later decision. But, a later Division Bench

14. *Gobardhandas v. Jang Bahadur*, (1926) 98 I.C. 33=1926 Oudh 616 =1 Luck. 569.

15. *Baijnath v. Ghanashyam*, 8 C.W.N. 382.

16. *Sadanand v. Kali Shankar*, 10 C.W.N. 28=3 C.L.J. 95.

17. *Motilal v. Makund Singh*, (1897) 19 All. 477; Relied on *Sujan Singh v. Hira Singh*, 12 All. 399.

18. *Bhagwati v. Banwarilal*, (1908) 31 All. 82 (F.B.); Relied on *Sabhajit v. Srigopal*, (1894) 17 All. 222 and *Mahabir Pershad v. Macnaghten*, (1889) 16 Cal. 682.

19. *Ibid.*, 31 All. 82 (F.B.); Cf. *Motilal v. Mohunt Singh*, 19 All. 477.

20. (1919) 41 All. 479 (480)=50 I.C. 143; Followed 19 All. 477.

21. (1897) 19 All. 477.

ruling in *Mohsin Raza Khan v. Haider Baksh*,²² follows the Full Bench decision, and dissents from *Motilal v. Makund Singh*,²³ and *Babu Ram v. Peareylal*.²⁴ The view taken by the **Allahabad High Court**, therefore, is that broadly speaking the fact that the decree-holder and auction-purchaser are one and the same person can have no bearing on the rights and liabilities attaching to a decree-holder as such. In a case, therefore, where the decree-holder is himself the auction-purchaser, and the sale has been confirmed and a sale certificate granted, the decree-holder must be taken to have received from himself as auction-purchaser the sale price, and it is as auction-purchaser and as auction-purchaser alone that he can proceed to make an application, if necessary, under O. 21, R. 95, Civil Procedure Code.²⁵ Therefore an application under O. 21, R. 95, Civil Procedure Code, by the decree-holder in his capacity as an auction-purchaser to recover possession is not a proceeding in execution and a step-in-aid of execution.²⁶

According to the **Bombay High Court**, a decree-holder by becoming a purchaser at a Court-sale does not cease to be a party to the suit within the meaning of S. 47, Civil Procedure Code and proceedings for delivery of possession of property purchased by the decree-holder are proceedings in execution of decree.²⁷ The execution of the decree is not complete and final, until the decree-holder actually receives the sale-proceeds through the Court, and until he secures possession of the property through the Court.²⁸ Accordingly, it is held that an application by a decree-holder to be put in possession of the property which he has purchased in execution of his decree is a step-in-aid of execution of that decree.²⁹ The **Calcutta High Court**³⁰ has held following the Allahabad view in *Motilal v. Makund Singh*,³¹ that an application by a decree-

22. (1929) 115 I.C. 869=1928 All. 368=26 A.L.J. 498=50 All. 670.

23. 19 All. 477.

24. 41 All. 479.

25. *Mohsin v. Haider*, 115 I.C. 869=1928 All. 368=50 All. 670=26 A.L.J. 498.

26. *Ibid.*

27. *Sadashiv v. Narayan*, (1911) 35 Bom. 452.

28. *Ibid.*, (1911) 35 Bom. 452 (459); Relied on *Koormayya v. Krishnamma*, (1893) 17 Mad. 165; *Paransingh v. Jazwahir Singh*, (1884) 6 All. 366 and *Sujan Singh v. Hira Singh*, (1889) 12 All. 399.

29. *Ibid.*, (1911) 35 Bom. 452 (459); Relied on *Sariatoola v. Rajkumar*, (1900) 27 Cal. 709; *Lakshmanan v. Kannammal*, (1900) 24 Mad. 185; *Kasinatha v. Uthumansa*, (1901) 25 Mad. 529; and *Motilal v. Makund Singh*, (1897) 19 All. 477.

30. *Sariatoola v. Rajkumar*, (1900) 27 Cal. 709; also see *Pran Krishna v. Juramoni*, (1909) 1 I.C. 430=13 C.W.N. 694.

31. (1897) 19 All. 477.

holder to be put in possession of the property which he purchased in execution of his decree is a step-in-aid of execution and the decree-holder will get a fresh starting point of limitation from the date of the application. In *Annada Prasanna v. Somaruddi Mirdha*,³² it was held per Newbould, J., that an application by a decree-holder to be put in possession of property purchased by him at a sale in execution of his decree, is an application to the Court to take a step-in-aid of execution. But, Cuming, J., held that an application, to be a step-in-aid of execution must be one by the decree-holder in his capacity of decree-holder, and not in his capacity of auction-purchaser. This is practically the view held by the **Full Bench** of the **Allahabad High Court** in 31 All. 82 (F.B.) which has been followed in 50 All. 670; 1928 All. 368, *supra*, and it relies on the principle stated in the Calcutta case of *Ananda Mohan Roy v. Hara Sundari*,³³ where they observe:—

“It seems to us that when the sale of the property attached in execution has been completed, and the purchase-money paid into Court, nothing more remains to be done in respect of the execution of the decree as against the property and no application as regards the purchase-money, either to draw it out of Court or set it off against the decree when the decree-holder is himself the purchaser, can properly be said to be an application to the Court to take some step in execution of the decree.”

The **Patna High Court** has dissented from the Allahabad view in *Motilal v. Makund Singh*,^{33-a} and it has been held that an application for possession made by a decree-holder auction-purchaser after the confirmation of sale is not a step-in-aid of execution, inasmuch as on the confirmation of sale the property vests in the purchaser, and any further step which it may be necessary for him to take in order to secure possession is not a step taken by a decree-holder, even if he happens to be the auction-purchaser, but is an application by auction-purchaser, as such, and consequently has nothing to do with the execution of the decree.³⁴

2618. An application for execution properly made to a Court to which the decree is sent for jurisdiction, if returned under a misapprehension will be tantamount at least to a step-in-aid of execution.³⁵ The transferring Court retains jurisdiction only for limited purposes, *e.g.*, for dealing with applications for recording assignment of

Application for execution to Court without jurisdiction.

32. (1920) 54 I.C. 839=23 C.W.N. 926=30 C.L.J. 135.

33. 23 Cal. 196.

33-a. (1897) 19 All. 477.

34. *Kamal Nain v. Kesho Prasad Singh*, (1922) 1 P. 701=1922 Pat. 310=68 I.C. 638; Followed in *Trilokenath Jha v. Bansman Jha*, (1923) 72 I.C. 938=1923 Pat. 22=2 Pat. 249; Diss. from 19 All. 477.

35. *Seshaiyer v. Madan Mohan*, 1932 Pat. 286=11 Pat. 513=13 P.L.T. 623=139 I.C. 843.

decrees under O. 21, R. 16, and applications against the legal representatives of judgment-debtor.³⁶ Accordingly, where an application for execution was made to a Court which originally had no jurisdiction but subsequently acquired jurisdiction, and no fresh application was made after the confirmation of jurisdiction it was held that the application did not save limitation.³⁷ An application by the decree-holder to the Court which passed the decree for transfer of that decree to a Court having no jurisdiction to execute it, is not a step-in-aid of execution. The mere fact that such an application is in prescribed form will make no difference.³⁸

2619. Where the decree-holder makes an application against the deceased judgment-debtor in good faith as he was not aware of the death of the judgment-debtor, the application must be deemed to be an application made in accordance with law to take some step-in-aid of execution.³⁹ An application for execution against a dead person is not in accordance with law, and cannot amount to an application for taking steps-in-aid of execution.⁴⁰ An execution application filed *bona fide* within the time prescribed by law against a dead person, though it cannot be acted upon, is nevertheless a step-in-aid of execution, which has the effect of saving the decree from being barred.⁴¹

2620. An execution petition presented *bona fide* against a wrong legal representative of a deceased judgment-debtor is still an application to take a step-in-aid of execution sufficient to save limitation.⁴² An application for execution of decree made against a wrong person under the *bona fide* belief that that person was the real legal representative of the judgment-debtor is an application in accordance with law within the meaning of Art. 182, and in any event it is clearly an applica-

36. *Jatindra Kumar v. Mohendro Chandra*, 60 Cal. 1176=58 C.L.J. 192=37 C.W.N. 1167=1933 Cal. 906.

37. *Ibid.*

38. *Sital Prasad Sukul v. Babulal*, 1932 Pat. 309; cf. 1916 P.C. 16 and 1924 Pat. 471.

39. *Maula Baksh v. Mahomed Ikram*, 1934 Lah. 55.

40. *Ramkali v. Bir Bahadur*, 1934 A.L.J. 829=4 A.W.R. 509.

41. *Subramania v. Rangaswami*, 1935 Mad. 161=68 M.L.J. 261=155 I.C. 327=41 L.W. 173=1935 M.W.N. 15; also see *Sheogobind Ram v. Mt. Kishun Bose*, 11 Pat. 546=138 I.C. 91=13 P.L.T. 318=1932 Pat. 222 and *Balkishendas v. Bedmati Koer*, 20 Cal. 388 (396); *Ramaswami v. Oppillamani*, 4 I.C. 1059=33 Mad. 6; *Begambibi v. Bulaqi Shah & Sons*, 90 I.C. 1050=1926 Lah. 34; *Hari Mahadeo Vedekar v. Vishnu Balakrishna*, 134 I.C. 699=1931 Bom. 425=33 Bom.L.R. 622.

42. *Ibid.*

tion to take a step-in-aid of execution of the decree and does give a fresh start to the period of limitation.⁴³ The same view appears to have been taken in *Bipin Behari v. Bibi Zohra*⁴⁴ and in *Puran Mal v. Mt. Dilwa*.⁴⁵ An application for execution against a minor judgment-debtor mentioning therein as his guardian the person who had been appointed and was acting as guardian but who happened to have died before the date of the application is sufficient to furnish a fresh starting point for limitation for the execution of decree.⁴⁶

2621. We have seen in the previous paragraphs, that in the following cases, the application was held not to be an application to take some step-in-aid of execution:—

What does not constitute a step-in-aid.

(1) Certification by decree-holder is not an application to take some step-in-aid of execution. See “Application to enter up part satisfaction”.⁴⁷

(2) Application to bring decree into conformity with judgment, under O. 20, R. 6, Civil Procedure Code (S. 206, Civil Procedure Code, 1882), does not form the starting point of a fresh period of limitation, as a step-in-aid of execution, under Art. 182 (5), Limitation Act. See “Application for amendment of decree”.⁴⁸

(3) Application for copy of decree is not a step-in-aid. See “Application for return of copy of decree”, *ante*.⁴⁹

43. *Brojo Sunder Das v. Radha Prasad Bhagat*, 1932 Pat. 306=11 Pat. 508=139 I.C. 840.

44. (1908) 35 Cal. 1047.

45. 1924 Pat. 333=72 I.C. 1003.

46. *Jagannatha Rao v. Narayanamurthy*, 145 I.C. 714=1933 Mad. 697=65 M.L.J. 374; Relied on *Ghulam Hussain v. Narayan Singh*, 1931 Lah. 636=134 I.C. 1107 and *Puran Mal v. Dilwa*, 72 I.C. 1003=1924 Pat. 333=4 P.L.T. 54.

47. *Suraiya v. Trilokinath*, 9 Luck. 288=147 I.C. 766=1934 Oudh 426; *Adya Persad v. Lal Girjish*, 1933 All. 364; also see *Amar Krishna v. Jagat Bandhu*, 1931 Cal. 719 (F.B.); *The President, Union Board v. Thirumala*, (1935) 159 I.C. 544=42 L.W. 588; *Hariram v. Himanlal*, (1935) 157 I.C. 1052=1935 All. 259, etc.; *Maung Tung Hlaing v. U Aung Gyaw*, 1930 Rang. 64 and *Ram Bharose v. Rammanlal*, 1932 Oudh 148=7 Luck. 590=137 I.C. 768 (F.B.); *Kaliandas v. Mahomed Khan*, 1933 Sind 365=147 I.C. 30.

48. *Kallu Rai v. Fahiman*, (1890) 13 All. 124; *Daya Kishan v. Nanhi*, (1898) 20 All. 304; also see *Tarsi Ram v. Man Singh*, (1886) 8 All. 492 and *Ahsanullah v. Dakhini Din*, (1905) 27 All. 575.

49. *Gopibandhu v. Domburu*, (1881) 11 Mad. 336; *Gunga Pershad v. Debi Sundari*, (1889) 11 Cal. 227; *Rajkumar v. Raj Lakhi*, (1885) 12 Cal. 441; also see *Pachiappa v. Poojali*, 28 Mad. 557 and *Muthia Veetil v. Irrakat*, 39 M.L.J. 572=60 I.C. 117.

(4) An application to obtain a succession certificate, is not a step-in-aid of execution within this article. See "Application for certificate of heirship: Probate of Letters" *ante*.⁵⁰

(5) Mere payment of process-fee, or *batta*, or costs, unaccompanied by any application, is not a step-in-aid of execution.¹ See "Depositing fee or stamps", *ante*.

(6) Postponement of sale, by consent.—An application which has the effect rather of retarding the execution proceedings than of furthering execution is not a step-in-aid of execution. See "Consent by decree-holder"² and "Striking off proceedings", *ante*.³ An application by a decree-holder for the postponement of a sale in execution of his decree on the ground that he had given time to the judgment-debtor, is neither an application for execution, nor one to take some step-in-aid of execution of the decree.⁴ An application by the decree-holder for stay of execution proceedings is not an application to enforce or keep in force a decree.⁵

(7) An application made by both the parties to the Court to postpone the application in the *Darkhast*, with a view to compromise being arrived at between the parties is not a step-in-aid of execution.⁶

(8) Opposition or resistance of the decree-holder to the judgment-debtor's application for insolvency will not amount to the taking of a step-in-aid of execution.⁷ The decree-holder should make a direct and independent application, and a mere opposition or resistance of a judgment-debtor's application does not give a fresh starting point.⁸ An application by the decree-holder

50. *Murugappa v. Baswantrao*, (1913) 37 Bom. 559.

1. *Dwarkanath v. Anandrao*, (1894) 20 Bom. 179; *Trimbak v. Kashinath*, (1897) 22 Bom. 722; *Maluk Chand v. Becharnatha*, (1900) 25 Bom. 639; *Vellaya v. Jagannatha*, (1883) 7 Mad. 307; also see *Arunachallam v. Latchmanan*, (1924) 82 I.C. 497=1924 Mad. 906=47 M.L.J. 537.

2. *Sreenivasa v. Ponnuswamy*, (1904) 28 Mad. 40.

3. *Abdul Hossein v. Fazilun*, (1892) 20 Cal. 255; *Vishnu Nagappa v. Narasimha*, 1923 Bom. 461=73 I.C. 1011=25 Bom.L.R. 490; *Kartick v. Juggernath*, 27 Cal. 285; *Abdul Kader v. Krishnan*, (1913) 38 Mad. 695=23 I.C. 533.

4. *Mainath v. Debi Baksh*, (1881) 3 All. 757; *Troylokya v. Jyoti Prakash*, (1903) 30 Cal. 761; cf. *Sitla Din v. Sheo Prasad*, (1881) 4 All. 60.

5. *Fakir v. Ghulam*, 1 All. 580.

6. *Bishnu Nagappa v. Narasimha*, 1923 Bom. 461; *Barrow v. Javerchand*, (1895) 19 Mad. 67.

7. *Langtu Pandu v. Baijnath*, (1906) 28 All. 387.

8. *Shiblal v. Radhakishen*, (1885) 7 All. 898; *Umesh v. Soonder Narain*, (1889) 16 Cal. 747; *Madho Pershad v. Ghanayalal*, 1929 Lah. 529=115 I.C. 24=30 P.L.R. 419.

objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution.⁹

(9) **Confirmation of sale.**—The mere act of the Court confirming a sale in execution, not shown to have been performed at the instance of the decree-holder, is not a "step-in-aid". See "**Application for sale confirmation**", *ante*.¹⁰

(10) **Taking out money.**—According to **Calcutta High Court**, an application made by a judgment-creditor to take out of Court certain monies lying there to his credit, cannot be considered to be a step-in-aid of execution. See "**Application for payment**",¹¹ *ante*. The **Madras High Court**, however, takes a different view.¹² The **Bombay High Court** has followed the Madras view to a considerable extent.¹³ The mere drawing out of money, is not a step-in-aid of execution unless there was an application either before or after to draw the money so that application might be construed as a step-in-aid of execution.¹⁴

(11) **Application for possession.**—An application for possession by decree-holder auction-purchaser, after the sale confirmation, is not a step-in-aid of execution.¹⁵ There is a conflict of view on the question which is noticed under heading "**Application for possession**", *ante*.

(12) **Filing affidavit of service.**—The filing by the peon of an affidavit of service of notice on the judgment-debtor does not amount to a step-in-aid of execution.¹⁶

9. *Kuppuswami v. Rajagopala*, 45 Mad. 466 (470)=42 M.L.J. 303=1922 Mad. 79=70 I.C. 324; also see *Krishna v. Seetharama*, 50 Mad. 49=98 I.C. 456=1926 Mad. 1178 (1180).

10. *Motendro v. Mohendro*, 10 C.L.R. 330; also see *Umesh Chandra v. Shib Narain*, 31 Cal. 1011; *Panchamma v. Narasimha*, 11 C.L.J. 356; *Triloknath v. Bansman*, 2 Pat. 249.

11. *Hemchander v. Bhojo Soondury*, (1881) 8 Cal. 89; *Fazl Imam v. Metta Singh*, (1884) 10 Cal. 549; *Apurba v. Chandomoni*, 10 C.W.N. 354 (358); *Ananda Mohan v. Hara Soondari*, (1895) 23 Cal. 196 (199); also see *Kasu v. Attar Singh*, 207 P.L.R. 1908 (F.B.).

12. *Venkatarayalu v. Narasingha*, (1880) 2 Mad. 174; *Koormaya v. Krishnamma*, (1893) 17 Mad. 165.

13. *Bapuchand v. Mugutrao*, (1896) 22 Bom. 340; *Mulchand v. Jamanbi*, (1925) 1925 Bom. 443.

14. *Ramanathan v. Estate Collector*, 144 I.C. 66=38 L.W. 205=1933 Mad. 597.

15. *Mohsin Razakhan v. Haider Baksh*, (1929) 115 I.C. 869=1928 All. 368=50 All. 670; *Annada Prasanna v. Somoruddi*—Per Cuming, J., (1920) 54 I.C. 839=23 C.W.N. 926=30 C.L.J. 135; *Bhagwati v. Banwarilal*, (1908) 31 All. 82 (F.B.).

16. *Mohanlal v. Bapuji Ghelabai*, 11 Bom.L.R. 729=3 I.C. 771 and *Annapurna v. Dhirendra*, 24 C.W.N. 55=30 C.L.J. 518=54 I.C. 1; also see *Fateh Bahadur v. Parmeshwar*, 1928 Pat. 145=6 Pat. 694=108 I.C. 430; But cf. *Prankrishna v. Protap Chandra*, (1917) 38 I.C. 536=21 C.W.N.

(13) **Application for transfer of decree.**—An application for transfer of a decree for execution is not a step-in-aid of execution,¹⁷ especially when transfer is to a Court having no jurisdiction.¹⁸

(14) **Application for reconstruction of decree.**—Where a decree has been lost or destroyed, an application to the Court to reconstruct the decree is not a “step-in-aid” of execution.¹⁹

(15) **Application to Court not having jurisdiction.**—Where an application for execution was made to a Court which originally had no jurisdiction, but subsequently acquired jurisdiction, and no fresh application was made after the confirmment of jurisdiction, it was held that the application did not save limitation.²⁰

(16) **Application for time to put in petition for substituted service.**—A step-in-aid of execution for the purpose of Art. 182, cl. (5) must satisfy two conditions: (1) The step is one which the *Court* has to take; (2) the *Court* must be asked to take it. Accordingly, an application for time to put in a petition for substituted service is not a step-in-aid so as to save limitation.²¹ An application asking for time, is ordinarily not a step-in-aid of execution.²²

(17) **Application for time to file sale papers.**—A memorandum for the return of sale papers or an oral application for grant of time to file the sale papers or an affidavit filed subsequently to the petition for leave to bid is not a step-in-aid of execution.²³

(18) **Application by decree-holder to receive poundage fees.**—An application by a decree-holder to receive poundage fees from him in respect of some of his judgment-debtor's property purchased by himself, is not a step-in-aid of execution.²⁴

(19) **Application for return of decree.**—Nor is an application for the return to the decree-holder of a decree, made to a

423; *Mohanlal v. Nasiruddin*, 1928 Cal. 302=109 I.C. 588; *Thakur Singh v. Sheo Bhanjan Singh*, (1919) 49 I.C. 892=4 P.L.J. 921.

17. *Gopal Tewari v. Ramdhari Pandey*, 152 I.C. 987=1934 Pat. 662; but see “**Application for Transfer of Decree**”—*ante*.

18. *Sital Prasad v. Bahulal*, 1932 Pat. 309=11 Pat. 785=13 Pat.L.T. 498.

19. *Raj Gir v. Iswardhari*, 11 C.L.J. 243=5 I.C. 660; also see *Ratanchand v. Chandulal*, 150 I.C. 866=36 Bom.L.R. 115=1934 Bom. 113 (2).

20. *Jatindra Kumar v. Mohendra*, 60 Cal. 1176=58 C.L.J. 192=37 C.W.N. 1167=1933 Cal. 906.

21. *Ramaswami Chetty v. Palaniappa*, 145 I.C. 933=65 M.L.J. 271=1933 Mad. 674.

22. *Kartick v. Jagannath*, 27 Cal. 285 (288).

23. *Raghava Ayyangar v. Natesan Chettiar*, 1931 M.W.N. 413; Followed 1927 M.W.N. 792=41 Mad. 251.

24. *Aghore Kali v. Prasanna Kumar*, (1895) 22 Cal. 827; *Anandamohan v. Harcesoondari*, (1895) 23 Cal. 196.

Court to which it has been transferred for execution, and by which it has been partially executed, a step-in-aid of execution.²⁵

(20) **Recovery of costs.**—Application to recover costs incidental to execution is not an application to execute the original decree and is not a step-in-aid of execution.²⁶

CLAUSE (5): SUB-TITLE VI: FINAL ORDER

2622. **FINAL ORDER.**—(1) One of the essential requirements of Cl. (5) of Art. 182, Limitation Act, is the determination of the date when the “*final order*” was passed on any previous application to take some step-in-aid of execution. We have noticed earlier that as an effect of the Amending Act, IX of 1927, whereas under Limitation Act (IX of 1908) the period of limitation ran from the date of applying in accordance with law to the proper Court for execution or to take some step-in-aid of execution of decree or order, the period of limitation now begins not from the date of the previous application, but from the date of the previous order passed.²⁷ Where the matter is carried in appeal, the date of the final order is the date of the appellate order.²⁸

(2) The words “*final order*” imply that it should be final as far as the Court passing the order is concerned. It should be an order which if not reversed or modified by a Court of appeal would be binding as between the parties.²⁹ “Final order” means final order in the proceeding to which the application gave rise.³⁰ The fact that the application for execution is withdrawn or struck off at the request of the decree-holder does not prevent it from giving rise to a new starting point for a period of limitation.³¹ “Final order” means an order which conclusively decides the matter between the parties as distinguished from interlocutory.³²

25. *Aghore Kali v. Prasunna Kumar*, (1895) 22 Cal. 827; *Rajaram v. Banaji*, 22 Bom. 311 and *Mahalinga v. Narayana*, 6 M.L.J. 23.

26. *Sahu Nandlal v. Sahu Dharam*, (1925) 48 All. 377=1926 All. 440; *Appu Rao v. Ramkrishna*, (1901) 24 Mad. 672.

27. *Ghanayalal v. Nathuram*, 1931 Lah. 81 (F.B.); *Ram Bharose v. Rammanlal*, 1932 Oudh 148=9 O.W.N. 209=137 I.C. 768 (F.B.).

28. *Abberam v. Bholar*, 157 I.C. 604=37 P.L.R. 257.

29. *Ram Bharose v. Rammanlal*, 1932 Oudh 148=9 O.W.N. 209=137 I.C. 768 (F.B.); also see *Kesavulu v. Official Receiver*, (1936) 163 I.C. 354.

30. *Kadiresan Chettiar v. Maung San Ya*, 142 I.C. 435=1933 Rang. 87.

31. *Ibid.*, 1933 Rang. 87.

32. *Punjab National Bank, Ltd. v. Dinanath*, 1934 Pesh. 23=149 I.C. 136.

Illustrations.

(1) In the case of a **certificate by the decree-holder, and the recording of payment by the Court**, the law does not require any notice being sent to the judgment-debtor to question the alleged payment, hence recording of payment by the Court under O. 21, R. 2 (1) cannot be regarded as a final order within the meaning of Art. 182 (5), Limitation Act.³³

(iii) Illustrations.

(2) Where the Judge ordered **notice to issue to the judgment-debtor** returnable on a certain date, and on that date, the cases were closed at the decree-holder's request and he applied for execution against the same judgment-debtors within three years of this date, it was held that the order closing the case was the final order, and the application was in time.³⁴

(3) A second execution application (filed after the amending Act IX of 1927 came into force) was returned for correction of some defects and only re-presented along with a third application more than three years from the date of the first application: it was held that so long as no final orders had been passed on the second application, it was still pending and no question of limitation arose, and that the Court should first pass orders on the second application, and then, if necessary, consider whether the third application was in time.³⁵

(4) Where the executing Court transfers the execution to another Court to enable the decree-holder to receive his rateable distribution, so far as the Court seized with the execution is concerned, this is the final order.³⁶

(5) Where a decree-holder makes an **application to the Court** which passed the decree asking for a **certificate of transfer** to another Court for execution, the final order on such application cannot be considered to have been passed until the date on which the required certificate is prepared, and handed over to the decree-holder who has undertaken to present it before the other Court, and limitation is to be reckoned only from such date and not from the date of the order of the Court merely directing the office to prepare a certificate.³⁷

(6) Where on the **receipt of a part-payment** of the decree amount, the decree-holder allowed his execution application to be dismissed with costs, and at the same time gave two months' time to the judgment-debtor to clear the balance, *held*, that the order passed on the application was the "final order", and the two months' time given by the decree-holder to the judgment-debtor to pay the decretal amount did not suspend the proceedings, as the application itself was dismissed on that day with costs.³⁸

33. *Ram Bharose v. Rammanlal*, 1932 Oudh 148=9 O.W.N. 209=137 I.C. 768 (F.B.); also see *Matadin v. Mt. Kaunsilla*, 1931 Oudh 356 (2).

34. *Kadiresan Chettiar v. Maung San Ya*, 1933 Rang. 87=142 I.C. 435.

35. *Mahomed Abu Bakhar v. Ramakrishna*, (1933) 144 I.C. 167=37 L.W. 469=1933 Mad. 540 (1)=64 M.L.J. 401.

36. *Punjab National Bank, Ltd. v. Dinanath*, 149 I.C. 136=1934 Pesh. 23.

37. *Hafizuddin v. Parshadilal*, 154 I.C. 718=1935 A.W.R. 419=1935 A.L.J. 370=1935 All. 757.

38. *Mahesh Prasad v. Shamlall*, 1935 A.L.J. 1087=157 I.C. 273=1935 A.W.R. 1055=1935 All. 909.

(7) An order directing the issue of notice on an application or returning an application for complying with certain conditions is not a "final order" within this clause.³⁹

2623. CLAUSE 6.—The old clause (6), now repealed by Old clause. Act IX of 1927, stood as follows:—

"6. (Where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such a notice is required by the Code of Civil Procedure, 1908."

The present clause is entirely new, and is intended to set at rest the conflict of decisions as to whether an application for restitution falls under Art. 181 or Art. 182.

2624. APPLICATION FOR RESTITUTION.—An application for restitution under S. 144, Civil Procedure Code (S. 583 of the Civil Procedure Code, 1882), was sometimes held to be "an application for execution" within the meaning of Art. 182, Limitation Act.⁴⁰ According to this view an application for execution meant an application to enforce the decree, and in the case of an application for restitution, it meant an application to *enforce the legal obligation arising from the appellate decree*.⁴¹ The language of old S. 583, Civil Procedure Code, 1882, was understood to mean that an application for restitution was nothing but an application for execution. The Code, however, did not use the word "*execution*" in connection with the application for restitution, and there was a difference of opinion on the question where a proceeding under S. 144, Civil Procedure Code, was a proceeding in execution. The changed language of S. 144, Civil Procedure Code has led several High Courts to hold that an application for restitution under Civil Procedure Code, S. 144, is not an application for execution, but is an application governed by Art. 181 of the Limitation Act. *See* notes under Art. 181, *ante*.⁴² But, a different view was taken

39. *Kesavaloo v. The Official Receiver*, (1936) 163 I.C. 354=1936 M.W.N. 582; *Reld. on Batuknath v. Munni Dei*, 36 All. 284=23 I.C. 644=1914 P.C. 65=41 I.A. 104 (P.C.); *Abdul Majid v. Jawahir Lal*, 36 All. 350=1914 P.C. 66=27 M.L.J. 17 (P.C.); also see *Sachindra v. Maharaj*, 49 Cal. 203=74 I.C. 660=1922 P.C. 121 (P.C.).

40. *Venkayya v. Raghavacharlu*, (1897) 20 Mad. 448 and *Nandlal v. Sitaram*, (1886) 8 All. 545; also see *Basanta Kumari Dasi v. Balmukand*, (1922) 2 Pat. 277=1923 Pat. 371.

41. *Unnamalai v. Mathan*, 42 I.C. 530=33 M.L.J. 413; *Somasundaram v. Chokkalinga*, 40 Mad. 780 (782); *Kurgodigowda v. Ningangowda*, 41 Bom. 625 (630)=41 I.C. 238=19 Bom. L. R. 638; *Hamid Ali v. Ahmed Ali*, 45 Bom. 1137=23 Bom. L. R. 480=1921 Bom. 67=62 I.C. 233; *Chandika Singh v. Bithal Das*, 7 O.W.N. 1153=1931 Oudh 51 (52).

42. *Jiwan Ram v. Nand Ram*, (1922) 44 All. 407=1922 All. 223; *Brijlal v. Damodar*, (1922) 44 All. 555; *Baijnath v. Balmukanda*, (1925) 47 All. 98=1925 All. 137; *Ram Singh v. Sham Pershad*, 67 P.R. 1918=44

in some other High Courts,⁴³ where Art. 182 was applied to such applications.

2625. SCOPE OF CLAUSE 6.—In *Thakur Barmha v. Jiban Ram*,⁴⁴ where order granting certificate of sale of property different from that described in the schedule, was set aside as having been made without jurisdiction, their Lordships of the Privy Council observed that

“if by a mistake the wrong property was attached, and an order made to sell it, the only course open to the decree-holders on the discovery of the mistake was to commence the proceedings over again”.

If the decree has once been recorded as satisfied, a fresh application for execution would be incompetent without the entire proceedings resulting in extinguishment by satisfaction being set aside. As observed by the Madras High Court in *Muthukumara Samia v. Muthusami*,⁴⁵

“there is no warrant for the proposition that a sale by the Court of property which subsequently turns out not to belong to the judgment-debtor is void, and it makes no difference that the auction-purchaser is the decree-holder. The law does not permit him to treat his sale as a void sale and ignore it and put in a further execution application as if it had never taken place”.

The Court-sale of a property which turns out not to belong to the judgment-debtor is not void *ab initio*, but only voidable. A decree-holder auction-purchaser whose decree has been recorded as satisfied cannot, upon a defect in the judgment-debtor's title appearing, without first setting aside the sale under O. 21, R. 91, re-open his decree and proceed to obtain further satisfaction of it.⁴⁶ An application for execution on the ground that the decree has not been satisfied, or remains partially unsatisfied would be governed by Art. 182. Again, where the recorded satisfaction is set aside, within the period allowed under Art. 166, the decree-holder would be entitled to re-execute the decree. But in certain cases, Art. 181 would be applicable to execution applications as noticed in the com-

I.C. 301=15 P.L.R. 1918; *Chandra Singh v. Bishan Singh*, 1924 Lah. 166=76 I.C. 501=5 L.L.J. 389; *Kripa Sindhu v. Mahanta*, 47 I.C. 47=3 P.L.J. 367 (369, 371); *Balmukand v. Basanta Kumari*, (1924) 3 Pat. 371=1925 Pat. 1; *Ram Jawahar v. Bankey*, (1928) 7 Pat. 794=1928 Pat. 598; *Saroj Bhushan v. Debendra*, 59 Cal. 337=35 C.W.N. 1294; *Faslar Rahman v. Abdul Samad*, 92 I.C. 960=1926 Cal. 981 and *Maung Hla v. Ma Hnin*, (1930) 8 Rang. 271=1930 Rang. 241.

43. *Kurgodigowda v. Ningangowda*, (1917) 41 Bom. 625 (630)=41 I.C. 238; *Hamidalli v. Ahmedalli*, (1920) 45 Bom. 1137=62 I.C. 233; *Somasundaram v. Chokkalingam*, (1916) 40 Mad. 780; *Muniah v. Gammagamma*, 1931 M.W.N. 1006 and *Chandrika v. Bithal*, 1931 Oudh 51 (52).

44. (1913) 41 Cal. 590 (599).

45. (1927) 100 I.C. 522=50 Mad. 639=52 M.L.J. 148=25 L.W. 232=38 M.L.J. 84.

46. *Mundlapati Jagannadha v. Rachapudi Basawaya*, 1927 Mad. 835=53 M.L.J. 255 (Art. 166, applied).

ments under Art. 181, Limitation Act.⁴⁷ Applications for re-execution do not fall under Art. 182, and would fall under Art. 181, Limitation Act. But, if period allowed under Art. 191, Limitation Act, has expired, the decree-holder might be left without a remedy. The present cl. (6) is intended to remove such a hardship, but its scope is confined to cases where the decree-holder realises *money*, which he is subsequently made to refund as the result of a *decree* in another *suit*; and the starting point has been fixed as the date of the *final* decree or order in the other suit. In other cases where the decree-holder has been made to refund as the result of a subsequent proceeding other than a suit, this clause will be inapplicable.⁴⁸ It is to be noticed that S. 144 (2) of the Civil Procedure Code lays down that no suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-S. (1). This bars a *suit* to obtain restitution, etc., which could be obtained by application under sub-S. (1) of S. 144, Civil Procedure Code. In other cases, the relief would be obtainable by suit, and if a *decree* for refund is obtained, an application for refund would, of course, be an application for execution of the decree.

The period of limitation runs from the date of the decree passed in the suit for restitution, where a decree is set aside on appeal, and the order is confirmed in second appeal, limitation for an application for restitution runs from the date of the order in second appeal, and not from that in the first appeal.⁴⁹

2626. CLAUSE 7: SCOPE OF.—This clause is the same as Cl. (6) of the 3rd Column of Art. 179, Sch. II, Act XV of 1877, and covers applications for execution of instalment decrees. Where the decree or order directs any payment to be made at a certain date, the period of limitation for an application to enforce such payment commences to run from that date, and not from the date of the decree. Article 182, is not exhaustive of all applications for execution of decrees,⁵⁰ and where

(i) Application to enforce payment only. the application is not to *enforce* any *payment*, but to compel the judgment-debtor to do any act which the decree directs to be done at a certain *future* date, Cl. (7), or any other clause of Art. 182, does not apply, and consequently, the residuary Art. 181 will govern the case.¹

47. *Rameshvar v. Homeshvar*, 48 I.A. 17=40 M.L.J. 1 (P.C.) and *Rungiah v. Nanjappa*, 26 Mad. 780=13 M.L.J. 412.

48. See Mitra's Limitation Act, Vol. II, p. 2096.

49. *Fazlur Rahman v. Abdulsamad*, 92 I.C. 960=1926 Cal. 981; Followed *Uma Charan v. Nibaran Chandra*, 75 I.C. 2=37 C.L.J. 452=1923 Cal. 389 and *Ram Charan v. Lakhi Kanta*, 7 B.L.R. 704=16 W.R. 1.

50. *Rungiah Goundan & Co. v. Nanjappa Row*, (1903) 26 Mad. 781.

1. *Muhd. Islam v. Muhd. Ahsan*, (1894) 16 All. 237; Relied on *Thakar-*

Another essential requirement for the application of Cl. (7) of Art. 182, is that upon a proper construction of the decree, the payment of money must be fixed for a certain date.² Where in case of an instalment decree an application has been made after some instalments have fallen due, the appropriate article is Art. 182 (7).³

2627 to 2634. ILLUSTRATIVE CASES.

2628. (1) Where a decree was for possession of immoveable property, but its execution was contingent on default being made by the judgment-debtor in the payment year by year of a certain annuity to the decree-holder, it was held that the limitation applicable to the execution of such decree was that prescribed by Art. 181, Limitation Act.⁴

(2) Where it had been decreed that "in case of default being made in the payment of any one instalment the whole amount of the decree shall become payable at once,"⁵ or, where the condition was that "in the event of default the decree shall be executed for the whole amount,"⁶ or, where the decree was that "on failure to pay three successive instalments the entire amount shall be recoverable,"⁷ the intention was that limitation would begin to run on the happening of a default, as the cases involved an obligation to execute. On the other hand, where the decree provided that "the principal with interest should be paid by certain instalments commencing from a certain date, and in case of default and non-payment of any instalment the plaintiff had power to realize in one lump sum from the property hypothecated in the decree, and from the defendants personally, the entire decretal amount payable up to that time by executing the decree," it was held that the decree-holder had the option to execute whole on default, but that it was not the intention that on the happening of a default the decree-holder should be bound to execute the decree once and for all.⁸ Where in a decree for money payable by certain instalments the decree provided for possession of land in default of payment of whole or part, and the decree-holder was not intended

das v. Shadilal, 8 All. 56; also see *Shanker Prasad v. Jalpa Prasad*, 16 All. 371; *Hargopal v. Ram Rachpal*, 2 Lah. 155; *Kashi Ram v. Pandu*, 27 Bom. 1 (F.B.); and *Maung Sin v. Matok*, 5 Rang. 422=1927 P.C. 146=53 M.L.J. 22 (P.C.).

2. *Maung Sin v. Ma Tok*, 5 Rang. 422=1927 P.C. 146 (As to meaning of certain date see *Joti Prasad v. Srichand*, 1928 All. 629=51 All. 237 (F.B.)).

3. *Ram Prasad Ram v. Jadunandan*, 149 I.C. 598=1934 A.L.J. 772=4 A.W.R. 498=1934 All. 534.

4. *Muhd. Islam v. Muhd. Ahsan*, (1894) 16 All. 237 (No obligation to execute decree on first default).

5. *Dulsook Rattanchand v. Chuga Narrun*, 2 Bom. 358; *Mon Mohan v. Durga Churn*, 15 Cal. 502.

6. *Shib Dutt v. Kalka Prasad*, 2 All. 443.

7. *Asmatullah v. Kally Churn*, 7 Cal. 56.

8. *Shankar Prasad v. Jalpa Prasad*, (1894) 16 All. 371.

to be given the option of obtaining only on the occurrence of the first default in payment, but it entitled him to apply for possession on the occurrence of any subsequent, an application made for delivery of possession more than 3 years after the date when the first default took place, was within time under Art. 181, Limitation Act.⁹ In *Kashi Ram v. Pandu*,¹⁰ a **Full Bench** of the **Bombay High Court** per Jenkins, C.J., explained that the question of waiver of option by subsequent conduct of the parties precluding either of them from afterwards asserting that payment was not made regularly and in satisfaction of an obligation under the decree was not for, if at all removed from an application of the doctrine of estoppel. However, "it is a fundamental proposition of law that payment and acceptance of overdue instalments cannot by themselves prove a waiver. The point is one to be determined on the circumstances of each case".

2629. (3) Where a mortgage-decree directed that the mortgaged properties should be sold, and if the sale proceeds were insufficient, the balance should be realized from the other properties, and the persons of the judgment-debtors, it was held that the direction in the decree was not a direction to pay money at a certain date within the meaning of Cl. (7) of Art. 182.¹¹ Similarly, a decree which directs the sale of mortgaged property in default of payment of the mortgage money declared due on or before the date fixed in the decree, is not, within the meaning of Cl. (7) of Column 3 of Art. 182, Limitation Act, a decree directing the payment of the amount to be made at a certain date.¹² If, however, there is also a personal decree against the mortgagor and the application is to execute the decree as such, limitation will run from the date of the decree under Cl. (1), if payment is enforceable under the decree from the date thereof; or from a future date under Cl. (7), if payment can be enforced under the decree only on or after such future date fixed in the decree.¹³ **Neither Cl. (1), nor Cl. (7) can apply to the execution of a mortgage-decree**, as such, namely, to an application for sale of the mortgaged property which the decree directs to be sold in default of payment of the ascertained amount on or before the day fixed in the decree.¹⁴

2630. (4) Where a decree, by which certain properties were to be left in the possession of the judgment-debtor who was to pay to the decree-holder annually a certain sum of money, or in default of payment of some annuity the said property was to be made over to the decree-holder, their Lordships of the **Privy Council** held that upon the true construction of the decree each instalment as it became due was a claim originating under the decree from the date when

9. *Hargopal v. Ram Rachpal*, 2 Lah. 155 (Not followed 8 P.R. 1917—Waiver of option not allowed).

10. 27 Bom. 1 (F.B.).

11. *Janendranath Bose v. Khulna Loan Coy., Ltd.*, (1914) 24 I.C. 35=18 C.W.N. 492.

12. *Rungiah Goundan & Co. v. Nanjappa Row*, (1903) 26 Mad. 781; also see *Hanmant v. Shidu Sambhu*, 1923 Bom. 300=72 I.C. 556=47 Bom. 692.

13. *Ibid.*

14. *Ibid.*

such claim arose, and that the provisions of Cl. (7) of Art. 182, Limitation Act, therefore, applied.¹⁵

2631. (5) Where a compromise-decree, in a dispute for trusteeship of certain properties, was passed providing that the plaintiff was to manage the trust properties for two years, and the defendant the next two years thereafter, with a further clause that they were to manage alternatively in turns of two years each, it was held that the right to execute the decree arose in part from time to time and a fresh application for execution was permissible under Art. 182, Cl. (7), within three years of any of the periods in which the plaintiff was entitled to be in possession and management of the trust properties.¹⁶ The objection that Cl. (7) of Art. 182 does not apply and it refers only to payment was met by the answer that the compromise decree directed *inter alia* payment of the balance of funds in the hands of the outgoing trustee.¹⁷ Where a compromise decree for instalments was passed between the parties by which it was agreed that part of decree amount would be paid within certain time, and balance was to be paid in several regular instalments; and in default of two instalments, all the money was to be paid at once; and if the first part payment was not made, all the money would be paid at once. But there was default in the payment from the beginning, and the decree-holder did not apply for execution of the whole decree, and realized the part of decree amount in some instalment, and he then applied for execution of the whole of the balance remaining, it was held that the application filed more than three years from the date of default to pay part of the decree, was time barred, except for the instalments which had fallen due on dates within 3 years from the date of the application.¹⁸ Where a compromise decree directs payment of the decretal amount by instalments on particular dates, and provides that in case the defendant fails to pay any instalment at the stipulated period then the entire decretal amount might be realised by execution but relating only to instalments which fell due within 3 years of the application is within time under Art. 182 (7).¹⁹ Where under the terms of a compromise decree fixing yearly instalments, the decree-holder was entitled to realise the entire decree amount, it was held that the decree-holder having the option to execute the decree may execute his decree on the happening of the first, the second or subsequent default; and the case was governed by Art. 182 (7), Limitation Act.²⁰ The words

15. *Maung Sin v. Ma Tok*, 5 Rang. 422=53 M.L.J. 22=1927 P.C. 146 (P.C.).

16. *Kothandaramasami Naidu v. Pappammal*, (1924) 79 I.C. 891=1925 Mad. 218.

17. *Ibid.*

18. *Hari Ram v. Himmanlal*, 1935 All. 259=157 I.C. 1052; also see *Mt. Koran v. Bhai Nanak Singh*, 1933 Pesh. 14=141 I. C. 745 (Held, that a decree-holder in an instalment decree is entitled to take out execution for the instalments still due which are within time, irrespective of the fact that so far as the execution proceedings are concerned the default was made from the very start and the whole amount had become payable).

19. *Ajodhia Prasad v. Bansilal*, 1935 Oudh 465=156 I.C. 764=1935 O.W.N. 837 (F.B.).

20. *Lal Bahadur v. Mathura Prasad*, 149 I.C. 603=11 O.W.N. 498=1934 Oudh 334; also see *Braham Kishun v. Harihar*, 11 Pat. 440=13 P. L.T. 454=1933 Pat. 253.

"such date" in Cl. (7), referred to the date on which a default was made in payment of any of the instalments and on the occasion of *each default* the decree-holder was entitled to enforce his claim for the entire amount due except in respect of which the claim had become barred.²¹ Where a decree confers a vested right on a minor which the minor is entitled under the decree to execute only on his attaining majority, limitation for execution of such right by the minor's legal representative does not begin to run from death of minor but only from date when he attains majority when he himself would be entitled to execute.²² It was held in *Kaveri v. Venkattamma*,²³ under the old Limitation Act, that "If it can be gathered from a decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of Limitation Act, (Art. 179, Cl. 6) (Now Art. 182, Cl. 7) are satisfied."

2632. (6) Where a decree provided that the principal amount together with interest was re-payable within 12 years of the decree, and in default the immoveable property was to be sold after 12 years, and it also provided that interest was to be paid every year, and in case of default in payment of any two years' interest plaintiff was given an option to execute the decree at once; and immediately on the first default the plaintiff exercised his option by praying for the sale of the property, it was held that a second *darkhast* after nine years of the default and after 12 years of the decree, was time barred, because the plaintiff having exercised his option on the first *darkhast* he could not fall back on the former clause giving him 12 years' time.²⁴

2633. (7) A redemption decree under S. 92, Transfer of Property Act, must fix a time for payment of money due and award of possession, and an order should be passed in the case of a mortgage by conditional sale for foreclosure in case of default. Therefore, where the decree in such a case directed that the plaintiff should get possession on paying a certain sum but **no time was fixed for the payment** nor was any order made for foreclosure or sale, it was held that the decree was not one under S. 92, but an ordinary decree to the execution of which Art. 182 would apply.²⁵ According to **Bombay High Court**, where a decree for redemption mentions no time for payment, it is to be **taken as operating from its date unless kept alive** by application for execution made according to law within the prescribed periods.²⁶ The same view has been taken

21. See Note 20, p. 2702, *supra*.

22. *Murugesam Pillai v. Meenakshi Sundara Ammal*, 1935 Mad. 107 (2)=40 M.L.W. 875=154 I.C. 529.

23. (1891) 14 Mad. 396.

24. *Pandurang v. Mahadev*, 132 I.C. 437=33 Bom.L.R. 459=1931 Bom. 263.

25. *Krishna Chandra v. Jakerlal Haq*, (1909) 1 I.C. 71=15 C.L.J. 115.

26. *Narayan Govind v. Anand Ram*, (1891) 16 Bom. 480; Diss. from *Gan Savall v. Narayan Dhond*, 7 Bom. 467 and *Maloji v. Sagaji*, 13 Bom. 567; also see *Maruti v. Krishna*, (1899) 23 Bom. 592; cf. *Hannant v. Shidu Sambhu*, 1923 Bom. 300=47 Bom. 692=72 I.C. 556=25 Bom. L. R. 358.

by the Oudh Judicial Commissioner's Court, that if no time for payment of the money was fixed by the decree, the decree-holder had three years within which to execute the decree, and deposit the money.²⁷ According to the Madras High Court in *Etyati v. Matalakat*,²⁸ a decree for redemption should be treated as executable from the date on which it is passed although it allows the decree-holder no time within which to pay the mortgage-money. If the decree is to pay a certain amount in respect of the debt on mortgage in *Chaitra* of any year, the plaintiff was not entitled to take possession of the lands in dispute in any other month except *Chaitra*, and as the relationship of mortgagor and mortgagee still continued to exist between the parties, it was really a pre-

Decree indefinite as to date liminary decree.²⁹ A decree directing that upon payment by the plaintiff of a certain sum of money "in any year in the month of *Jeth*" he

was to receive possession of certain property, was indefinite as to the date on which payment was to be made, and being incapable of execution on the date on which it was passed, was therefore, held not governed, as to the period of limitation for its execution, by Art. 182, Limitation Act.³⁰

2634. (8) The right to execute the decree could not arise unless payment was made, and the plaintiff, therefore, was en-

Date of decree—means the date when the decree becomes executable. titled to execute the decree within three years of the date when he made the payment.³¹ Similarly, a decree for possession on payment of improvements to be ascertained in future on Commissioner's report is not for a fixed term and

time would not run from the date of decree.³² Where a compromise decree provided that the money should be payable without interest within six months, and that if no such payment was made, the decree-holder should be entitled to recover his money with interest at a specified rate from the date of decree, it was held that the decree did not become capable of execution till a default had been made by the judgment-debtor to pay the decretal money within the period allowed, and time would not commence to run till after the expiry of that period.³³

2635. **CERTAIN DATE.**—There was no corresponding specific provision under Act XIV of 1859.

Legislative changes. The Acts IX of 1871, and XV of 1877, used the expression "*specified date*", which in the present Act has

27. *Ajudhia Singh v. Drigpal Singh*, (1911) 10 I.C. 187=14 O.C. 100 and *Jogeshur Singh v. Raja Bhagwan Bux*, 14 O.C. 10=9 I.C. 337; Reld. on *Etyati v. Matalakat*, 28 Mad. 211.

28. 28 Mad. 211.

29. *Hanmant v. Shidusambhu*, 1923 Bom. 300=72 I.C. 556=47 Bom. 692=25 Bom. L. R. 358.

30. *Mt. Rukmina Kuar v. Sheodat Rai*, (1919) 51 I.C. 576=17 A.L.J. 841.

31. *Ibid.*

32. *Deiva Sikamoni v. Raju Pillai*, 1930 Mad. 995=59 M.L.J. 579 (Art. 181 applied where decree for possession passed on condition that plaintiff should pay improvements—Amount not settled by decree but to be decided later on Commissioner's report).

33. *Surajman Chaube v. Anjore Sukal*, 1924 All. 263 [Art. 181 or 182 (7) applicable].

been replaced by the words "certain date". Clause 167 of Act IX of 1871 was worded thus:

"Where the application is to enforce payment of an instalment which the decree directs to be paid at a *specified date*—the date so specified."

The corresponding Cl. (6) to Art. 179 in Act XV of 1877, was in the following terms:—

"Where the application is to enforce any payment which the decree or order directs to be made at a *specified date*—such date."

2636. Where a maintenance decree in favour of a Hindu

Old cases.

widow directed payment of a certain amount to her every year, it was held that there was no precise date specified for payment of the annuity, but the decree was construed as making the judgment-debtor liable to pay the annuity on the day of the year from its date, and thence forward on the corresponding date year after year.³⁴ According to **Madras High Court**, in *Yusuf Khan v. Sirdar Khan*,³⁵ a decree which directs payment of money to be made annually is not a decree which directs payment of money to be made at a certain date. But, in *Kaveri v. Venkamma*,³⁶ it was held that if it can be gathered from a decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of the clause are satisfied. The question whether the sum decreed is payable by an ascertained date is a question purely of construction.³⁷ The **Punjab Chief Court** has held, that on the maxim *certum est quod certum redi potest* there can be no difficulty in ascertaining the dates on which the instalments fixed in the decree are payable. Accordingly, the contention that the decree did not specify any certain date for payment of the instalments, and that the time, therefore, ran from the date of the decree, was overruled.³⁸ A certain date could be ascertained with reference to a contingent event.³⁹ Where a decree directed that the amount decreed should be paid on the expiration of 5 years, the period of limitation for execution ran from the day on which the period of 5 years from the date of the decree expired.⁴⁰ If a decree stays execution until disposal of the judgment-debtor's insolvency petition then pending there is no direction for payment at a *certain date*, within the meaning of Cl. (7), and

34. *Lakshmibhai v. Madhavray*, (1887) 12 Bom. 65; *Aitamma v. Naraina*, 30 Mad. 504; cf. *Subbanatha v. Subba Lakshmi*, (1883) 7 Mad. 80; *Yusuf Khan v. Sardar Khan*, (1883) 7 Mad. 83 (No longer good law); also see *Muhammad Kamruddin v. Piarilal*, 13 P.R. 1892.

35. (1883) 7 Mad. 83.

36. (1890) 14 Mad. 396; also see *Aitamma v. Naraina*, (1907) 30 Mad. 504.

37. *Subbanatha v. Lakshmi*, 7 Mad. 80.

38. *Mohammad Nawaz v. Ramdas*, 22 P.R. 1905.

39. *Muhammad Akbar Khan v. Dwarkadas*, 159 P.R. 1889.

40. *Ramlal v. Natha Singh*, 45 P.R. 1882.

if no other clause in Art. 182 is applicable, the residuary Art. 181 will apply.⁴¹

2637. In *Joti Prasad v. Srichand*,⁴² a Full Bench of the Allahabad High Court pointed out that the words "*certain date*" had a different import from the words "*specified date*". Where a compromise decree directed payment by instalments on named dates, and further directed the judgment-debtor to pay the entire balance due if he made default as to any two successive instalments, it was held that if the application for execution is an application to recover certain instalments already overdue, Art. 182 (7) applies and limitation will run in respect of each instalment from the date on which it became payable. Held, further: that if the application for execution is an application to recover the balance of the decretal amount remaining unpaid, Art. 181 applies, and limitation will run as to the whole balance unpaid, from the date of the later of the last two successive instalments unpaid, the decree-holder being entitled to a decree for the whole balance if his application is within three years of that date less the amount of any individual instalments, which regarded as individual instalments, are not already barred by limitation. In determining the question whether the decree-holder's application for recovery of the instalments after the dates fixed for their payment had expired could be taken out of Art. 182, the meaning of the expression "*certain date*" had to be considered. Sulaiman, A.C.J., observed that attention had to be directed to the significance of this expression. He said:—

"The corresponding clause in the Act of 1871 contained the expression '*specified date*'. That necessarily connoted the idea that the exact date should be mentioned in the decree. The substitution of the word '*certain*' in place of '*specified*' widens the scope of its meaning. It is no longer necessary to mention by the year, month and day the exact date in the decree. All the same the date fixed for payment must be a certain date. In my opinion the word '*certain*' is used in contradistinction to '*uncertain*'. It is not used in the sense in which one might say that a certain man came to see me. It obviously means a date which though not expressly mentioned or ascertained, must yet be a date which must certainly occur."⁴³

He was therefore of opinion

"that in such instalment decrees, where the whole amount becomes due only if default is made, and not due if no default is made, the date of default, which does later on occur by chance, is not a date certain on which payment is directed by the decree. In this view time did not begin to run under Art. 182 for the recovery of all the subsequent instalments from the date of the first default, but under cl. (7) a separate period of three years is prescribed to run from the respective date on which each instalment

41. *Asrafuddin v. Bipin Bihari*, (1903) 30 Cal. 407.

42. 1928 All. 629=51 All. 237 (F.B.).

43. *Per* Sulaiman, C.J., in *Joti Prasad v. Srichand*, 1928 All. 629 (634) (F.B.).

fell due." . . . "The case where a decree-holder applies to recover the whole amount by enforcement of the default clause before the dates fixed for the subsequent instalments have arrived would be quite different. Such an application would not fall under Art. 182 (7), nor, as is obvious, under cl. (1), and would, therefore, be governed by the general Art. 181."⁴⁴

Boys, J., held that

"the words 'the decree directs to be made at a certain date,' seem open only to the construction that the date must be specified in, or with certainty ascertainable from, the decree itself."

Article 182 (7) in this view cannot apply, though the application is one of the class described in the first column of Art. 182, where the date is not certain, *i.e.*, either apparent or determinable on the face of the decree; but is only a date which on the happening of a particular event, which might never have happened at all, becomes certain.⁴⁵

2638. INSTALMENT DECREE.

2639. It has been noticed in "Illustrative cases," *ante*, that in case of instalment decree giving the decree-holder an option to realise the whole amount on default, the decree-holder would be entitled to take out execution for the whole amount on the happening of first, second, or any subsequent default.⁴⁶ But, an application for execution taking advantage of the default clause cannot be said to be independent of the uncertain contingency of defaults happening, and as "the date might or might not come at all," as observed by Sulaiman, A.C.J., in the **Allahabad Full Bench case**,⁴⁷ the decree does not fix a "*certain date*" for the payment of the whole amount in a lump sum, and such cases would be governed by the residuary Article 181, and not by Cl. (7) of Art. 182, Limitation Act. Where the right to execute is not compulsory, but is optional, there may be a question of waiver and election to continue to treat the decree as an instalment decree. But, where the decree-holder has elected and applied to recover the entire amount on a default happening the decree-holder can no longer treat the instalment decree as otherwise than at an end.⁴⁸ As was observed by Banerji, J., in *Bhagwan*

44. *Joti Prasad v. Sri Chand*, 1928 All. 629 (635) (*Per* Sulaiman, A.C.J.).

45. *Ibid.*, 1928 All. 629 (639) (*Per* Boys, J.).

46. *Muhammad Islam v. Muhammad Ahsan*, (1894) 16 All. 237; *Braham Kishen v. Harihar*, 1932 Pat. 253=11 Pat. 440=139 I.C. 202.

47. *Joti Prasad v. Srichand*, 1928 All. 629=51 All. 237 (F.B.); cf. *Ugrahnath v. Laganmani*, (1881) 4 All. 83 (Decree for possession became capable of execution on the date of first complete default); also cf. *Raichand Motichand v. Dhondq Luxman*, (1918) 42 Bom. 728 (*Held*, that entire decretal debt became payable on failure to pay any one instalment; and on terms of decree a complete legally enforceable right had accrued to the judgment-creditor on failure to pay the first annual instalment).

48. *Pandurang v. Mahadev*, 1931 Bom. 263=33 Bom. L. R. 459=132 I.C. 437.

Das v. Janki,⁴⁹

"His right to execute the decree arose when default was made in the payment of instalments, and he exercised that right. Therefore it is no longer open to him to say that he could give effect to the provisions of the decree, and receive instalments".

Unless a decree clearly leaves the decree-holder no option on the happening of the default but to execute the decree once for all the whole amount due under it, the decree-holder may execute it on the happening of the first, second, or any subsequent default; and limitation will run only against him in respect of each instalment separately from the time when each such instalment may become due and payable.⁵⁰ See also *Maung Sin v. Motok*.¹

2640. Where the payments in question had not been certified to the Court executing the decree, they
(ii) Certification of payment. could not be recognised under the provisions of the Civil Procedure Code.²

Where, therefore, payment had not been made towards liquidation of an instalment decree, but such payments were not certified to the Court executing the decree, it was *held* that limitation ran against the decree-holder from the date upon which the first instalment was due.³ But, the **Full Bench of Allahabad High Court** in *Joti Prasad v. Srichand*,⁴ has laid down that there is no period of limitation applicable to a decree-holder certifying a payment under O. 21, R. 2 (1). The **Calcutta High Court** in the case of *Bali Mohammad v. Aijamai*,⁵ has, however, considered Art. 181, Limitation Act, to be applicable. It has been held in a number of cases, that in order to certify payment it is enough that the decree-holder mentions the fact of such payment in the application for execution of the decree in respect of the balance.⁶

49. 1923 Bom. 201 (2)=72 I.C. 290.

50. *Brahm Kishun v. Harihar Munder*, 1932 Pat. 253=11 Pat. 440.

1. 1927 P.C. 146=54 I.A. 272=101 I.C. 736=5 Rang. 422=53 M. L.J. 22 (P.C.) (Each instalment of annuity is a claim under decree and each default gives rise to right to recover property).

2. *Mithu Lal v. Khairati Lal*, (1890) 12 All. 569; *Folld. Shamlal v. Kanhia Lal*, 4 All. 316 and *Zahur Husain v. Bakhtazcar*, 7 All. 317.

3. *Chattar Singh v. Amir Singh*, (1916) 38 All. 204.

4. 1928 All. 629=51 All. 237=112 I.C. 73=26 A.L.J. 966 (F.B.); cf. *Baijnath v. Pannalal*, 1922 All. 706=46 All. 635 (*Held*, that certification should be made within a reasonable time—say three years).

5. 1922 Cal. 30=35 C.L.J. 71=26 C.W.N. 529=68 I.C. 780.

6. *Jobin Chand v. Yusufali*, 1925 Cal. 1012=54 Cal. 143=86 I.C. 1051 (1054); *Reld. on Eusuff Zeman v. Sanchia*, (1916) 43 Cal. 207=34 I.C. 606; *Lakhi Narayan v. Felamani*, (1915) 27 I.C. 11=20 C.L.J. 131; *Pandurang v. Jagyabhan*, (1921) 45 Bom. 91=59 I.C. 399 and *Masilamani v. Sethni*, (1917) 41 Mad. 251=41 I.C. 701; also see *Shafi Mahomed v. Choithram*, (1919) 52 I.C. 804=13 S.L.R. 37.

2641. See notes under Art. 75, *ante*. There is a divergence of judicial opinion on the question whether the principle of successive defaults in Art. 75 should be applied in cases falling under Art. 182 (7), also. In some cases, distinction is drawn between the *compulsory* or *optional* character of the default clause. The authorities are not unanimous on the question of the effect of mere abstinence on the part of the decree-holder from taking out execution for the whole amount due on a default. Opinions differ on the point of *waiver* by decree-holder, whether *saving* time or not.

2642. In the case of a decree for money payable by instalments, with a proviso that in the event of default the decree should be executed for the whole amount, the decree-holder is strictly bound by the terms of the decree, and if no application is made for execution within three years from the date of the *first* default, the decree would be barred.⁷ An acknowledgment in writing by the judgment-debtor of his liability under the decree, if signed after the decree had become already barred, could not create a new period of limitation.⁸ However, where a decree for money is payable by instalments with a proviso to the effect that on default being made in payment of the instalments the decree-holder is *entitled* to execute the decree for the whole amount due, such a decree is to be construed as much as possible in favour of the decree-holder, and unless the decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due.⁹ The Allahabad decisions seem to emphasise on the considerations of the *compulsory* or *optional* nature of the default clause, and this

7. *Shibdutt v. Kalka Prasad*, (1879) 2 All. 443; also see and cf. *Hurri Pershad v. Nasib Singh*, (1894) 21 Cal. 542 (Decree for payment of money by instalments, entitling decree-holder to realize full amount on default, held, not intended to give the option of waiving default); and *Sitabchand v. Hyder*, (1896) 24 Cal. 281 (Mortgage-bond, with instalments, giving plaintiff liberty to sue for whole amount on default, construed as if plaintiff was bound to sue on first default).

8. *Ibid*.

9. *Shankar Prasad v. Jalpa Prasad*, (1894) 16 All. 371; cf. *Dulsook Rattan Chand v. Chugon Narrun*, 2 Bom. 356 (Whole amount shall become payable at once on default); cf. *Shib Datt v. Kalka Prasad*, 2 All. 443 (Decree should be executed for the whole amount on default); *Asmatullah v. Kally Churn*, 7 Cal. 56 (Entire amount shall be recoverable on failure to pay three successive defaults); also cf. *Monmohun v. Durga Churn*, 15 Cal. 502 (Entire amount decreed should be recoverable in default of any one instalment).

aspect has led to some conflicting decisions as observed by the Full Bench in *Joti Prasad v. Sri Chand*.¹⁰ A proviso, in a decree made payable by instalments, by which the whole amount of the decree is to become due upon default in payment of any one instalment, is a proviso enuring for the benefit of the decree-holder alone, and he is at liberty to take advantage of it or to waive it as he thinks fit.¹¹

2643. In *Dulsook v. Chugon*,¹² the **Bombay High Court** took the view that failure to pay in accordance with the terms of an instalment decree is not affected for the purposes of limitation by subsequent payment and acceptance. But, it has been repeatedly recognised in other High Courts that to the general rule, by which a decree-holder would ordinarily be barred of his rights under an instalment decree, there is an exception where the default has been waived.¹³ The **Full Bench** decision of **Bombay High Court**, in *Kashi Ram v. Pandu*,¹⁴ therefore observed that

"the true view appears to be that, though there may be a failure to pay punctually under an instalment decree, still the subsequent conduct of the parties may preclude either of them from afterwards asserting that payment was not made regularly and in satisfaction of the obligation under the decree".

It was added, that the proposition that payment and acceptance of overdue instalments cannot by themselves prove waiver is not to be taken as a general proposition of law apart from the facts and circumstances of each particular case.¹⁵ In *Raichand Motichand v. Dhondo Luxman*,¹⁶ where an instalment decree provided that the debt be paid in eight annual instalments, and that on failure to pay any one of the instalments before the next had become due, the creditor could call in the whole amount of debt with interest at the agreed rate, and it was found that no instalment was ever paid, it was held that on the terms of the decree a complete legally enforceable right had accrued to the judgment-creditor on failure to pay the first annual instalment, and the period of limitation allowed to him within which to enforce it was three years and no longer. Where a decree payable by instalments provided for full payment

10. 51 All. 237=1928 All. 629; cf. *Chattar Singh v. Amir Singh*, 38 All. 204 and *Lachmi Narain v. Sarju Prasad*, 39 All. 230.

11. *Ramcalpo Bhattacharjee v. Ramchunder Shome*, (1887) 14 Cal. 352; Rehd. on *Nilmadhub v. Ramsodoy*, 9 Cal. 857.

12. (1877) 2 Bom. 356.

13. *Monmohun Roy v. Durga Churn*, (1888) 15 Cal. 502.

14. (1902) 27 Bom. 1 (F.B.).

15. *Kashi Ram v. Pandu*, 27 Bom. 1 (F.B.); Rehd. *Balaji v. Sakharan*, (1892) 17 Bom. 555 (559); cf. *Ram Culpo v. Ram Chunder*, (1887) 14 Cal. 352; *Mon Mohun v. Durga Churn*, (1888) 15 Cal. 503; *Hurri Pershad v. Nasik Singh*, (1894) 21 Cal. 542 (547).

16. (1918) 42 Bom. 728=47 I.C. 313=20 Bom. L. R. 773.

on default, such decree ceases to be instalment decree on a default taking place¹⁷; and, the Court cannot order at the instance of the judgment-creditor that a decree which has ceased to be an instalment decree should be restored to its previous status so as to prevent time from running against him.¹⁸

2644. According to the **Calcutta High Court** in *Asmatullah v. Kally Churn*,¹⁹ there is nothing in the present law to show that there are, or may be, various recurrent starting points from which limitation is to run in respect of the execution of a decree *as a whole* after it has become final. Where the decree provided for the decree-holder applying for execution of the whole decree still unsatisfied, upon the occurrence of default in three of the prescribed instalments, it was held that under the decree, therefore, the decree-holder had several courses upon to him, subject, of course, to the rules of limitation. He could have, upon the occurrence of three defaults, forthwith taken out execution of the whole decree, or he could have executed for each instalment severally within three years after it became due, or he might have contented himself with accepting whatever was paid him from time to time and then applied for execution of the decree for the outstanding balance, before the expiry of three years from the date of the decree, or from the date of the third default, if the terms of the decree altered the period of limitation.²⁰ Where a decree is made payable by instalments, and contains a provision that, on failure of any one instalment, the whole is to become due, the question whether the decree-holder may waive the benefit of the provision or must execute his decree within three years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case.²¹ The creditor who had the option, on default of payment of any one instalment, to execute the whole decree, and who did not exercise that option, but received instalments, due subsequently to the default, may be considered to have waived his right to execute the whole decree.²² But, the case in 13 Cal. 73 was distinguishable, where the decree-holder sought to take advantage of the provisions of the decree, and did not profess to have waived his claim.²³ In

17. *Gulabrao Yeshwant v. Magan Ghelabhai*, 1925 Bom. 326=27 Bom. L. R. 461=87 I.C. 769.

18. *Ibid.*

19. (1881) 7 Cal. 56 (59).

20. (1881) 7 Cal. 56 (59, 60).

21. *Judhister Patro v. Nobin Chandra*, (1886) 13 Cal. 73.

22. *Nilmadhub Chuckerbutty v. Ramsody Ghose*, 9 Cal. 857.

23. *Judhister Patro v. Nobin Chandra*, (1886) 13 Cal. 73.

Bir Narain v. Darpanarain,²⁴ there had been no acceptance of payment subsequent to the first default, nor a mere abstinence on the part of the decree-holder from seeking the benefit of the proviso, but on the contrary there had been an affirmative act done by him showing that he did not waive the benefit of the proviso, but claimed to execute the entire decree. Where there is an optional right given to enforce payment of money, such right may be waived; but when it is not waived, or when there is nothing to show that it has been waived, limitation would run from the date when the right accrues.²⁵ When, under a decree payable by instalments the whole decretal amount becomes due on default in the payment of one instalment, the decree-holder has not the option either to compel immediate payment of the whole amount due under the decree or to recover the money in accordance with the instalments.²⁶ In the case of a decree payable by instalment the decree-holder may waive the default in payment of a particular instalment and where such waiver takes place, limitation for the execution of the decree under cl. 7 of Art. 182 begins to run from the date of the default.²⁷ If an instalment decree provides that the decree-holder will be entitled to sue for or take out execution for the entire amount on default of any one instalment, the entire amount becomes due on such default and time begins to run from the date of such default. The mere fact of the decree-holder not enforcing the right given to him under the bond by attempting to realize the entire amount which falls due on default of one instalment does not in itself amount to a waiver for all time to come. But payment and acceptance of an overdue instalment would be a waiver so as to save limitation. However, this waiver cannot have the effect of modifying the terms of the decree or operate as a waiver in respect of future instalments.²⁸ Thus, on the application of the principle of Art. 75, the Calcutta decisions have held that in case of an instalment decree with a default clause, entitling the decree-holder to execute for the whole amount becoming due, the default of the judgment-debtor may be waived by accepting payment of an overdue instalment, and an application may be made for execution in respect of a subsequent instalment on a fresh default, within three years from date of the fresh default. This agrees with the view

24. (1892) 20 Cal. 74; Reld. on *Mon Mohun Roy v. Durga Churn Gooce*, 15 Cal. 502.

25. *Sitabchand Nahar v. Hyder Malla*, (1896) 24 Cal. 281 (286)=1 C.W.N. 229.

26. *Joyanuddin Khan v. Jamiruddin Sarkar*, (1917) 37 I.C. 916=21 C.W.N. 835.

27. *Jalim Chand v. Yusuf Ali Choudhuri*, 1925 Cal. 1012=86 I.C. 1051 (1054)=54 Cal. 143.

28. *Kali Churn Roy v. Mohesh Chandra Ghosh*, (1926) 85 I.C. 784=1926 Cal. 212.

of the **Bombay Full Bench** decision in *Kashi Ram v. Pandu*,²⁹ and the Madras decision in *Rajeswar v. Hari*.³⁰

2645. The **Punjab Chief Court** held in *Kishen Chand v. Bhai Gopal Singh*,³¹ that where a decree for money payable by instalments contained a proviso that if any one instalment was not duly paid, the decree-holder should be entitled to recover forthwith the whole amount remaining due under the decree, the decree-holder had the option of taking advantage of any default, and was entitled to execute his decree for any of the instalments not barred by limitation and was not bound to apply for execution of the whole decree within three years from the date of the first default. Where in a decree for money payable by certain annual instalments the decree provided for possession of land in default of payment of whole, or part, and the decree-holder applied to be put in possession of the land more than three years after the date when the first default took place, the **Lahore High Court** held, that the decree was not intended to give the option to decree-holder of obtaining possession of the land only on the occurrence of the first default in payment, but it entitled him to apply for delivery of possession on the occurrence of any subsequent default.³² This view has been followed by Addison, J., in *Raja v. Hazari*,³³ following *Allah Baksh v. Bhawani*³⁴ and *Kripa Devi v. Dasandhi Ram*³⁵; also *Kishen Chand v. Bhai Gopal Singh*.³⁶ The decisions of the **Allahabad**,³⁷ **Bombay**³⁸ and **Calcutta**³⁹ High Courts, taking the view that the default clause is to be read in favour of the judgment-debtor and that the decree-holder is bound to sue out execution of the whole within three years from the date of the first default, were dissented from.

2646. The **Sind Judicial Commissioner's Court** followed the **Bombay Full Bench** decision in the case of *Kashi Ram v. Pandu*,⁴⁰ as autho-

29. 27 Bom. 1 (13) (F.B.) (Virtually O.R. 2 Bom. 356).

30. 19 Mad. 162.

31. (1912) 16 I.C. 842=172 P.L.R. 1912=6 P.R. 1913=271 P.W.R. 1912; Reld. on *Allah Baksh v. Bhawani*, 100 P.R. 1902=131 P.L.R. 1902; Ref. and cf. *Shankar Prasad v. Jalpa Prasad*, (1894) 16 All. 371.

32. *Hargopal v. Ram Rachhpal*, 2 Lah. 155.

33. (1928) 109 I.C. 272=10 L.L.J. 382.

34. 100 P.R. 1902=131 P.L.R. 1902.

35. 36 I.C. 978=8 P.R. 1917=194 P.W.R. 1916.

36. 6 P.R. 1913=16 I.C. 842=172 P.L.R. 1912=271 P.W.R. 1912.

37. *Chattar Singh v. Amir Singh*, 32 I.C. 590=38 All. 204=14 A.L.J. 132.

38. *Raichand Motichand v. Dhondo Luxman*, 47 I.C. 313=42 Bom. 728=20 Bom. L. R. 773.

39. *Kalicharan Roy v. Maheshchander Ghosh*, 85 I.C. 784=1926 Cal. 212.

40. 27 Bom. 1=4 Bom.L.R. 688 (F.B.).

rity for the proposition that the mere acceptance of overdue instalments is not of itself sufficient proof of waiver.⁴¹ Whether the payment and acceptance of an overdue instalment is to be treated as a payment regularly made in satisfaction of the instalments due, so as to extend the period of limitation for execution of the decree, is a question of fact.⁴²

2647. The following brief statement of the legal position, may be of advantage in appreciating the several points of view bearing on the question of waiver of default in respect of an instalment decree with proviso.⁴³

(1) Where the decree simply provides for the execution of the *whole* amount in the event of default, and under the terms of the decree it can be said that the judgment-debtor is bound to sue on the first default occurring,⁴⁴ the decree-holder is not entitled to count the period of limitation from the date of any *subsequent* default.⁴⁵ Such a decree ceases to be an instalment decree on the default occurring⁴⁶ and so far as the execution of the decree as a *whole* is concerned, there are no recurring starting points.⁴⁷

(2) Some High Courts take the view, that the decree-holder is *not bound* to execute for the whole on the first default, and he is entitled to sue on the first, second or subsequent default occurring.⁴⁸ Where the decree, as construed in favour of the decree-holders, taking the default clause to enure for his benefit, gives him an option,⁴⁹ he may waive the right to execute on a default, or take advantage of it, as he pleases. Where the default is waived, the case is an exception to the general rule of bar of right from date of default.⁵⁰

41. *Bhazwandas Feroomal v. Menghraj*, (1918) 45 I.C. 324=11 S.L.R. 120; *Reld. on 27 Bom. 1 (F.B.)* and *Kimatrai v. Wadero*, 25 I.C. 938=8 S.L.R. 63; also see *Bahadur v. Gclomal*, (1921) 59 I.C. 607=14 S.L.R. 128.

42. *Ibid.*

43. See *Mitra's Limitation Act*, Vol. II, pp. 2100-2104.

44. *Shibdutt v. Kalka Parshad*, (1879) 2 All. 443; *Shankar Prasad v. Jalpa Prasad*, (1894) 16 All. 371.

45. *Dulsook Rattan Chand v. Chugon*, 2 Bom. 356; *Raichand Motichand v. Dhondo Luxman*, (1918) 42 Bom. 728=47 I.C. 313=20 Bom.L.R. 773; *Gulab Rai v. Magan*, 1925 Bom. 326=87 I.C. 769.

46. *Gulab Rao Yeshwant v. Magan Ghelabhai*, 1925 Bom. 326=87 I.C. 769=27 Bom.L.R. 461.

47. *Asmatullah v. Kalichurn*, (1881) 7 Cal. 56 (59); *Joyanuddin v. Jamiruddin*, (1917) 37 I.C. 916=21 C.W.N. 835.

48. *Janki Prasad v. Ghulamali*, 5 All. 201; *Raja v. Hasari*, 109 I.C. 272=10 L.L.J. 382; *Kishen Chand v. Bhai Gopal Singh*, 16 I.C. 842.

49. *Shankar Prasad v. Jalpa Prasad*, 16 All. 371; *Joti Prasad v. Siri Chand*, 51 All. 237 (F.B.); *Ramculpo v. Ram Chunder*, (1887) 14 Cal. 352.

50. *Manmohan Roy v. Durga Churn*, (1888) 15 Cal. 502; *Hargopal v.*

(3) A distinction has been drawn between the compulsory or optional nature of the default clause¹; but the **Allahabad Full Bench** decision has held that the distinction in the language of the decree is immaterial,² and, the **Lahore High Court** considers that the default clause is only for the benefit of the decree-holder, and its nature is always optional.³

(4) A distinction is sometimes drawn between an application for payment of the instalments under the decree, in spite of the default, and the execution of the whole decree by reason of the default.⁴ In the former case, Art. 182 (7) would apply irrespective of the language of the decree as regards the default clause; and Art. 181 would apply in the latter case, where the application falls neither under cl. (1), nor cl. (7) of Art. 182, although the decree is of the class dealt with in this article.⁵ As a result all instalments within three years of application, and within three years of the date of each instalment, as it falls due, will be within time under Art. 182 (7); but the application for the whole or unpaid balance of the decretal amount on default, will be governed by three years' rule under Art. 181, from the date of the last of the successive defaults.⁶

(5) In some **Calcutta** cases, the decree-holder is considered under an obligation to sue within three years of the first default, where the decree-holder does not waive the default by receiving overdue instalments, and the rule applies as regards later instalments also which cannot be recovered as such, unless there has been a real *waiver* of a default.⁷ The **Bombay High Court** is of opinion that the decree-holder in such cases is estopped by his conduct from asserting that there has been any default.⁸ The **Calcutta** view has been accepted by some other High Courts also.⁹

Ram Rachhpal, 2 Lah. 155; *Raja v. Hazari*, (1928) 109 I.C. 272=10 L.L.J. 382.

1. *Chattar Singh v. Amir Singh*, 38 All. 204; and *Lachmi Narain v. Sarju Prasad*, 39 All. 230.

2. *Joti Prasad v. Sri Chand*, 51 All. 237 (F.B.).

3. *Raja v. Hazari*, 10 L.L.J. 382=109 I.C. 272; *Kishen Chand v. Bhai Gopal Singh*, 16 I.C. 842; also see *Kalicharn v. Mohesh Chandra*, 1926 Cal. 212 (No point made of the distinction).

4. *Badri Narain v. Kunj Behari*, 35 All. 178; *Joti Prasad v. Srichand*, 51 All. 237 (F.B.); cf. *Hargopal v. Ram Rachhpal*, 2 Lah. 155.

5. *Joti Prasad v. Srichand*, 51 All. 237 (F.B.).

6. *Ibid.*

7. *Mon Mohun Roy v. Durga Churn*, 15 Cal. 502; *Kali Charan v. Mohesh Chandra*, 1926 Cal. 212=85 I.C. 874.

8. *Kashi Ram v. Pandu*, 27 Bom. 1 (F.B.); *Rai Chand v. Dhondo*, 42 Bom. 728=1923 Bom 207; *Hansraj v. Bapu*, 72 I.C. 275.

9. *Bhawani Das v. Meghraj*, 45 I.C. 324; *Bahadur v. Gelamal*, 59 I.C. 607; also see *Mahomed Unis v. Janeshwar*, 1929 All. 881.

(6) Where the decree is for possession of land containing a proviso that the decree *should not be executed*, so long as defendant pays the plaintiff, a fixed annuity in certain instalments, but that the plaintiff should be entitled to possession of *land*, if default were made in the payment of three such instalments, the prevailing view is that such a decree for possession may be executed within three years of the last default, under Art. 181 of the Limitation Act.¹⁰

2648-2657. EXPLANATION I.

2649. *See* note, *ante*, under the head "Previous History". In cases under Act XIV of 1859, where the decree was a joint one, and proceedings in execution were taken by one of the decree-holders only, it was held that the right of one decree-holder to execute is kept alive by proceedings duly taken to put the decree in execution by his co-decreeholder.¹¹ However, in the absence of any order in the decree awarding particular sums to each of the decree-holders, one decree-holder cannot be allowed to take out execution of such portion of the decree as he may consider due to himself.¹² Every application made by one or more out of several decree-holders was taken as an application made in the interests of all, and thus every proceeding taken by one was a proceeding taken for the benefit of all to enforce the judgment or to keep it in force.¹³ A joint decree does not become several by the mere fact of two out of three sharers in it taking out execution of their shares, or lose its character as an entire and joint decree as regards the share of the third decree-holder.¹⁴ The action of a co-decree-holder was, therefore, sufficient to keep the decree alive in its entirety, and a partial execution by one or more decree-holders operated for the benefit of all parties interested in the decree.¹⁵ The joint nature of an *ijmalee* decree could not be altered by a subsequent arrangement between the parties, and any *bona fide* proceeding taken to enforce a joint decree by any one of the judgment-creditors within the meaning of

10. *Muhammad v. Muhammad*, 16 All. 237; *Thakurdas v. Shadi*, 8 All. 56; *Shanker Prasad v. Jalpa Prasad*, 16 All. 371; also see *Hargopal v. Ram Rachhpal*, 2 Lah. 155=1921 Lah. 42 and *Maung Sin v. Ma Tok*, 5 Rang. 422=53 M.L.J. 22 (P.C.); But cf. *Ugrah Nath v. Langanmani*, 4 All. 83 and *Dulsook Rattanchand v. Chugon*, 2 Bom. 356.

11. *Johiroonissa v. Amceroonissa*, (1866) 6 W.R. 59, Misc.; *Brijo v. Ram Baksh*, 1 W.R. Misc. 2.

12. *Maharance Indurjeet v. Mazum Ali Khan*, (1866) 6 W.R. 76 Misc.; also see *Azisunmissa v. Shoshi Bhushan*, 11 W.R. 343; *Shib Chunder v. Ram Chunder*, 16 W.R. 29; and *Brojo Komar v. Ram*, 1 W.R. Misc. 2.

13. *Roy Preonath v. Prannath Roy*, (1867) 8 W.R. 100.

14. *Azeezonissa v. Shushee Bhooshun*, (1869) 11 W.R. 343.

15. *Mt. Dhunessuree v. Goodhur Sahay*, (1869) 11 W.R. 421.

S. 20, Act XIV of 1859, was sufficient to keep the whole decree alive.¹⁶ A purchaser of an aliquot share or part of a decree could not take out execution-proceedings for the particular share he had purchased; but, if such proceedings were taken under a misapprehension of law, but with a *bona fide* endeavour to recover the amount due, the decree-holders might be successful when the proceedings were legitimized by all the purchasers joining together in one application for execution.¹⁷ Where there is a decree *against* a number of persons, jointly, proceedings taken to enforce it against one keep it alive against all.¹⁸ But when such decree is against the defendant's separately distinguishing the shares payable by each, proceedings taken against one do not keep it alive against the others.¹⁹ Where one of two defendants appealed against a decree, if the decree was joint and several, and the appeal imperilled the whole decree, the time for execution would count from the date of the decision in appeal.²⁰ In cases of execution of a joint decree, by some of the decree-holders, the Court had the discretion to refuse or grant the application, with due regard to the rights of the absent decree-holders, and when a Court, under a mistaken view of the law, allowed any of the holders of a decree to execute a portion of the decree, such execution could not be excluded from the calculation, when the question of limitation was raised.²¹ Proceedings in execution, taken out *bona fide* and with the permission of the Court, even though irregular, *e.g.*, execution of a part only of a joint decree, was sufficient to keep the decree in force.²² Where the decree specified the relief, *e.g.*, *one* moiety to three decree-holders, and the other moiety to two other decree-holders, the effect was otherwise.²³ It has been held in *Chooda Sahoo v. Tripoora Dutta*,²⁴ that, when a decree is passed severally in favour of a number of persons distinguishing a certain portion of the aggregate amount decreed as payable to each and one of those persons takes proceedings in execution for the recovery of his own portion such proceedings do not keep the decree alive for the benefit of the others.

16. *Aodh Beharce Lall v. Brojo Mohunlal*, (1870) 13 W.R. 128.

17. *Koylas Nath Ghose v. Nitya Shama*, (1871) 15 W.R. 449.

18. *Shaikh Bunead Ali v. Juggessur Singh*, 6 W.R. Misc. 25; *Mohesh Chunder Biswas v. Taramonee Dassi*, 9 W.R. 240.

19. *Wise v. Rajnarain*, 10 B.L.R. 253 (F.B.); *Stephenson v. Unnada*, 6 W.R. Misc. 18 and *Khema Debi v. Bukshi*, 10 B.L.R. 259= 10 W.R. 101.

20. *Chedoolal v. Nund Coomar*, (1866) 6 W.R. 60 Misc.

21. *Shib Chunder Das v. Ram Chunder Poddar*, (1871) 16 W.R. 29.

22. *Pran Kishore v. Kishen Chunder*, (1871) 16 W.R. 267.

23. *Chooda Sahoo v. Tripoora Dutt*, (1870) 13 W.R. 244.

24. *Ibid.*

2650. This explanation is the result of decisions under Act XIV of 1859, noticed in the preceding paragraph. The principle which underlies these decisions collected and reviewed in *Ram Autar v. Ajudhia Singh*,²⁵ has now met with legislative approval, and is embodied in Explanation I to Art. 182, Limitation Act, 1908, which is in terms identical with Explanation I to Art. 179 of the Limitation Act, XV of 1877. The explanation is divided into two paragraphs. **The first paragraph** of Explanation I deals with the case of decrees passed severally and jointly in favour of more than one decree-holder. **The second paragraph** treats of decrees passed severally or jointly against more persons than one. The first part of each paragraph deals with decrees passed *severally* in favour of, or against, more persons than one; and, the second part of each paragraph refers to decrees passed *jointly* in favour of, or against more persons than one. Where the decree is passed *severally in favour of*, or against a plurality of persons, distinguishing portions of the subject-matter as payable or deliverable *to* or *by* each, the decree is, as it were, equivalent to several separate decrees written on one piece of paper. Only that portion of the decree will be kept alive in which steps will be taken.²⁶ In the other case, where the decree is passed jointly in favour of more persons than one, and does not distinctly specify portions of the subject-matter as payable or deliverable *to* each decree-holder, or *by* each judgment-debtor, proceedings taken, by any one, or, against any one will save limitation for the whole decree.

2651. In execution of a mortgage decree, the subsequent mortgagee would be entitled to the surplus sale-proceeds after the mortgaged property is sold at the instance of the prior mortgagee. But, the only property that could be brought to sale as against the subsequent mortgagees would be the property mortgaged to them. And, if the decree does not in any way apportion the mortgage-debt, it cannot be held, having regard to the terms of the decree, that it comes within the scope of the first paragraph of Explanation I, to the article.²⁷ Such a decree is to be treated as a decree passed *jointly* against the mortgagor and the subsequent mortgagees.²⁸

25. See (1876) 1 All. 231 (*Held*, that an application for partial execution of a joint-decree by one of the decree-holders is not an application according to law, and consequently, has not the effect of keeping the decree in force).

26. *Chooda Sahoo v. Tripoora Dutt*, (1870) 13 W.R. 244.

27. *Troylokhyanath Bose v. Jyoti Prakash*, (1903) 30 Cal. 761 (769) = 8 C.W.N. 251.

28. *Ibid.*

2652. JOINT AND SEVERAL DECREES.—Explana-

Distinction appli-
cable to applications
in cl. 5.

tion I, *re*: effect of joint and several decrees is in terms applicable to the applications mentioned in Cl. (5), Art. 182.²⁹ The principle is that if the judgment-creditor does something which keeps alive a joint decree as against one of his joint judgment-debtors, the decree is to be regarded as alive as against all the joint judgment-debtors, and if it is alive, it is of course capable of execution.³⁰ In cases which are referred to in Art. 182, of the Limitation Act there is an equity arising by the fact that the judgment-creditor has done something for the purpose of realising the fruits of his judgment.³¹ In *Gopal v. Gosain*,³² Banerjee, J., observed that

“Explanation I, makes a distinction between a joint decree against several defendants, and a decree in which separate re-
No distinction be-
tween joint and seve-
ral decrees in cl. 2.
liefs are granted against different defendants with reference to Cl. (5) of Art. 182; but no such distinction is made with reference to Cl. (2), and this is a clear indication that the legislature intended that time should run from the date of the final decree of the appellate Court where there has been an appeal irrespective of the question whether the appeal related to the whole decree or not.”

Mahmud, J., observed in *Mashiatulnissa v. Rani*,³³ that

“there are many reasons why the same rule and the same principle which apply to Cl. (4), Art. 179 (Now Cl. 5, Art. 182), as to the extension of the time within which execution is to be limited are not to be made to apply to Cl. (2). The main reason is that in Explanation I the word “appeal” does not occur, and therefore the word “application” in that clause is not to be taken as applying to “appeal”, nor even for extending limitation to any decree on account of its having been subjected to appeal”.

An application for execution by a transferee of a part of a decree keeps, by virtue of Cl. (5) of Art. 182, Limitation Act, the decree alive so as to enable the transferor to further execute the decree. Explanation I to that article does not apply to a case where a decree originally passed in favour of one person has afterwards come to be owned by more persons than one in severalty. Sadasiva Aiyar, J., said:—

“it is not permissible to restrict the provisions of Cl. (5), which are intended for the benefit of decree-holders by extending the words of the first sentence of Explanation I to cases not falling within its exact language”.³⁴

29. *Abdul Khadir v. Ahmad S. Ravuther*, (1913) 38 Mad. 419: (s.c.) (1911) 35 Mad. 670.

30. *Ibid.*, 38 Mad. 419 (422).

31. *Ibid.*

32. 25 Cal. 594 (599)=2 C.W.N. 556 (560) (F.B.)—Per Banerjee, J.

33. (1889) 13 All. 1 (7) (F.B.).

34. *Venkatta Redayya v. Yarakayya*, (1921) 45 Mad. 35; Relied on *Ramasami v. Andi Pillai*, (1891) 14 Mad. 252 and (1890) 13 Mad. 347.

2653. In the case of a joint decree against several persons, an execution application against some of them saves limitation against all,³⁵ the judgment-debtors or even against the legal representatives of a deceased judgment-debtor, who were not parties to such application.³⁶

Joint decree against several persons. Several legal representatives of a debtor. Execution against one of several *legal representatives* of a deceased judgment-debtor is treated as execution against one of several joint judgment-debtors, and execution against one takes effect as against all. The decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly even though some other reliefs may be given separately against them.³⁷ A decree passed against two or more persons is a joint decree within the meaning of Cl. 7, Art. 182, even though there is a direction in the decree with regard to some of them that the decree can be executed only against their share in the family property. The mere fact that a decree differentiates between the judgment-debtors as regards the mode of execution does not affect the fact that all of them are jointly liable for the decretal amount, and execution against some keeps the decree alive against all the judgment-debtors.³⁸ If a decree being in *A's* favour *B* becomes entitled (by operation of law) to a portion thereof, *A* and *B* are not thereby joint decree-holders, nevertheless *B's* application to execute the *whole* decree saves time in *A's* favour.³⁹ In the case of joint decree-holders an application by one would enure to the benefit of all.⁴⁰ A payment made by one of several persons jointly liable under a decree, but not as agent of his co-judgment-debtors, cannot operate to save limitation as against any of the judgment-debtors other than the person making the same. S. 21 applies to judgment-debts under this article.⁴¹

35. *Ramasray v. Lachmi Narayan*, (1927) 103 I.C. 867=1927 Pat. 416.

36. *Kantam Kotigadu v. Kotturi Subbayya*, 106 I.C. 391=39 M.L.T. 336=1927 Mad. 1103; also see *Jogendra v. Rasik*, 2 C.L.J. 544; *Samia Pillai v. Chokkalinga*, 17 Mad. 76=4 M.L.J. 8 (Application against some judgment-debtors, some of whom are dead takes effect against their legal representatives); and *Ram Anuj v. Hingulal*, 3 All. 517; *Vasudeva v. Narayanappa*, 31 I.C. 853=18 M.L.T. 517.

37. *Pattannayya v. Pattayya*, 1926 Mad. 453=50 M.L.J. 215; Followed 30 Mad. 268 and 11 C.L.J. 83; Compare *Ghulam Mohiuddin v. Dambar*, 40 All. 206; *Nandlal v. Dharam Kirti*, 1926 All. 440=48 All. 377 (Application against one judgment-debtor in respect of the relief passed severally would not save limitation against all).

38. *Motilal Agarhari v. Champalal*, (1929) 118 I.C. 327=1929 All. 795.

39. *Ramasami v. Anda Pillai*, (1890) 14 Mad. 252 (Reversing 13 Mad. 347—Assignment by operation of law of a share in a decree); Relied in 1921 Mad. 415=41 M.L.J. 312=45 Mad. 35.

40. *Periasami v. Krishna Ayyar*, 25 Mad. 431 (447) (F.B.).

41. *Ahsanullah v. Dakhini*, 1905 A.W.N. 108=27 All. 575.

Illustrations.

(1) Where a joint decree was passed against seven persons, and applications for execution were made against six of the judgment-debtors an agreement entered into between them and the decree-holder to pay the decree by instalments had not the effect of releasing the estate of the seventh judgment-debtor.⁴²

(2) Where the decree-holder obtained the decree for costs against several defendants, and he executed the decree against some of them, and within the next three years of the previous execution he applied for execution against the other defendants, it was *held* that the application for partial execution against some only of the judgment-debtors must be deemed, in virtue of Explanation I, Limitation Act, Art. 182, to have taken effect against the others, and saved limitation.⁴³ Under Art. 182, there is only a single starting point where there has been an appeal, review or amendment, although it might be open for a decree-holder to apply for execution of a part of the decree before proceedings in appeal, review or amendment have terminated.⁴⁴

(3) Where a decree was passed against two persons who were minors and others who were majors but the decree against the minors was subsequently declared to be inoperative, and the decree-holder never took out execution within three years from the date of his decree against his judgment-debtors other than those who were minors, held that in view of Art. 179 (1) (Art. 182, Cl. 1) the application for execution against the minors only were applications in accordance with law, and saved the operation of limitation against all.⁴⁵

(4) But, where some out of several joint decree-holders apply for execution on their own behalf, and during the pendency of such application the others also apply but the latter application is not competent, the two applications cannot be considered to supplement each others in order to extend limitation.⁴⁶

(5) Where two minor sisters obtained a joint-decree against defendants, and were represented by a guardian who died after applying for execution, and later the major decree-holder applied for execution, it was held that application by guardian as next friend took effect in favour of both decree-holders.⁴⁷

(6) In *Subramania Chettiar v. Alagappa*,⁴⁸ it was held that where a decree awards mesne profits against *A* and *B* jointly and costs jointly against *A*, *B* and *C*, an application to execute the decree for mesne profits against

42. *Lachmana Kuer v. Sampatrai*, (1909) 2 I.C. 88 (All.).

43. *Baroda Kinkar v. Nobinchandra*, (1909) 4 I.C. 408=11 C.L.J. 83=14 C.W.N. 465.

44. *Vyidianatha Aiyar v. Subramanya*, (1911) 36 Mad. 104.

45. *Lalta Prasad v. Suraj Kumar*, (1909) 31 All. 309.

46. *Ahmad Ali v. Mt. Fatima Sultan*, 152 I.C. 443=1934 Pesh. 40.

47. *Manchand Panna Chand v. Kesari*, (1910) 34 Bom. 672.

48. (1906) 30 Mad. 268=2 M.L.T. 189; Followed in *Barroda Kinkar v. Nobin Chandra*, (1909) 11 C.L.J. 83=14 C.W.N. 465; also see *Vyidianatha v. Subramania*, (1911) 36 Mad. 104 (Part of decree containing unascertained amount—Execution of whole decree three years after ascertainment); and *Chinna Vellayan v. Muthayya Chetty*, (1921) 61 I.C. 901=1921 Mad. 116=13 L.W. 59=29 M.L.T. 57 (Joint decree against several judgment-debtors—Stay of execution against one entitles exclusion of period for execution against the others); Contra *Parameshwaran Nambudri v. Seshan Pat-tar*, 1928 Mad. 627=51 Mad. 583=110 I.C. 518=55 M.L.J. 156.

A and *B* keeps alive the right to execute the decree for costs against *C* under part 2 of para. 2, Expl. I to Art. 182, Limitation Act.

(7) Where a defendant is directed to pay certain sum to plaintiff, and another defendant is directed to pay a similar sum or a different sum to the plaintiff, the decree is not a joint decree; but where a decree directs that *A* and *B* shall pay a certain sum to the plaintiff, and further directs that *A* should pay another sum, and *B* should pay another sum, and that *A* and *B* should bear their own costs, the decree is a joint decree against *A* and *B*.⁴⁹ However, it has been held in *Nandlal Saran v. Dharam Kirti Saran*,⁵⁰ that where a decree is jointly passed against all the defendants in one matter, and severally against different defendants with respect to other matters, the first portion of the Explanation to Art. 182 shall apply to decrees passed severally and the second portion to the decree or decrees passed jointly.

2654. A partition decree though not in terms joint, may enure equally for the benefit of the defendant and the plaintiff.¹ The Calcutta High Court has held that in a partition decree there is a joint declaration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each shareholder or set of shareholders having a distinct share.² This view has been accepted by Allahabad³ and Madras High Courts.⁴ Their Lordships of the Privy Council have held in *Lachmi Narain v. Balmukand*,⁵ that the parties to the partition suit on the making of a decree acquire rights and liabilities which are fixed and any party can apply to have it enforced. But a *several* decree awarding a sum of money to the plaintiff and giving the defendant the right to be restored to possession of the lands in the suit is not governed by this explanation nor by the principle which is sometime applied to some partition decrees.

2655. Where a decree specifies clearly the respective liabilities of the various judgment-debtors and puts Defendants severally liable. it beyond doubt that the decree-holder could proceed against individual judgment-debtors in respect of their share of the decretal amount and costs, it is in reality a separate decree against each of the judgment-

49. *Pattannayya v. Pattayya*, (1926) 50 M.L.J. 215=1926 Mad. 453; Followed 30 Mad. 268 and 11 C.L.J. 83.

50. 94 I.C. 961=24 A.L.J. 465=1926 All. 40; Cf. 30 Mad. 268=2 M.L.T. 189.

1. *Jeddi v. Rama Rao*, 22 Bom. 998 (1001).

2. *Sheikh Khoorshed Hossein v. Nubbee Fatima*, (1878) 3 Cal. 551; also see *Mohun Chunder v. Mohesh Chander*, (1883) 9 Cal. 568.

3. *Dost Muihd. v. Said Begum*, 20 All. 81; cf. *Hikmatali v. Walian-nissa*, 12 All. 506.

4. *Assam v. Pathumma*, 22 Mad. 494 and *Ramasami v. Narayana*, 42 M.L.J. 94; *Vasudeva v. Vittal*, 43 M.L.J. 379.

5. 51 I.A. 321=4 Pat. 61=47 M.L.J. 441 (P.C.).

debtors and the mere fact that the decree is written out on one sheet of paper does not in fact make any difference. In applying the law of limitation, the decree has to be kept in force against each judgment-debtor and the execution taken against one of them is not sufficient to prevent the period of limitation running in favour of the other.⁶ As observed in *Stephenson v. Annoda Dossee*,⁷

"It may be that some decrees though based nominally on one document, are in reality separate decrees against separate individuals. In such cases, the Court might and probably would consider them to be separate, and in execution put the law of limitation in force against different defendants as if they were separate".

This doctrine, that there might be nominally one decree passed in a suit which is essentially of a composite character and contains a number of decrees has been recognised in a number of cases.⁸ If a decree is not joint against the judgment-debtors, but is a separate decree against each of them, application against one cannot keep the decree alive against others.

Illustrations.

(1) Where in a suit for the recovery of arrears of rent in respect of three tenancies held by the defendants, a decree was made which at the instance of the plaintiffs specified the sums due in respect of, and leviable from, each of the tenancies, it was *held* that although the decree was passed in one suit and was set out on one sheet of paper, the position was precisely the same as if the plaintiffs had brought three distinct suits against the defendants, one in respect of each tenancy, and had obtained 3 different decrees. Consequently, the rule of limitation would be applicable separately to each sum decreed against each tenancy, so that an application for execution of the decree in respect of the sum leviable from one of the tenancies would not, under Art. 182, Cls. (5) and (6), protect from the bar of limitation the decree in respect of the sums leviable from the other tenancies.⁹

(2) In execution of a decree against *S*, *D* attached a decree held by *S* against himself and others for possession of certain property and costs. On appeal, this decree had resulted in a decree for costs against *D* and another appellant only. *D*, executed and realized the lower Court's decree, before *S*, became insolvent. When a receiver was appointed to *S*'s property, and his rights in

6. *Hafiz Mahomed Abdullah v. Amrao Singh*, 35 P.L.R. 692=1934 Lah. 637 (2).

7. 6 W.R. Misc. 18.

8. *Khema Debea v. Kumolakant*, 10 B.L.R. 259-n=10 W.R. 10; *Wise v. Rajnarain*, 19 W.R. 30=10 B.L.R. 258 (F.B.) (Decree made in suit taken to be in reality and substance a separate decree against each for the portion for which each was declared to be liable); also see *Hureehur Singh v. Hridoy Narain*, 25 W.R. 310.

9. *Dhirendranath Sirkar v. Nischintapore Company*, (1916) 36 I.C. 398=22 C.W.N. 192; Relied on *Wise v. Rajnarain*, 19 W.R. 30=10 B.L.R. 258 (F.B.); *Stephenson v. Annoda Dossee*, 6 W.R. Misc. 18; Cf. *Ram Brichhrai v. Deo Tiwari*, (1921) 44 All. 166 (Decree in part a mortgage decree and in part a simple money-decree).

either decree were sold to *M*, held on an application made by the purchaser *M*, that there was nothing more to realize under the original decree, and the execution of the appellate decree was barred by limitation.¹⁰

(3) A decree against one person for the rent of one period and against another for the rent of another period is in fact two decrees, i.e., a separate decree against each for the sum for which he is liable. In such a case the decree is to be kept in force against each, and the proceedings in execution against one of the defendants are not sufficient to prevent the law of limitation applying to the other defendant.¹¹

Decree, not joint, but several. **Separate decrees—Continuous proceedings in execution.** (4) Where a plaintiff obtained separate decrees against several persons in respect of several duties which they were to perform separately, and the plaintiff chose to proceed in the first instance against some, and not against others, in taking out execution; held that the proceedings taken at different times were not continuous proceedings in execution, and that limitation would run separately from date of latest action in each case.¹²

(5) A person who undertakes, during the pendency of an appeal by a judgment-debtor, to pay a certain sum of money in the event of the appeal being dismissed, as a condition for the stay of execution during pendency of the appeal, does not become a joint judgment-debtor with the principal judgment-debtor within the meaning of the 2nd paragraph of Expl. I of Art. 182, Limitation Act, and an application for execution against such a person does not operate to save limitation against the judgment-debtor.¹³

2656. A surety's liability, on failure of the debtors to pay the debt or any one of the instalments, for the debt or to have execution at once taking out against him, is a separate liability, and proceedings against one or other of the joint-debtors which would keep the decree alive against all of them would not affect him.¹⁴ Section 204 of Act VIII of 1859 applied to cases such as that of parties who became sureties under S. 76 or S. 83, but not to parties who became sureties after a decree was passed.¹⁵ A security bond given by a third party for the due performance of the decree of the appellate Court under S. 546 of the Civil Procedure Code, 1882 (O. 41, R. 6, Civil Procedure Code, 1908), could not be enforced in execution of that

10. *Ghulam Muhiuddin v. Dambar Singh*, (1918) 40 All. 206=16 A. L.J. 109.

11. *Wise v. Rajnarain*, (1873) 19 W.R. 30=10 B.L.R. 258 (F.B.); Cf. *Bishunchand v. Abhoykomar Chand*, (1923) 76 I.C. 452=5 P.L.T. 276 (Mortgage and money-decree combined: portion relating to money-decree not a "several decree").

12. *Hurcehur Singh v. Hriday Narain*, (1876) 25 W.R. 310.

13. *Birendra Chandra v. Tulsi Charan*, (1925) 85 I.C. 657 (Cal.).

14. *Hurkhoo Singh v. Baboo Ram Kishen*, (1866) 6 W. R. Misc. 44.

15. *Ibid.* (on review), 7 W.R. 329.

decree. A separate suit must be brought.¹⁶ The enforcement of the liability of a surety is now provided by S. 145, Civil Procedure Code, 1908, which differs from the old S. 253, Civil Procedure Code, 1882, in certain respects. Section 145 is no bar to a regular suit against surety.¹⁷ It simply enables a party for whose benefit security has been given to enforce the surety bond against the surety by way of execution to the extent to which the surety has rendered himself *personally* liable, and no more.¹⁸ Where an appeal has been preferred from a decree for the performance whereof a person has become liable as a surety, the period of limitation for an application under S. 145, Civil Procedure Code, is three years from the date of the appellate decree as provided by Art. 182 (2), Limitation Act, and not three years from the date of the original decree.¹⁹

Bombay. The mode of enforcing payment against a surety is by summary process in execution, under S. 145, Civil Procedure Code, and not by separate suit. But, the application for execution against a surety would not operate to keep alive the order as against the principal debtor unless it was made to enforce a liability which was common to both under the order.²⁰ Where under the order of Court the surety was not liable for interest or costs, and his liability was expressly confined by his bond to the principal sum, and it was only as to that sum that he was jointly liable with the principal debtor, it was held that the previous application, for execution against the surety for money for which he was not liable under the order, could not be regarded as a step-in-aid of execution against the principal debtor.²¹ For the interest and cost only the principal debtor was made liable under the decree, and the case, therefore, was one in which the decree or order had been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, and according to Expl. I, the application took effect against only such of the said persons as it may be made against.²² In *Narayan v. Timayya*,²³ the **Bombay High Court** held that the application against the

16. *Subjoo Das v. Balmakund Das*, (1895) 23 Cal. 212; Reld. on *Radha Pershad v. Phuljhari*, 12 Cal. 402; *Kalicharan v. Balgobind*, 15 Cal. 497 and *Tokhan Singh v. Udwant Singh*, 22 Cal. 25; cf. *Venkapa Naik v. Baslingappa*, 12 Bom. 411.

17. *Motilal v. Thakore*, (1911) 36 Bom. 42=12 I.C. 549.

18. *Srinibash Prasad v. Kesho Prashad*, (1911) 38 Cal. 754 (776)=9 I.C. 862.

19. *Cholappa v. Ramchandra*, (1920) 44 Bom. 34=53 I.C. 187.

20. *Kusaji v. Vinayak*, (1898) 23 Bom. 478 (482).

21. *Ibid.*

22. *Ibid.*, (1898) 23 Bom. 478 (483).

23. 31 Bom. 50=8 Bom. L. R. 807; Reld. in 47 Bom. 778=73 I.C. 233=25 Bom. L. R. 810.

judgment-debtor would not save the limitation against the surety, as the sureties are not co-judgment-debtors, if judgment-debtors at all. This view was followed in *Yusuf Ali v. Pappa Miya*,²⁴ and is

Rangoon.

Calcutta.

supported by the judgments of **Rangoon High Court**, in *Mahomed Cassim v. Mt. Jameela Bibi*.²⁵ The **Calcutta High**

Court has taken the view that a person who undertakes, during the pendency of an appeal by a judgment-debtor, to pay a certain sum of money in the event of the appeal being dismissed, as a condition for the stay of execution during pendency of the appeal, does not become a joint judgment-debtor within the meaning of the second paragraph of Explanation I of Art. 182, Limitation Act, and an application for execution against such a person does not operate to save limitation against the judgment-debtor.²⁶ No question of limitation however arises where money or other property is deposited in Court as *security* for the satisfaction of the decree under appeal. If the appeal is dismissed, the amount is *transferred to the credit* of the decree-holder, and the Court can similarly deal with the property pledged converting it into cash for his benefit.²⁷ According to the **Lahore**

Lahore.

High Court, a decree passed against a judgment-debtor is not a decree against his sureties jointly simply because it can be executed against the sureties as well as against the judgment-debtor.²⁸ Where during the pendency of an appeal by a judgment-debtor, a person stood surety for the payment of the decretal amount, and on the appeal being dismissed the decree-holder applied for execution of the decree as against the property of the judgment-debtor alone, and more than three years later the decree-holder applied to execute the decree as against the surety, it was held that the previous application did not operate to save limitation as against the surety inasmuch as no step was sought to be taken under that application as against the surety.²⁹ However, a single Judge took the view, in another Lahore case, that a surety is a person against whom a decree is jointly passed within the meaning of the explanation to Art. 182.³⁰

Patna.

The **Patna High Court** has held, on a review of the case-law, that the weight of authority is distinctly in favour of the proposition that a surety is

24. *Yusufalli v. Pappa Miya*, 47 Bom. 778=73 I.C. 233.

25. 1928 Rang. 282=6 Rang. 334=111 I.C. 479.

26. *Birendra Chandra v. Tulsi Charan*, (1925) 85 I.C. 657=1926 Cal. 267.

27. *Sheogolam v. Rabut*, 4 Cal. 6.

28. *Wazir Baksh v. Hari Ram*, (1921) 60 I.C. 265=1922 Lah. 208.

29. *Ibid.*

30. *Honda Ram v. Seth Kanwar Bhan*, 67 I.C. 301=1922 Lah. 457=38 P.W.R. 1922=74 P.L.R. 1922.

not a joint judgment-debtor within the meaning of Art. 182, Limitation Act, though a surety against whom a decree has not been passed, becomes liable under the terms of his bond and execution can be taken out against him under the provisions of S. 145, Civil

Allahabad. Procedure Code.³¹ The **Allahabad High Court** held in *Mohammad Hafiz v. Mohammad Ibrahim*,³² that the surety was not a person against whom the decree had been jointly passed within the meaning of the words in the first explanation to Art. 182. The learned Judges, however, held that the decree-holders were entitled to the benefit of cl. (5) of the article. In *Badrudin v. Muhammad Hafiz*,³³ Piggott, J., in further proceedings in the same case affirmed the view taken by him in the earlier case. The conclusion reached is that, according to the view taken by most of the High Courts the *statutory* joint liability under S. 145, Civil Procedure Code, does not mean that the decree is joint for the purpose of Art. 182, Limitation Act, Explanation I. The **Oudh Chief Court** takes the view that the decree cannot be said to be jointly passed against the judgment-debtor and the surety, because when the decree was passed, the surety did not appear on the scene. And that Art. 181 applies and time runs from the date of the last application for execution against the judgment-debtor.³⁴

2657. See Notes under Art. 182, cl. 5, *ante*, dealing with the question of application for partial execution keeping alive entire decree. Under **Partial execution whether permissible.** O. 21, R. 15, in case of joint decree-holders, ordinarily *all* must join in an application for execution, but one of them may apply for execution of the *whole* decree for the benefit of *all* the decree-holders.³⁵ The **Madras High Court** has held that although the Civil Procedure Code does not allow one of several decree-holders to apply for the partial execution of a joint-decree, yet an application by one of such decree-holders for execution of the decree in respect of so much of the relief granted to *all* as he considers appertains to him individually, may keep in force the decree as being an application according to law.³⁶ The **Allahabad** view however is that a decree passed jointly in favour

31. *Kirtyanand Singh v. Pirthi Chand*, (1929) 120 I.C. 315=1929 Pat. 597; Rehd. on *Raghunandan v. Kirtynand*, 8 Pat. 310=120 I.C. 309=1929 Pat. 595.

32. 43 All. 152=18 A.L.J. 988=58 I.C. 794=1921 All. 291.

33. 77 I.C. 129=44 All. 743=20 A.L.J. 726=1922 All. 481.

34. *Shyamlal v. Nasiruddin*, 8 Luck. 427=10 O.W.N. 571=1933 Oudh 209 (213)=143 I.C. 808.

35. *Autoo Misree v. Bidhoo*, (1878) 4 Cal. 605 (Application by *Mooktear* on behalf of the judgment-creditors, accepted by Court without objection, to form of application, when presented).

36. *Kuthathi Haji v. Bavotti Haji*, (1880) 3 Mad. 79; Rehd. in 18 Mad. 464.

of more persons than one can only be legally executed as a whole for the benefit of all the decree-holders, and not partially to the extent of the interest of each individual decree-holder.³⁷ A joint decree, however, cannot be executed by one of the several joint holders in respect only of his share of the decree.³⁸ Peacock, C.J., in *Haro Sanker v. Tarak Chandra*,³⁹ has well explained the reason of the rule:

"Suppose there was a decree for a lac of rupees, it could not be contended that the decree-holder could assign it to a lac of assignees, so as to give to each of them power to take out execution for one rupee, his portion of it. . . . This is shown to be the correct view . . . by supposing a case of execution by arresting the judgment-debtor. Could each one of the assignees arrest the debtor for his own portion?"

And he answers it by observing

"that the section which provides the period, during which a judgment-debtor is to be detained in jail in execution of a decree, shows that the Legislature contemplated one entire execution, and not several executions as to portions of the same decree".⁴⁰

This view has been relied upon by the **Oudh Chief Court** in *Gauri Shanker v. Jang Bahadur*,⁴¹ where it is held that an application by one of two persons jointly interested in a decree for execution of one-half of the decretal amount to which he is entitled is not one in accordance with law, inasmuch as it is not open to the party to apply for partial execution of a decree. But, if the judgment-debtor allows a joint decree-holder to take out *partial* execution, he cannot be permitted afterwards to object that the application was not in accordance with law, and, therefore, such application would be effectual to save limitation.⁴² Similarly, the **Calcutta High Court** has held in *Kanak Prova Debi v. Dhirendranath Roy*,⁴³ that where the trial Court passed a decree for costs severally, and the appellate Court gave a joint decree, and application for execution was made by one of the joint decree-holders for his share only and entertained by the Court, it was held that although the Civil Procedure Code does not permit such an application, the applications so made being accepted by the Court and order made for execution after service of notice on the parties, they were effective in keeping alive the entire decree.

Explanation II: See "Proper Court," *ante*.

37. *The Collector v. Raja Jagannath*, (1881) 4 All. 72; Reld. on *Ram Autar v. Ajudhia Singh*, 1 All. 231.

38. *Banarsidas v. Maharani Kuar*, (1882) 5 All. 27; Folld. 1 All. 231; 4 All. 72 and *Haro Sanker v. Tarak*, 3 B.L.R. 114.

39. *Haro Sanker v. Tarak*, 3 B.L.R. 114.

40. *Ibid*.

41. (1926) 97 I.C. 896=3 O.W.N. 160 Sup.; 1926 Oudh 605; Reld. on 1 All. 231; 4 All. 72 and 5 All. 27.

42. *Nandarai v. Raghunandan*, (1885) 7 All. 282; Folld. *Mungal Pershad v. Grija Kant*, 8 Cal. 51=8 I.A. 123 (P.C.).

43. 1928 Cal. 861=32 C.W.N. 1107.

Article.	Description of Suit.	Period of Limitation.	Time from which period begins to run.
183.	To enforce a judgment, decree, or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.	Twelve years.	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right.

Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be.

SYNOPSIS.

- 2658. **Previous History.**
- 2659-2664. **Scope and application.**
- 2660. (1) Ordinary original jurisdiction.
- 2661. (2) Original jurisdiction includes insolvency jurisdiction.
- 2662. (3) S. 48 (2) (b) not applicable to cases governed by Art. 183.
- 2663. (4) Application for restoration, whether an application for execution.
- 2664. (5) Character of Court passing decree.
- Article explained.**
- 2665. "To enforce a judgment or decree."
- 2666. Application for an order absolute for sale.
- 2667. Application to enforce judgment or order.
- 2668. Order of the Privy Council.
- 2669. **Starting point of limitation.**
- 2670. Article whether controlled by Ss. 6, 7 and 8.
- 2671. Present right to enforce.
- 2672. Revivor of the decree or order.
Common law practice.
- 2673. Order directing transmission of decree does not amount to a revivor.
- 2674. Order recognising transfer by assignment.
- 2675. Revivor against one inoperative against another.
- 2676. Acknowledgment and payment.
- 2677. Difference between Art. 182 and 183.

NOTES.

2658. **PREVIOUS HISTORY.**—Section 19 of Act XIV of 1859 made the corresponding provision, but it did not contain the words “*in the exercise of its ordinary original civil jurisdiction*”. It was applicable only to Courts established by Royal charter. The

Decrees of Privy Council.

6 W.R. Misc. 69 (F.B.).

Chunder Rai,⁴⁴ overruling the view taken in *Alexander Wise v. Jugobundo*,⁴⁵ where it was held that Privy Council decrees were subject to the limitation laid down in S. 20 of Act XIV of 1859, corresponding to the present Art. 182. The execution of decrees

Appellate decrees of High Court.

16 W.R.F.B. 1.

of the High Court, in the exercise of its appellate jurisdiction, were held to be governed by S. 19 of Act XIV of 1859⁴⁶; but a Full Bench of the Calcutta High Court, in *Ram Churn Bysack v. Luckhee Kant*,⁴⁷ held that S. 19 of Act XIV of 1859 was never intended to apply and did not apply to decrees of the High Court on its appellate side, and that the execution of decrees of the High Court on its appellate side was governed by S. 20 of Act XIV of 1859 (now Art. 182).

Privy Council view.

14 M.I.A. 65.

Their Lordships of the Privy Council affirmed this view in *Kristo Kinker Ghose v. Buroda Kanta Singh*,⁴⁸ observing that

“the preponderance of authority in India, was now in favour of the proposition, that the execution of **decrees of the High Court, made on appeal from the District Courts, was subject to the three years’ rule of limitations**” “That considering the date and history of the Limitation Act VIII of 1859, the High Courts though unquestionably ‘Courts established by Royal Charter’ in the broad and general sense of the term, were not, when exercising their appellate jurisdiction from the *mofussil* Court, ‘such Courts’ within the meaning of Act XIV of 1859.”

Their Lordships did not hold it necessary to decide whether the **decrees of the Privy Council** were not subject to any law of

44. (1866) 6 W.R. Misc. 69.

45. 4 W.R. Mis. 10.

46. *Maharaja Mahtab Chand v. Taruck Nath*, (1866) 6 W. R. Mis. 94; *Ishan Chunder v. Jugodishurree*, (1867) 8 W.R. 267; *Kishen Kinker v. Burodakant* (1867) 8 W.R. 470; *Huro Pershad v. Manick Lushker*, (1869) 12 W.R. 343; *Wahid Ali v. Mullick Enayet*, (1870) 14 W.R. 288.

47. (1871) 16 W.R. F.B. 1 given effect to by legislative recognition in Act IX of 1871, where the qualifying words “*in the exercise of its ordinary original civil jurisdiction*” were added.

48. (1872) 14 M.I.A. 465.

limitation, by reason of the order of His Majesty in Council being an act done by virtue of Royal prerogative, 8 Cal. 218 (F.B.). and not properly speaking the decree of a Court. But, as observed in 8 Cal. 218 (F.B.), their Lordships threw out a tolerably strong hint that an order of His Majesty in Council was not a decree of any Court.

"At the same time they affirmed, or rather expressed no dissent from the Full Bench ruling of the Calcutta High Court that whether the decree of the lower Court is reversed or modified, or affirmed, the decree passed by the appellate Court is the final decree in the suit."

In *Pitts v. La Fontaine*,⁴⁹ their Lordships held that,

"when a decision of this Board has been reported to His Majesty, and has been sanctioned, and embodied in an order of Council, it becomes the decree or order of the final Court of appeal, and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution".

Next, in *Lethbridge v. Raja Saheb Prahlad Sen*,⁵⁰ Phear, J., laid down that

"the Privy Council order affirming the previous decrees must comprehend and embrace these decrees . . . for they fall to be executed with the Privy Council order; in other words, the judgment-creditor is unquestionably entitled in executing the 'decree or order' of the Privy Council to get the benefit of the decrees or orders which that Privy Council order affirmed".

Then followed the addition to **Art. 169 of the Limitation Act IX of 1871**, of the words "*or any order of His Majesty in Council*" by S. 21 of Act VI of 1874, (Privy Council Appeal Act), which was passed to make it clear, by adding these words, to Art. 169 of Act IX of 1871, that the right to enforce such an order was controlled by the extended period of limitation. Article 169 enacted as follows:

"To enforce a judgment, decree, or order of any Court established by Royal charter, *in the exercise of its ordinary original civil jurisdiction*."

The Limitation Act XV of 1877, Art. 180, was in the same terms as Art. 169 of Act IX of 1871, after the words referred to were added. Both these articles did not apply to execution of Orders in Council on cases decided by a Chartered High Court in its appellate jurisdiction.¹ It was in view of these authorities that the Full Bench decision in 8 Cal. 218 (F.B.) above referred to was given. Art. 183 of the present Act corresponds to Art. 180 of Act XV of 1877, which was a re-enactment of Art. 169 of Sch. II, Act IX of 1871, as amended by S. 21 of Act VI of 1874, with some slight verbal alteration.

49. L.R. 6 App. Cas. 482; also see *Somer Singh v. Premdei*, 3 Pat. 327 (332)=1925 Pat. 40=5 Pat. L. T. 21=79 I.C. 794 (Indian Courts are not competent to go behind Order in Council).

50. 19 W.R. 301.

1. (*Mohunt*) *Buldraj Dass v. Mohunt Taponidhi Giri Gossain*, Misc. App. No. 293 of 1877; Reld. upon in *Luchmun Pershad Singh v. Kishen Persad Singh*, (1882) 8 Cal. 218 (221) (F.B.).

2659-2664. SCOPE AND APPLICATION.

2660. (1) The words "*ordinary original jurisdiction*" in this article, first introduced in Act IX of 1871, adopt the view taken in the Full Bench case, 16 W.R. 1 (F.B.), that the execution of decrees of the High Court on its appellate side was never intended to be governed by the twelve years' rule under S. 19 of Act XIV of 1859: but was governed by S. 20 of that Act (now Art. 182).² The expression "*ordinary original*" in the Charter as opposed to "*extraordinary*" jurisdiction which the High Court may assume at its discretion, upon special occasions and by special orders, includes all such jurisdiction as is exercised by the High Court in the ordinary course of law without any step taken to assume it.³

2661. (2) Art. 183, Limitation Act, applies to a judgment of a Court for the relief of insolvent debtors entered up in the High Court, in accordance with S. 86 of the Statute 11 and 12, Vic., cap. 21. Although a Court held under the latter statute determines the substance of the questions relating to the insolvent's estate, the proceedings in execution and the judgment are the High Court's. The judgment is entered up in the ordinary course of the duty cast upon the High Court by the law, not by way of special or extraordinary action, but in the exercise of its ordinary original civil jurisdiction. When an order has been made, under S. 86 of Statute 11 and 12, Vic., cap. 21, that execution be taken out, a present right accrues to the Official Assignee to apply for it, and, therefore, Art. 183 (Art. 180, Act XV of 1877), is the article applicable.⁴

2662. (3) It was held by **Bombay**,⁵ **Calcutta**,⁶ and **Madras**⁷ High Courts, in cases under the Civil Procedure Code, 1882, that in view of the provisions in Art. 180 of the Limitation Act, XV of 1877, for a revivor of

2. *Ram Churn v. Lukhee Kant*, 16 W.R. 1 (F.B.); approved in *Kristo Kinker v. Buroda Kant*, 17 W.R. 292=14 M.I.A. 465 (P.C.); also see *Arunachela v. Pelayuden*, 5 M.H.C.R. 215.

3. In the matter of *Candas Narrondas v. C. A. Turner*, (1889) 13 Bom. 520; s.c. 11 Bom. 138; also see *Navivaho v. The Official Assignee*, (1883) 16 I.A. 156 (162) (P.C.) (As to the meaning of "Ordinary jurisdiction").

4. *Ibid.*, (1889) 13 Bom. 520 (P.C.).

5. *Mayabhai Prembhai v. Tribhuvandas*, (1882) 6 Bom. 258 (260).

6. *Futteh Narain v. Chundrabati*, (1893) 20 Cal. 551 (557); *Jogendra Chundra Roy v. Syamdas*, (1909) 36 Cal. 543=1 I.C. 168 (174)=9 C.L.J. 271.

7. *Ganapathi v. Balasundara*, (1884) 7 Mad. 540 (545).

the decrees of Chartered High Courts in the exercise of ordinary original civil jurisdiction, and of orders of His Majesty in Council, S. 230 (now S. 48, Civil Procedure Code, 1908), did not apply to Chartered High Courts in the exercise of Ordinary Original Civil Jurisdiction. The present sub-S. 2 (b) of S. 48, Civil Procedure Code, 1908, is new, and it has been added to give legislative recognition to the above view.

"Nothing in S. 48, Civil Procedure Code, shall be deemed to limit or otherwise affect the operation of Art. 180 of the Second Schedule to the Indian Limitation Act, 1877." (Now Art. 183, Limitation Act, 1908.)

This article is therefore independent of, and not controlled by S. 48, Civil Procedure Code.

2663. (4) An application for restitution is virtually an application for execution of the High Court decree amending the decree of the trial Court. Consequently, the minority of the defendant would save limitation under S. 6, of the Limitation Act, 1908.⁸ The **Bombay High Court** takes the view that the words "an application for the execution of a decree" in S. 6, are not to be construed so narrowly as to exclude an application for restitution in consequence of the decree.⁹ The expression "execution of a decree" is not used in Art. 183, but reference is made to the enforcement of a decree of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, or an order of His Majesty in Council.¹⁰

According to the **Allahabad High Court**, the word "*execution*" as used in O. 45, R. 15, was intended to cover a case of restitution as well as a case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council, and a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply in the first instance to the Court indicated by R. 15. In the case of *Damodar Das v. Brijlal*,¹¹ where a decree was passed by the High Court against *B*, who appealed to the Privy Council, and during the pendency of the appeal *D* and others obtained possession of the property in suit from *B*, and the Privy Council having reversed the decree, *B* applied to the Subordinate Judge to restore him to possession of the property and filed a copy of the Printed Judgment of their Lordships of the Privy Council in proof of the fact that the judgment of the High Court had been reversed, it

8. *Kurgodi Gouda v. Ningam Gouda*, (1917) 41 Bom. 625=19 Bom. L. R. 638=41 I.C. 238.

9. *Ibid.*, (1917) 41 Bom. 625 (629); also see *Hamidalli v. Ahmedalli*, 45 Bom. 1137 (Proceedings in restitution are also proceedings in execution).

10. *Ibid.*, (1917) 41 Bom. 625 (629).

11. (1915) 37 All. 567.

was held that the application should have been made to the High Court, and the Subordinate Judge could not entertain it. Mukerji, J., observed in *Sohan Bibi v. Baijnath Das*,¹² that where an application is made to obtain restitution as the necessary result of the order of His Majesty in Council, that application is to be taken as one to “enforce” an order in Council and must be governed by Art. 183 and not by the general and omnibus Art. 181. The word “enforce” ought to have a much larger meaning than the word “execution”. Similarly, the **Madras High Court** has held that where an order of His Majesty in Council was transmitted under O. 45, R. 15, Civil Procedure Code, by the High Court to the District Court as the Court which passed the first decree, the latter Court has jurisdiction to entertain an application made by an assignee of the decree under O. 21, R. 16, Civil Procedure Code, to recognise the assignment and to allow him to execute the decree.¹³ The act of the High Court in receiving and filing an order of the Privy Council is a purely ministerial function.¹⁴ It is also provided that the High Court should act as an intermediary for carrying out the orders of His Majesty in Council, because the Privy Council does not deal direct with Subordinate Courts.¹⁵ The **Madras High Court** points out that an application for restitution is an application in execution under the new Code of Civil Procedure (Act V of 1908) as under the old Code (Act XIV of 1882).¹⁶ However, the **Patna High Court** holds that proceedings for restitution are not governed by O. 45, R. 15, Civil Procedure Code.¹⁷ An application for restitution should be made to the trial Court. An order for restitution passed by a trial Court after it had been furnished with a copy of the order of the Privy Council upon which the application was based is not irregular merely because the applicants had not put before the Court a copy of the order.¹⁸

12. 1928 All. 293=50 All. 767=112 I.C. 876=26 A.L.J. 587; Reld. on *Brijlal v. Damodar*, 1922 All. 238=44 All. 555=66 I.C. 545=20 A.L.J. 456.

13. 13. *Krishna Bhoopathi v. Raja of Vizianagram*, (1914) 38 Mad. 832; Reld. on *Premalal Mullick v. Sumbhoonath Roy*, (1895) 22 Cal. 960 (971).

14. *Ibid.*

15. *Ibid.*, 38 Mad. 832.

16. *Somasundaram v. Chhokalingam*, (1916) 40 Mad. 780=5 L.W. 267=38 I.C. 806; Reld. on *Prag Narain v. Kamakhia Singh*, (1909) 31 All. 551 (P.C.) (Under the old Code restitution was by way of execution).

17. *Jugal Kishore v. Homeshwar*, 6 Pat. 252=1927 Pat. 208=102 I.C. 614; Applied *Balmukand v. Basanta Kumari*, 78 I.C. 200=3 Pat. 371=1925 Pat. 1 (F.B.).

18. *Jugal Kishore v. Homeshwar Singh*, 102 I.C. 614=6 Pat. 252=1927 Pat. 208.

2664. (5) It is to be noticed that having regard to the provisions of O. 21, R. 9, and S. 42, Civil Procedure Code, 1908 (old S. 227 and 228, Civil Procedure Code, 1882) the period of limitation applicable to the execution of a decree, transmitted by one Court to another for execution, depends on the character of the Court which passed the decree, and not on the character of the Court executing it.¹⁹ A decree does not become a decree of the High Court merely because it has been transferred to that Court for execution and may have to be enforced in the same manner as a decree of the High Court.²⁰ A decree passed by the late Chief Court of Burma, which is executed by the Rangoon High Court does not become a decree of the High Court.²¹ So a decree of a *Mofussil* Court, though it is being executed by the High Court is subject to the three years' limitation prescribed by Art. 182; and conversely when a decree of the High Court passed on its ordinary original side is executed by a mofussil Court, the limitation applicable is, nevertheless, 12 years under Art. 183, Limitation Act.²² A decree passed by the High Court on appeal from a mofussil Court is not a decree of the High Court.²³

ARTICLE EXPLAINED.

2665. "TO ENFORCE A JUDGMENT, OR DECREE."

2666. A preliminary mortgage decree under S. 88 of the Transfer of Property Act, 1882, does not require, and is not followed by any supplemental decree, but only, if necessary, by an application for an order absolute for sale under S. 89 of the Transfer of Property Act. (See O. 34, Rr. 4 and 5): such an application is a petition for realization by the mortgagee of his decree, and is an application to "*enforce a judgment or decree*", etc., within the provisions of Art. 183 of the Limitation Act, 1908.²⁴ Their Lordships of the Privy Council

19. *Tincowrie Dawn v. Debendronath Mookerjee*, (1890) 17 Cal. 491; *Sree Krishna Doss v. Alambhu Ammal*, (1911) 11 I.C. 635=36 Mad. 108. See notes under Art. 182, ante.

20. *Jogemaya v. Thackomoni*, 24 Cal. 473 (491) (*Per* Trevelyan, J.).

21. *Alibhai v. Noor Mahomed*, 6 Rang. 566=1928 Rang. 317=114 I.C. 674.

22. *Sree Krishna Doss v. Alambhu Ammal*, (1911) 36 Mad. 108=11 I.C. 635; *Chatterput Singh v. Daya Chand*, (1911) 11 I.C. 216 (Mad.); also see *Kanji Mal v. Kidarnath*, (1919) 49 I.C. 982 (Punj.).

23. *Kistokinkar v. Burodakant*, 17 W.R. 292=10 B.L.R. 101 (P.C.) and *Ram Charan v. Lakhi Kant*, 7 B.L.R. 704=16 W.R. 1 (F.B.).

24. *Amlook Chand Parrack v. Sarat Chunder Mukerjee*, (1911) 38 Cal. 913; *Reld. on Harendralal v. Maharani*, (1901) 28 Cal. 557=28 I.A. 89 (97); cf. *Madhab Mani Dassi v. Lambert*, (1910) 37 Cal. 796=15 C.W. N. 337 (A case not falling under the new Code, in which this point was left undecided).

affirmed the view of the **Calcutta High Court**, and held that where a High Court in the exercise of its Ordinary Original Civil Jurisdiction passes a preliminary mortgage-decree, an application for an order absolute for sale of the mortgaged property made after 12 years from the date of the preliminary decree is barred by Art. 183, Limitation Act.²⁵ The **Madras High Court** has followed this view in *Mahammad Husain v. Abdul Kareem*,²⁶ that the process by which a preliminary decree is to be made the final decree is by way of execution. It was observed that

"although the third column of Art. 183, of the Limitation Act speaks of the 'enforcement' of a judgment, decree or order, there can be no doubt that it is a provision for the execution of decrees passed on the original side corresponding to Art. 182 which deals with the mofussil decrees".²⁷

It was further held,

"that a decree-holder will have 12 years under S. 48, of the Code of Civil Procedure to perfect the preliminary decree, and another 12 years under the same section if he gets the order absolute within the first 12 years".²⁸

The **Calcutta High Court** takes it settled by authority that the relation between decree *nisi* under S. 88 and an order absolute under S. 89 (Transfer of Property Act) is such that an application for the latter is an application to enforce the former within the meaning of Art. 183,²⁹ and also an application for the execution of the former within Art. 182, Limitation Act.³⁰

2667. The word "to enforce", in Art. 183, has a wider meaning than the word "to execute" in Art. 182, and should be interpreted, as equivalent to "to give full effect to", which is synonymous with "to enforce".³¹ The word "enforce" and should be interpreted, as equivalent to "to give full effect to", which is synonymous with "to enforce".³¹ The word "enforce"

25. *Munnalal Parruck v. Sarat Chunder Mukerjee*, (1915) 27 I.C. 683=21 C.L.J. 118 (P.C.).

26. (1915) 29 I.C. 237 (Mad.).

27. *Mahammad Husain v. Abdul Kareem*, (1915) 29 I.C. 237 (Mad.); *Reld. on Mallikarjunadu v. Lingamurthi*, 25 Mad. 244=12 M.L.J. 279 (F.B.); and *Rangiah Goundan v. Sanjappa Row*, 26 Mad. 780=13 M.L.J. 412.

28. *Ibid.*

29. *Apurba Krishna v. Rashbehari*, 47 Cal. 746 (748)=60 I.C. 880; also see *Bhagwant Kuer v. Dewan Zamin*, (1924) 3 Pat. 596 (605); cf. *Pell v. Gregory*, 1925 Cal. 834=52 Cal. 828 (F.B.) (846) (*Per Rankin, J.*) (The period of limitation for an application for a personal decree is three years under Art. 181).

30. *Ibid.*

31. *Brijlal v. Damodar*, 1922 All. 238=44 All. 555 (*Per Ryves, J.*); also see *Sohan Bibi v. Baijnath Das*, 1928 All. 293=50 All. 767=112 I.C. 876=26 A.L.J. 587 (*Per Mukerji, J.*); cf. *Chutterput Singh v. Sait Sumraj Mull*, 43 Cal. 903 (F.B.); *Pell v. Gregory*, 52 Cal. 828 (F.B.) (Application for a final decree may be regarded as one to enforce the

is not limited to realisation by execution, but may have a wider meaning, *e.g.*, the passing of an order absolute for sale.³² Where an award has been filed in High Court under S. 15, Act IX of 1899, the execution applications are governed by Art. 183, Limitation Act,³³ subject to the provisions contained in Ss. 4 to 25 every application to enforce a judgment, decree or order of any Court established by Royal Charter made after the period of 12 years shall be dismissed. The mere filing of a tabular statement in accordance with O. 21, R. 11, Civil Procedure Code, amounts to an application to the Court within the meaning of S. 183 of the First Schedule to the Limitation Act read in conjunction with S. 3 of the Act.³⁴ The article does not require the *making* of an *order* in execution in order that the rights of the decree-holder should be preserved, except no doubt in cases where a question arises as to whether or not there has been a revivor within the meaning of 3rd column.³⁵

2668. **ORDER OF THE PRIVY COUNCIL.**—*See* note above under the heading "Previous History". A Full Bench of the Calcutta High Court, in *Luchman Pershad Singh v. Kishun Pershad Singh*,³⁶ has held that although an order of His Majesty in Council may confirm a decree of the Court below, that order is the paramount decision in the suit; and any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirmed. Such an application was governed by Art. 180 of Act XV of 1877 (now Art. 183, Limitation Act, 1908). In this article, Orders in Council stand in the same category as decrees of Courts established by Royal Charter in the exercise of their ordinary original civil jurisdiction.³⁷ A decree of the Court of first instance confirmed by the High Court, which in its turn is confirmed by the Privy Council would come under Art. 183.³⁸ Where an appeal had been preferred to His Majesty

judgment or decree, and if so Art. 183 will apply: otherwise Art. 181 alone will apply).

32. *Munnalall v. Sarat*, 42 Cal. 776 (779) (P.C.); Affirming *Amlook v. Sarat*, 38 Cal. 913.

33. *Belvedere Jute Mills Co., Ltd. v. Hardwarimull & Co.*, 1927 Cal. 853=31 C.W.N. 1097=104 I.C. 808; Reld. on *Pokhardas v. Radha Kissen*, 1924 Lah. 544.

34. *Atarmoni Dasi v. Bepin Behari Dhur*, (1929) 115 I.C. 83=55 Cal. 1341=1929 Cal. 193.

35. *Ibid.*

36. (1882) 8 Cal. 218 (F.B.); citing *Kristo Kinker v. Burodacant Roy*, 14 M.I.A. 165=10 B.L.R. 101 (P.C.); *Pitts v. La Fontaine*, L.R. 6 App. Cas. 482; *Lethbridge v. Raja Saheb*, 19 W.R. 301.

37. *Futteh Narain v. Chundrabati*, (1892) 20 Cal. 551; also see *Bhoo-boona v. Jobrajsingh*, 11 C.L.R. 277 (Art. 183 would apply to all orders of His Majesty in Council).

38. *Raja Bhup Indar v. Bijai Bahadur Singh*, 27 I.A. 209=23 All. 152 (P.C.); *Nand Kumar v. Bilas Ram*, 43 I.C. 855=3 P.L.J. 116.

in Council from a decree of the High Court reversing the decree of the Court of first instance, and the High Court's decree was affirmed by an order of His Majesty in Council, it was held that under the corresponding Art. 167 of Act IX of 1871, the limitation of such application must be **computed from the date of the order of His Majesty in Council.**³⁹ Before the decree-holder can obtain execution he must apply to the High Court to transmit the order of His Majesty to the Court whose duty it is to issue execution.⁴⁰ But, the order of the High Court transmitting the order in Council to trial Court for execution is not a revivor of the order in Council within the meaning of Art. 183, Limitation Act.⁴¹ An order of His Majesty in Council dismissing an appeal for whatever cause is in effect an affirmance of the Court below and is the only order in the litigation capable of enforcement.⁴² But, it must be noticed that an order of His Majesty in Council in order to be enforceable as a decree must be one passed on the merits of an appeal to His Majesty in Council. **An order of His Majesty in Council dismissing an appeal for want of prosecution neither affirms nor adopts the decision appealed from.**⁴³ Where the appeal to the Privy Council was withdrawn without further prosecution, their Lordships held that on this withdrawal no "Order in Council" was passed which would attract Art. 183, and the limitation period was not 12 years as therein provided, but was 3 years from the date of the only decree that they could execute, *viz.*, the decree of the High Court made considerably more than 3 years before the application for execution which was consequently held barred by time.⁴⁴ Where an appeal to His Majesty in Council from a decree passed by the High Court for sale on a mortgage was dismissed for want of prosecution, it was held that limitation in respect of an application by the decree-holder for an order absolute for sale was governed by Art. 180, of Sch. II, Limitation Act, 1877 (now Art. 183), time running from the date of the order of His

39. *Gopal Sahu v. Joyram*, (1881) 7 Cal. 620.

40. *Luchmun Persad v. Kishun Pershad*, 8 Cal. 218 (223) (F.B.).

41. *Tribikram v. Badri Missir*, (1910) 36 I.C. 633=20 C.W.N. 1051=1 P.L.J. 385.

42. *Abdul Majid v. Jawahir Lal*, (1910) 33 All. 154 (F.B.); *Reld. on Beni Rai v. Ramlukham Rai*, (1898) 20 All. 367; *Tassaduq Rasul v. Kashiram*, (1902) 25 All. 109 (P.C.); see and cf. *Abdul Majid v. Jawahir Lal*, 36 All. 350=27 M.L.J. 17 (P.C.).

43. *Abdul Majid v. Jawahirlal*, (1914) 36 All. 350=18 C.W.N. 963=19 C.L.J. 626=27 M.L.J. 17=23 I.C. 649=1914 P.C. 66 (P.C.); also see *Batuknath v. Munni Dei*, (1914) 41 I.A. 104=18 C.W.N. 740=19 C.L.J. 574=36 All. 284 (P.C.); also see *Tikait Krishna Prasad v. Vasisir Narain*, 58 I.C. 977; *Viswanatha v. Sitalakshmi*, 61 I.C. 979 (Mad.); *Kalimuddin v. Esahabuddin*, 51 Cal. 715 (735); but see *Hiralal v. Ganu Mahto*, 4 Pat. 844; *Ragho Prasad v. Jadunandan*, 59 I.C. 896 (Pat.).

44. *Ibid.*

Majesty in Council.⁴⁵ See also *Bhagwant Kuer v. Dewan*,⁴⁶ where this article was held applicable to an application for the preparation of a final decree, the preliminary decree being an order of His Majesty in Council. A preliminary decree in a mortgage suit is executable and in order to obtain an order absolute steps have to be taken in execution, and Art. 182, or 183 of the Limitation Act will apply to such applications if the decree happens to be passed by a *mofussil* Court or by the Original Side of the High Court.⁴⁷ An application for restitution in pursuance of the decision of the Privy Council has been held to be in substance one to enforce a decree of the Privy Council, falling under the present article.⁴⁸ A person who has obtained a decree from the Privy Council for costs against the father since dead can enforce that decree against the sons and can proceed (under S. 53, Civil Procedure Code) at once against the property in the hands of the sons who are liable under the Hindu Law for the payment of the debts of their deceased father. Such an application is governed by Art. 183, and not by Art. 120 as the proceeding is not a *suit*, but an application.⁴⁹

2669. STARTING POINT OF LIMITATION.—See Ss.

Article whether controlled by Ss. 6, 7 and 8 of the Act.

250-252. "Applications made in execution", and Ss. 6, 7, and 8 of the Act. These sections are applicable to *suits*, and applications for execution. But, Art. 183, has a wider scope, as noticed above. Consequently, these sections would not apply where the application falling under Art. 183 is not an application for execution of a decree. The words "persons not capable of releasing the right" would mean persons who are legally incapacitated, such as infants and lunatics. This has been so held under an analogous provision of the English Law in S. 8 of the Real Property Limitation Act, 1877.⁵⁰ The Patna High Court, follow-

45. *Abdul Majid v. Jawahirlal*, (1910) 33 All. 154 (F.B.); cf. 36 All. 350=27 M.L.J. 17 (P.C.) [Reversing 33 All. 154 (F.B.) on another point].

46. (1924) 3 Pat. 596 (605); also see and cf. *Apurba Krishna v. Rashbehari*, 47 Cal. 746 (748)=60 I.C. 880.

47. *Muhd. Husain Saib v. Abdul Kareem Saib*, (1915) 29 I.C. 237 (Mad.).

48. See "Application for restitution, whether an application for execution" ante; *Brijlal v. Damodar Das*, 44 All. 555=1922 All. 238=20 A.L.J. 456=66 I.C. 545; *Sohanbibi v. Baijnath Das*, 50 All. 767=26 A.L.J. 587=1928 All. 293=112 I.C. 876; *Madhusudan v. Brijlal*, 61 I.C. 806 (All.) and *Somasundaram v. Chhokalingam*, (1916) 40 Mad. 780=38 I.C. 806.

49. *Chandra Char v. Shyam Kumari*, 11 Pat. 445=13 P.L.T. 719=1923 Pat. 261=139 I.C. 397.

50. *Hornsby Local Board v. Monarch Building Society*, (1889) 24 Q.B.D. 1 C.A.; also see *Piggott v. Jefferson*, (1841) 12 Sim. 26.

ing the above view, has held that the words "capable of releasing the right", exclude persons who are legally incapacitated such as infants and lunatics and, therefore the words of Art. 183 are not governed by Ss. 6, 7, and 8, Limitation Act.¹ However, the **Bom-may High Court** has held that an application *for the execution of a decree*, within the liberal meaning of the term used in S. 6 of the Limitation Act, includes an application for restitution in consequence of the decree, and the time for making such application in the case of a minor, is, therefore, extended under the provisions of this section.²

2671. The words "present right to enforce" are narrower than the words "present right to receive" in the English Statute referred to above. Under Indian Law the time must have arrived to enforce the right, and not merely to receive it. For instance, the Indian Law has made all judgments subject to limitation, and amongst them judgments of the Insolvent Court, Art. 183, therefore applies. But, the right to enforce the judgment does not accrue to the official assignee until the order of the Insolvent Court to take out execution is made.³ In execution of a decree of a High Court limitation runs from the time when the right accrues, that is to say, from the date of the decree, under Art. 183 of Sch. I, to the Limitation Act, 1908, and not from any time when the decree-holder has still an existing right to execute the decree.⁴

2672. **REVIVOR OF THE DECREE OR ORDER.—**
 Common Law practice. The word "revivor" in Art. 183, of the Limitation Act, refers to the Common Law practice of suing out writs of execution, known as *scire facias*, for the defendant to show cause why the judgment, not executed within a year and a day after the judgment was entered, should not be revived and execution had against him.⁵ An award of execution under a writ of *scire facias*, or more fully *scire facias quare executionem non habet*, was not a mere continuation of a former suit, but created a new right. It was the first *scire facias* which revived the judgment.⁶ This rule was embodied

1. *Musabar Sahu v. Kishun Narayana*, 1930 Pat. 141=123 I.C. 411.

2. *Kurgodigowda v. Ningam Gowda*, (1917) 41 Bom. 625=41 I.C. 238 =19 Bom.L.R. 638; Compare *Jugal Kishore v. Homeshwar*, 6 Pat. 252=1922 Pat. 208 (Application for restitution not an application for execution).

3. *In re Candas Narondas*, (1886) 11 Bom. 138 (149) (Affirmed by the Judicial Committee in 16 I.A. 156 P.C.).

4. *Chutterput Singh v. Dayachand*, (1911) 11 I.C. 216 (Cal.).

5. *Farrell v. Gleeson*, 11 Cl. and Fin. 702; *In the matter of Blake*, 2 Ir. Ch. Rep. 643.

6. *Ashootosh Dutt v. Doorga Churn Chatterji*, (1880) 6 Cal. 504 (510)—Per White, J., and Halsbury, *Laws of England*, Vol. I, p. 38; and

in S. 216 of the Civil Procedure Code of 1859; and S. 248, of the Code of 1877: and the Code of 1882. Compare the present provisions of O. 21, R. 22, Civil Procedure Code, 1908.

The proceeding in the Supreme Court which was introduced into Chartered Courts from the English writ of *scire facias*, had the effect of reviving a judgment, and in 1859 the Chartered Courts at the presidencies were governed by their own procedure. The proceeding has since been displaced by the provisions of the Civil Procedure Codes, in none of which is an order for execution made after notice described as reviving the decree; but the new proceeding is substantially the same as old proceeding in its effect. It commences with a notice to show cause why the decree shall not be executed, and terminates with an order, which is tantamount to the award of execution under the writ of *scire facias*.⁷ But, a mere notice to show cause, or an application on which notice under O. 21, R. 22, Civil Procedure Code, is issued has not this effect.⁸ For a proceeding under O. 21, R. 22, to be a revivor, it is necessary that the Court which issued the notice should come to a determination that the decree is capable of execution, and the decree-holder is entitled to enforce it.⁹

As observed in *Kamini v. Aghore*,

"in order to constitute a revivor of a decree there must be expressly or by implication, a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it".¹⁰

And consequently, the mere issue or service of notice under O. 21, R. 22, Civil Procedure Code cannot be sufficient to declare a decree capable of execution so as to constitute a revivor under Art. 183,

Vol. X, pp. 18 and 53; also see *Futteh Narain v. Chunderbati*, 20 Cal. 551 and *Jogendra Chandra v. Shyamdas*, 36 Cal. 543 (The English case-law is exhaustively reviewed) and *Ganapathi v. Balasundra*, 7 Mad. 540; *Umrao v. Lachmi*, 26 All. 361.

7. *Ashootosh Dutt v. Doorga Churn*, (1880) 6 Cal. 504 (510); Followed in (1884) 7 Mad. 540 (542); (1892) 20 Cal. 551; (1896) 24 Cal. 244; (1904) 26 All. 361; (1907) 4 A.L.J. 405; (1909) 36 Cal. 543 (548); also see *Krishnaiya v. Gajendra Naidu*, (1917) 40 Mad. 1127 (Revivor of decree on notice to all defendants necessary).

8. *Monohar Das v. Futteh Chand*, (1903) 30 Cal. 979; also see *Khajeh Salaluddin v. Afzal Begam*, 39 C.L.J. 590=84 I.C. 68; *Amulya Ratan v. Banku Behari*, 87 I.C. 61=41 C.L.J. 159; also see *Kamini Debi v. Aghore Nath*, 11 C.L.J. 91=14 C.W.N. 357; *Chutterput v. Sumari Mull*, 43 Cal. 903 (F.B.); also see *Tribikram v. Badri*, 20 C.W.N. 1051.

9. *Ibid.*

10. *Kamini v. Aghore*, (1909) 14 C.W.N. 357=11 C.L.J. 91=4 I.C. 402; also see *Muthia Chettiar v. Chidambara Chetty*, 1928 Cal. 686=55 Cal. 578; *Amulya Ratan v. Banku Behari*, (1925) 87 I.C. 61=41 C.L.J. 159=1925 Cal. 668.

Limitation Act.¹¹ The test whether an order is an order of revivor or not is whether it decided that the decree is still capable of execution and the decree-holder is entitled to enforce it.^{11-a}

Illustrations.

(1) Where a notice was issued under Ss. 232 and 248, Civil Procedure Code, 1882 for the execution of a decree and further proceedings were dropped until after the period allowed by limitation computed from the date of such decree, it was held that there being no order made by the Court such notice alone did not operate as a revivor of the decree.¹²

(2) In *Suja Hossein v. Monohar Das*,¹³ where the order was made after notice on the judgment-debtor to show cause, and after hearing both parties if they desired to be heard, it was held, that the order made gave a right to execute the decree, and from that fresh starting point the time must run. And in *Ashootosh Dutt v. Doorga Churn Chatterji*,¹⁴ it was held that an order for execution operates as a revivor.

(3) Where a decree was passed by the High Court in 1887: and in June, 1892, an application for the transmission of the decree to the District Court was made to the High Court, upon which a notice was issued, and the following order was passed thereon: "Let execution issue as prayed, no cause being shown", it was held that the order of the High Court made after issue of notice under S. 248, Civil Procedure Code amounted to a revivor of the decree, within the meaning of Art. 180, Limitation Act, 1877 (now Art. 183).¹⁵

(4) An application by the assignee of a decree for an order that a certified copy of the decree together with a certificate of non-satisfaction be transmitted to a certain Court for execution and the order passed thereon directing the transmission of the decree and granting leave to proceed with the execution, do not amount to a revivor and do not operate to extend the period of limitation for execution of the decree under Art. 183, Limitation Act.¹⁶

(5) An order for execution operates as a revivor, because it necessarily implies such a determination. Where the objection of the judgment-debtor is overruled, and it is decided that the decree is not barred by limitation the effect of the order is to entitle the decree-holder to proceed with the execution and there is consequently a revivor of the decree.¹⁷

11. *Amulya Ratan Banerji v. Banku Behari Chatterji*, (1925) 87 I.C. 61=41 C.L.J. 159=1925 Cal. 668.

11-a. *Naraindas Dat v. Banku Behary Chatterjee*, 78 I.C. 1001, s.c., on appeal: *Banku Behary v. Narain Das*, 54 I.A. 129=54 Cal. 500=52 M.L.J. 565 (P.C.).

12. *Monohardas v. Futteh Chand*, (1903) 30 Cal. 979; Cf. *Ashootosh Dutt v. Doorga Churn Chatterji*, 6 Cal. 504; also see and cf. *Suja Hossein v. Monohardas*, 24 Cal. 244.

13. 24 Cal. 244.

14. 6 Cal. 504.

15. *Umrao Singh v. Lachmi Narayan*, (1904) 26 All. 361; Relied upon 24 Cal. 244; 30 Cal. 979 and 7 Mad. 540; cf. 84 I.C. 68.

16. *Salaluddin v. Mt. Afsul Begum*, (1924) 84 I.C. 68=39 C.L.J. 590=28 C.W.N. 963=1925 Cal. 23; Followed *Chutterput Singh v. Sait Sumari Mal*, 36 I.C. 602=23 C.L.J. 645=43 Cal. 903=20 C.W.N. 889.

17. *Kamini v. Aghore*, (1909) 14 C.W.N. 357=11 C.L.J. 91=4 I.C. 402.

2673. An application for the transmission of a certified copy of the decree is not an application for execution.¹⁸ In *Amulya Rattan v. Banku Behari Chatterji*,¹⁹ it was observed that an order directing the transmission of a decree is an administrative act which does not judicially determine the enforceability of the decree, and consequently, it does not amount to a "revivor" within the meaning of Art. 183, of the Limitation Act. Under the present and regular practice the order of transmission is rightly made *ex parte* as a ministerial act, without serving any notice of the application for the order of transmission on the judgment-debtor. His first information is a notice under O. 21, R. 22, from the Court to which the execution of the decree has been transferred, to show cause why the decree should not be executed by that Court.²⁰ However, at one time a practice prevailed of making the order after notice, which gave rise to a conflict of view as to the effect of order after serving notice on the judgment-debtor, and his failure to appear and oppose it.²¹ In *Suja Hossein v. Monohur Das*,²² it was held that such an order though after notice could not operate as a revivor. But, on review this decision was reversed,²³ on the ground that such an order made after notice was a step-in-aid of execution and as such had the effect of a revivor.²⁴ A Full Bench in *Chutterput Singh v. Sait Soomari Mal*,²⁵ held that where an application for transmission of the decree was made before the Registrar of the High Court under a certain rule framed on the original side of the High Court, by virtue of which rule the Registrar issued the notice under O. 21, R. 22, Civil Procedure Code, (1) the Registrar had no jurisdiction to issue the notice under that order; (2) that even if the notices were rightly issued by him, the mere service of notice under O. 21, R. 22 was not sufficient to revive the decree. This seems to reiterate the view held in 22 Cal. 921; and it has been accepted

18. *Salaluddin v. Afzul Begam*, (1924) 39 C.L.J. 590=84 I.C. 68=1925 Cal. 23.

19. (1925) 87 I.C. 61=41 C.L.J. 159=1925 Cal. 668.

20. Mitra's Limitation Act, Vol. II, p. 2123.

21. *Ibid.*

22. 22 Cal. 921; cf. 24 Cal. 244.

23. *Ibid.*

24. *Suja Hossein v. Monohurdas*, 24 Cal. 244; Relied on *Ashootosh Datt v. Doorgachurn*, 6 Cal. 504 and *Futteh Narain v. Chunderbati*, 20 Cal. 551; see also *Amulya Ratan v. Banku Behari*, 87 I.C. 61=41 C.L.J. 159=1925 Cal. 668 (The expression 'step-in-aid' under Art. 182, Cl. (5), is not to be confused, or treated as co-extensive in meaning, with the term 'revivor' under Art. 183).

25. 43 Cal. 903 (F.B.).

and followed in later cases.²⁶ Their Lordships of the Privy Council have held in *Banku Behari Chatterji v. Naraindas Dat*,²⁷ that an application for transmission of a decree from the High Court to the District Court is not by itself a revival of the decree within the meaning of the Act inasmuch as it is a mere ministerial act of an officer of the Court, and not the judicial act of a Judge; and that the matter is not affected by the fact that actually notice to the parties concerned had been given, though they need not have been given under the law.

2674. However, an order recognising transfer by assignment stands upon a different footing. The Order recognising transfer by assignment. transferee should give notice under the Code of Civil Procedure of the application for execution to the transferor, and the judgment-debtor,²⁸ and the notice issued being a notice of an application for execution, and not merely of assignment,²⁹ an order passed thereon amounts to a determination, under the circumstances, as to the executability of the decree,³⁰ and thus would operate as a revivor.³¹ This is, therefore, no exception to the rule formulated in the preceding paragraph that a decision passed with *jurisdiction* holding expressly or by implication that the decree is still capable of execution, and the person named in the decree is entitled to enforce it, essentially operates as a revivor.³² This principle is further supported by the following illustrative cases, of what constitutes a revivor.

26. *Amulya Ratan v. Banku Behari*, 41 C.L.J. 159=87 I.C. 61; *Chutterput v. Dayachand*, 23 C.L.J. 641=11 I.C. 216; *Salaluddin v. Afsal Begum*, 39 C.L.J. 590=84 I.C. 68; *Narain Das v. Banku Behari*, 78 I.C. 1001=1925 Cal. 213; *Pierce Leslie & Co. v. Perumal*, 40 Mad. 1069 (F.B.); *Hazarilal v. Baidyanath*, 63 I.C. 116 (Cal.).

27. 1927 P.C. 73=101 I.C. 24=54 Cal. 500=54 I.A. 129=52 M.L.J. 569 (P.C.).

28. *Ramchandra v. Subramania*, 14 M.L.J. 393; *Annamalai v. Ramier*, 18 M.L.J. 24.

29. *Mt. Gulab Kuer v. Syed Mohd. Zafar Hossan*, 6 P.L.J. 358; *Mt. Bhagwant Kuer v. Dewan Zamin*, 3 Pat. 596.

30. *Raja of Ramnad v. Vellusami Tevar*, 48 I.A. 45=40 M.L.J. 197 (P.C.).

31. *Pitam v. Tota*, 29 All. 301; *Annamalai v. Ramier*, 18 M.L.J. 24; *Palaniappa v. Valliammai*, 52 Mad. 590=56 M.L.J. 555; cf. *Mahalinga v. Kuppunachariar*, 30 Mad. 541 [Under the proviso to S. 232, Civil Procedure Code, 1882, (O. 21, R. 16, Civil Procedure Code), the transferee of a decree could not obtain execution without notice to judgment-debtor, or his representative].

32. *Chutterput Singh v. Sait Sumari Mall*, 43 Cal. 903 (F.B.); *Banku Behari v. Narain Das*, 54 I.A. 129=54 Cal. 500=52 M.L.J. 565 (P.C.); *Kamini v. Aghore Nath*, 11 C.L.J. 91=14 C.W.N. 357; *Amulya Ratan v. Banku Behari*, 41 C.L.J. 159=87 I.C. 61; also see *Palaniappa v. Valliammai*, 52 Mad. 590=56 M.L.J. 555.

Illustrations.

(1) An order for execution after notice is effective as a revivor³³, though an order dismissing an execution proceeding for want of prosecution cannot amount to a revivor.³⁴

(2) Where the objection of the judgment-debtor was overruled, and it was decided that the decree was not barred by limitation, the effect of the order was to entitle the decree-holder to proceed with the execution and there was consequently, a revivor of the decree.³⁵

(3) Where an *ex parte* decree was obtained against a firm of which one S, was a partner: and an application for execution being made against the firm, S appeared and obtained an adjournment for moving to set aside the decree; and a rule was issued on the decree-holder, giving rise to an issue as to whether S was partner in defendant's firm, and this issue was determined against S; it was held that this did not by implication contain a determination that the decree was still capable of execution, as no question of right to execute the decree was before the Court, and the order confined to the simple question of S's partnership could not be regarded as determining the question whether decree-holder had a subsisting right to execute the decree, and did not constitute a revivor.³⁶

2675. It has been held by the Madras High Court, than an order of revivor of decree on the original side against the first defendant, under S. 248 of the old Code (O. 21, R. 22), was inoperative as against the second defendant to whom no notice went.³⁷ This rule requires notice to go to the person against whom execution is applied for, and sub-S. (6) of the third column of Art. 182 of the Limitation Act, 1877, provided that when such notice has been issued, the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him is to form a fresh starting point.³⁸ Explanation I of Art. 182 refers only to applications under Art. 182 and has nothing to do with the revivor of original side decrees, the applications provided for by Art. 183 being in terms excluded under Art. 182 of the Limitation Act.³⁹ For the purpose of Art. 183 of the Limitation Act, where an order of revivor is made without notice to one of the judgment-debtors the

33. *Monohar Das v. Futtehchand*, 30 Cal. 979; *Jogendra Chandra v. Shyamdas*, 36 Cal. 543; *Chutterput Singh v. Sait Sumari Mull*, 43 Cal. 903 (F.B.); *Krishnaiya v. Gajendra*, 40 Mad. 1127 and *Palaniappa v. Valliammai*, 52 Mad. 590=56 M.L.J. 555.

34. *Amulyaratan v. Banku Behari*, 41 C.L.J. 159=87 I.C. 61.

35. *Kamini Debi v. Aghore Nath*, (1909) 4 I.C. 402=11 C.L.J. 91=14 C.W.N. 357.

36. *Muthiah Chettiar v. Chidambaram*, 1928 Cal. 686=55 Cal. 578=110 I.C. 404=32 C.W.N. 336.

37. *Krishnaiyah v. Gajendra Naidu*, 40 Mad. 1127=22 M.L.T. 20=6 L.W. 290=40 I.C. 608=33 M.L.J. 533.

38. *Ibid.*

39. *Ibid.*

order has no effect as against him or his property, and therefore, an application for execution against such a judgment-debtor brought 12 years after the date of the decree is barred by limitation.⁴⁰ The object of the notice under O. 21, R. 22, Civil Procedure Code, is to enable the judgment-debtor to show cause why the decree should not be executed, and also to give him an opportunity of satisfying the decree. Where one of several judgment-debtors has no interest whatever in the property affected by the decree, the failure to serve the notice under O. 21, R. 22, Civil Procedure Code on him does not vitiate the execution proceeding.⁴¹

As an order operating as a revivor in favour of one can be of no avail to any of the other decree-holders, an execution of the decree by the prior mortgagee will not amount to a revivor of the right of the puisne mortgagee.⁴²

Effect of revivor in favour of one decree-holder.

2676. ACKNOWLEDGMENT, AND PAYMENT—Ss. 19 AND 20.—See notes under Ss. 19, 20 and 21, *ante*.

In *Purmanand Das v. Vallabhdas*,⁴³ it was contended that Ss. 19 and 20 do not apply to cases coming within Art. 183 (Art. 180 of Act XV of 1877). The latter is the more specific rule, and must prevail. If Ss. 19 and 20 were intended to apply to Art. 183, the words in that article as to payments and acknowledgments would be unnecessary. But the question was left open. The **Patna High Court** has held in *Tugan Mal v. Ladhulal*,⁴⁴ that the provisions of Art. 183 regarding acknowledgments as well as payments are self-contained and must be read independently of Ss. 19 and 20. This is exactly the view which seems to have been taken by Srinivasa Aiyangar, J., in *Arjee Prabappa Chetti v. Koneti Desikachari*,⁴⁵ where it was observed that

"the payment under Art. 183 is not required to be made either by the debtor or by some person acting on his behalf. The difference of wording is significant, and . . . fully intended. It follows therefore that even if the payment is for the judgment-debtor or on his own account, it would be a payment that will save limitation giving rise to a fresh starting point."

Following this view, it has been held in the Patna case above mentioned

40. *Maclaren v. Veeriah Naidu*, (1916) 32 I.C. 1003=38 Mad. 1102.

41. *Tara Prasanna v. Janendra Narain*, (1925) 88 I.C. 1039=1926 Cal. 86 (Under Art. 182, an execution application against some of several judgment-debtors is to be treated as one against all of them).

42. *Narain Das v. Banku Behari*, 78 I.C. 1001: s.c. on appeal *Banku Behari v. Naraindas*, 54 I.A. 129=54 Cal. 500=52 M.L.J. 565 (P.C.).

43. (1887) 11 Bom. 506 (510).

44. 1931 Pat. 218=10 Pat. 213=132 I.C. 109=12 P.L.T. 888.

45. 1925 Mad. 1131=90 I.C. 1028.

"that the word 'payment' has been used in Art. 183 in a wider sense than in S. 20, Limitation Act, and that the word 'payment' as used in Art. 183 is not qualified in any way as to the mode in which the payment is to be made or as to the person who is to make it".⁴⁶

The article also does not contain any word to prescribe any time during which the payment or acknowledgment must be made.⁴⁷ Nothing is said in this article as to *when* a payment must be made or an acknowledgment given,⁴⁸ nor in terms *by whom* the payment is to be made though the word "paid" may by implication be read as qualified by the words "by the person liable to pay".⁴⁹

2677. DIFFERENCE BETWEEN ARTS. 182 AND 183.—It would be noticed that Arts. 182 and 183 differ in the following respects:

(1) **Period.**—Article 182, gives a period of *three* years: whereas the period provided by Art. 183, is twelve years.

(2) **Starting point.**—Article 182 has a *fixed* starting point, *viz.*, the date of the decree or order; whereas the starting point under Art. 183, depends on the right to enforce the judgment of High Courts exercising ordinary original jurisdiction.⁵⁰

(3) **Revivor: payment: or acknowledgment.**—Art. 183 has an *express* provision as to decree-holder being entitled to a *fresh* period of *twelve* years from the date of *every* revivor, payment or acknowledgment.

(4) **Section 48 (2), Civil Procedure Code** is not applicable to cases governed by Art. 183¹; whereas Art. 182 expressly refers to S. 48, Civil Procedure Code so that the decrees of the *ordinary* Civil Courts *are* governed by S. 48, Civil Procedure Code.²

46. *Tugan Mal v. Ladhulal*, 1931 Pat. 218=10 Pat. 213.

47. Dr. Pal's Limitation Act, p. 1284.

48. Mitra's Limitation Act, Vol. II, p. 2125.

49. *Bradshaw v. Widdrington*, (1902) 2 Ch. 430 (450) (Under S. 40 3 and 4 Will. IV, c. 27, and S. 8 of 37 and 38 Vict., c. 57, the words are almost exactly the same).

50. In the matter of *Candas Narrondas v. C. A. Turner*, 13 Bom. 520=16 I.A. 156 (P.C.).

1. *Mayabhai v. Tribhuvandas*, (1882) 6 Bom. 258 (260); also see *Ganapathi v. Balasundram*, (1884) 7 Mad. 540 (545); *Futteh Narain v. Chundrabati*, (1893) 20 Cal. 551 (557); *Jogendra Chundra v. Shyamdas*, (1909) 36 Cal. 543=1 I.C. 168 (174)=9 C.L.J. 271.

2. See Mitra's Limitation Act, Vol. II, pp. 2126-2127.

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Suit for possession not barred under Art. 118,—1777, 1731.

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Starting point of limitation,—“*Interference*”,—1788, 1742.

Suit to obtain a declaration that an adoption is valid,—1739.

ARTICLE 120,—1789-1860, 1743-1801.**Applied,—**

Claim by one pre-emptor against another,—Art. 10. 994, 1053.

Pre-emption on sale of equity of redemption by unregistered deed,—993, 1051.

Succession by nomination or under Will, to a non-hereditary office,—Art. 124. 1893, 1834.

Suit by co-sharer to recover his share in the profits of a ferry,—cf. Art. 115,—1711, 1682.

Suit by joint tenants for compensation for use and occupation,—cf. Art. 110,—1666, 1642.

Suit for an account without dissolution,—cf. Art. 106,—1634, 1616.

Suit for arrears of assessment,—cf. Art. 110,—1666, 1642.

Suit for arrears of customary dues and cesses,—cf. Art. 110,—1668, 1643.

ARTICLE 120—(Contd.)**Applied—(Contd.)**

- Suits for declaration, and injunction,—1091, 1133.
- Suit for non-hereditary office of Karnam, or village accountant,—
cf. Art. 124,—1893, 1834.
- Suit for personal decree against mortgagor, where mortgagee deprived of mortgaged security,—cf. Art. 97,—1589, 1576.
- Suit for possession of land based on previous compromise,—cf. Art. 113,—1693, 1665.
- Suit for pre-emption on perpetual lease,—994, 1053.
- Suit for recovery of arrears of rent against co-owner tenant,—
cf. Art. 115,—1711, 1682.
- Suit for recovery of instalments of profession-tax,—not falling under Art. 6,—963, 1026.
- Suit for refund of money paid on account of octroi,—Art. 2. 931, 1001.
- Suit to enforce pre-emption against unregistered deed of conditional sale relating to property not admitting of physical possession,—cf. Art. 10,—981, 1039.
- Suit to recover possession as *dharmkarta* based on prescription,—
cf. Art. 124,—1893, 1834.
- Suit to recover surplus sale-proceeds of a sale for arrears of Government revenue,—963, 1026.
- where property pre-empted not admitting of physical possession,—
Art. 10. 994, 1052.
- Corresponding provisions,—1789, 1745.
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- of invalidity of trust-property,—1802, 1757.
- Declaratory suits**,—1796-A, 1755.
- by reversioners of a male proprietor,—1804, 1758.
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- against Government,—1796-A, 1753.
 - against validity of elections,—1808, 1763.
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 - by co-sharer in possession,—1796-A, 1753.
 - of heirship,—1808, 1763.
 - of invalidity of an alienation,—1796-A, 1755.
 - of invalidity of a marriage ceremony,—1808, 1764.
 - of periodically recurring right,—1808, 1764.
- Declaration of right** as purchasers,—1796-A, 1754.
- by reversioners,—1808, 1764.
 - of Muhammadan widow to customary life interest,—1808, 1763.
 - to actual possession,—1796-A, 1752.
- Declaration of title**,—
- and confirmation of possession,—1796-A, 1753.
 - under family custom,—1796-A, 1755.
 - to property sold in execution,—1796-A, 1753.
 - to share in moveable property,—1808, 1765.
 - to share of shamilat,—1796-A, 1754.
 - under direction of revenue Court,—1808, 1763.
- Declaration**,—
- that decree against plaintiff was passed by gross negligence or misconduct of his guardian *ad litem*,—1808, 1762.
 - that landlord not entitled to excess collection,—1808, 1764.
 - that plaintiffs are mutwallis,—1796-A, 1754.
 - that property not liable to sale in execution,—1796-A, 1754.
- Illustrative cases**,—1796-A, 1752.

ARTICLE 120—(Contd.)

Declaratory suits—(Contd.)

Order under Land Registration Act,—1796-A, 1754.

re. attachment by Magistrate,—1807, 1761.

respecting grant of mineral rights,—1796-A, 1752.

Section 42, Specific Relief Act,—1795, 1751.

Suit by the beneficiary,—1796-A, 1755.

Suit for declaration of injunction by worshippers,—1808, 1762.

Residuary article,—1790, 1745.

Scope and application,—

Suit against an order not deciding a question of title,—Cf. Art. 13. 1812, 1768.

arising out of attachment before judgment,—1811, 1767.

by auction-purchaser for refund of money for default on part of vendor,—Cf. Art. 97. 1834, 1781.

by executors for money spent on behalf of the estate,—Cf. Art. 132. 1850, 1790.

by a Hindu to set aside his father's alienation,—Cf. Art. 126. 1847, 1789.

by liquidator against Directors for mis-application of company's funds,—1817-1818, 1771.

by liquidator for calls,—Cf. Art. 112. 1840, 1784.

by one co-sharer against another for share of rent,—Cf. Arts. 48, 49, 62 and 109. 1824, 1777.

by other joint-tenants for compensation in respect of exclusive use and benefit by defendants,—Cf. Art. 36. 1817-1818, 1770.

by reversioner to have the alienation by female declared void,—Cf. Art. 125. 1846, 1789.

by reversioner to recover moveable property on death of a Hindu female,—Cf. Art. 141. 1851, 1791.

by shebait for money spent out of private funds,—Cf. Art. 132. 1850, 1790.

by shebait for sums advanced by him to the trust,—Cf. Art. 132. 1850, 1790.

by the holder of a bond to enforce his security against the sons of the surety,—Cf. Art. 132. 1850, 1790.

for an account against a trustee,—Cf. Art. 62. 1824, 1774.

for account of outstanding collections by a divided member of Hindu family,—Cf. Art. 89. 1830, 1780.

for account of the profits of joint family property,—Cf. Art. 62. 1824, 1774.

Suits for compensation for acts other than tort or breaches of contract,—Cf. Art. 36. 1817-1818, 1770.

for breach of contract,—Cf. Art. 115. 1882, 1786.

for breach of a registered contract,—Cf. Art. 116. 1843, 1787.

Suits for contribution in respect of money paid by plaintiff,—Cf. Art. 61. 1823, 1773.

Suits for declaration

against official act or order,—Cf. Art. 14. 1813, 1768.

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of title to immoveable property,—Cf. Arts. 142, 144. 1852, 1791.

Suit for declaration or possession concerning non-hereditary office,—Cf. Art. 124. 1845, 1788.

Suit for dissolution and accounts of a partnership,—Cf. Art. 106. 1836, 1782.

ARTICLE 120—(Contd.)**Scope and application—(Contd.)***Suits for mesne profits,—*

Cf. Art. 109. 1824, 1775.

Collected by a co-owner,—Cf. Arts. 62 and 109. 1837, 1783.

Suit for money decree on mortgage bond,—Cf. Art. 132. 1850, 1789.

Suit for money lent by sale of property pledged,—Cf. Arts. 57 and 59. 1822, 1772.

Suit for partition accounts based on agreement to distribute profits,—Cf. Art. 89. 1832, 1781.

Suit for pre-emption,—Cf. Art. 10. 1810, 1765.

Suits for proceeds of goods lost or acquired by conversion,—Cf. Art. 48. 1819, 1771.

Suit for recovery of instalment of profession-tax,—1809, 1765.

Suit for recovery of money due on a decree assigned to plaintiff,—Cf. Art. 79. 1815, 1770.

Suit for recovery of money payable under terms of any award,—Cf. Art. 113. 1841, 1784.

Suit for recovery of sum to adjust difference in partition,—Cf. Art. 111. 1839, 1784.

Suit for refund of money paid by plaintiff,—Cf. Art. 62. 1825, 1777.

Suit for rent against Co-owner,—Cf. Art. 110. 1838, 1783.

Suit for share of intestate estate,—Cf. Art. 123. 1844, 1787.

Suit for share of moveable property,—Cf. Art. 49. 1820, 1772.

Suit for work and materials of buildings,—Cf. Arts. 52 and 56. 1821, 1772.

Suit on administration surety bond,—Cf. Art. 68. 1827, 1779.

Suit on bond hypothecating cattle,—Cf. Art. 80. 1829, 1780.

Suit to enforce obligations arising out of decrees for accounts,—Cf. Art. 64. 1826, 1779.

Suit to enforce a mortgage of a turn of worship,—Cf. Art. 132. 1850, 1790.

Suit to establish a periodically recurring right,—Cf. Art. 131. 1849, 1789.

Suit to recover damages resulting from a conspiracy,—Cf. Art. 23. 1814, 1769.

Suit to recover money wrongly distributed or paid,—Cf. Art. 29. 1816, 1770.

Suit to recover remuneration as *dwaris* of temple,—Cf. Art. 102. 1835, 1782.

Suit to recover sale-proceeds from agent,—Cf. Art. 89. 1831, 1781.

Suit to set aside decree on ground of gross negligence of guardian of a minor,—Cf. Art. 95. 1833, 1781.

Suit upon a promissory note with special agreement,—Cf. Art. 73. 1828, 1779.

Starting point of limitation,—

Cause of action,—1853, 1752.

Certificate under Pensions Act,—1854, 1792.

Date of confirmation of sale,—1854, 1792.

Date of infringement of right,—1854, 1792.

Date of knowledge of right,—1858, 1794.

Fresh cause of action,—1860, 1797.

Misfeasance of directors of companies,—1857, 1794.

Recurring cause of action,—1859, 1796.

“*Right to sue*,” meaning of,—1853, 1792.

Suit, by a creditor to avoid an alienation,—1795, 1756.

ARTICLE 120—(Contd.)**Suit—(Contd.)**

- by a creditor to declare an alienation by judgment-debtor fraudulent,—Art. 11. 1026, 1080.
- by heirs of a Muhammadan intestate for possession of moveable property,—Cf. Art. 123. 1883, 1819.
- by reversioner to have alienation by a female declared void,—1803, 1757.
- for accounts of trust property,—1793, 1749.
- for arrears of rent against co-owner tenant of part of joint-property,—Cf. Art. 110. 1666, 1642.
- for cancellation of a will,—1800, 1756.
- for injunction,—Perpetual or mandatory,—1794, 1750.
- for which no period of limitation is provided for elsewhere in the schedule,—1743.
- to avoid sale of ancestral property by Hindu father,—1805, 1759.
- to set aside an instrument,—1798, 1755.
- to set aside sales,—1801, 1756.
- under special or local laws,—*
 - Municipal election rules,—1792, 1748.
 - Punjab Limitation Act I of 1900,—1792, 1748.
 - under Bengal Tenancy Act, S. 104 (H). 1792, 1747.
- When applied to suits for pre-emption,—See ART. 10. 994, 1052-1053.

ARTICLE 121,—1861-1870, 1801-1808.

- Adverse possession,—Whether an incumbrance,—1867, 1805.
- Adverse possession after creation of patni tenure,—1868, 1806.
- Application of Arts. 142 and 144. 1870, 1807.
- Corresponding provisions,—1861, 1802.
- explained,—“Encumbrance”,—1868, 1805-1806.**
 - “To avoid”,—an incumbrance, or undertenure,—1865, 1803-1804.
 - “To avoid”,—Notice not necessary,—1866, 1804.
- Legislative changes in,—1861, 1802.
- Notice to avoid an incumbrance or undertenure not necessary,—1866, 1804.
- Onus probandi**, on person asserting adverse possession after creation of patni,—1869, 1807.
- Scope and application,—**
 - Suit by assignee of auction-purchaser to avoid incumbrance,—1864, 1803.
 - Suit by auction-purchaser,—1863, 1803.
- Starting point of limitation,—**
 - Application of Arts. 142 and 144. 1870, 1807.
 - Date of refund of purchase-money,—2472, 2521.
- Suit, to avoid incumbrance or undertenures,—1801.

ARTICLE 122,—1871-1880, 1809-1817.

- Corresponding provisions,—1871, 1809.
- English law corresponding to,—1872, 1809.
- Recognizance bonds,—Criminal Procedure Code, Chap. 42. 1880, 817.
- Scope and application,—**
 - Decree not declaratory not enforceable by suit,—1874-1878, 1812-1816.
 - Judgment when enforceable by suit,—1873, 1810.
 - Suit based on an award,—1879, 1816.
 - Suit upon a judgment obtained in British India on a recognizance,—1808.

ARTICLE 123,—1881-1890, 1817-1829.

Corresponding provisions,—1881, 1817.

Explained,—

Extinguishment of right to sue,—S. 28. 1890, 1829.

"Payable", and "deliverable",—1890, 1829.

Suit for distributive share,—1889, 1826.

Suit for a legacy,—1887, 1824.

Suit for a share of the residue,—1888, 1824.

Legislative changes in,—1882, 1817.

Not applied,—

to heirs of a Muhammadan intestate,—1883, 1819.

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Scope and application,—Suit against executor *de son tort*,—1884, 1820.

against executor or representatives,—1883, 1818.

by heir against stranger,—Cf. Art. 144. 1886, 1823.

by heir against a tenant-in-common,—Cf. Art. 144. 1885, 1821.

for a legacy or share of residue,—1817.

Starting point of limitation,—

Suit for legacy or share of residue,—1890, 1828.

ARTICLE 124,—1891-1901, 1830-1845.**Adverse possession,—See ADVERSE POSSESSION.**

against next in succession to hereditary office,—1896, 1838.

against office-holder,—1895, 1837.

against person competent to sue,—1897, 1839.

among co-owners,—1898, 1841.

Claim to office barred by time,—1896, 1839.

Khazi Inam land,—1896, 1839.

Mortgage by a watandar,—1896, 1839.

of office of a karnam,—1896, 1839.

of personal right to manage property,—1894, 1835.

taking possession by adverse holders,—1900, 1843.

Alienation,

of hereditary office and endowed property, by a female office-holder,—1899, 1841.

Service tenures,—1899, 1843.

Suit by a stani for possession,—1899, 1842.

Tacking possession by adverse holders,—1900, 1843.

Void alienation of hereditary office, or endowed property,—1899, 1841.

Corresponding provisions.

Explained,

Definition of "hereditary office",—1892, 1831.

Non-hereditary office,—Succession by nomination,—1893, 1834.

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Definition,—1892, 1831.

Establishing right to office and receiving fee,—1892, 1833.

Khadimi rights,—1892, 1833.

Mutwalli, or trustee,—1892, 1832.

Reversion of managership to founder,—1892, 1832.

Scope of Art. 124. 1892, 1831.

Temporary incumbency,—1892, 1831.

The office of a shebait,—1892, 1831.

Non-hereditary office

Art. 120, application of,—1893, 1834.

Succession by nomination,—1893, 1834.

Succession under a will,—1893, 1834.

ARTICLE 124—(Contd.)**Scope and application,—**

Appointment to office by succession through inheritance,—1892, 1831.

Khadimi rights, partly by inheritance and partly by purchase,—1892, 1833.

Mutwalli or trustee managing endowed property,—Reversion of managership to founder,—1892, 1832.

Non-hereditary office,—Succession by nomination or under a will,—Cf. Art. 120. 1893, 1834.

Suit for property appurtenant to hereditary office,—1894, 1835.

Suit for the proper conduct of the Thakur's worship,—1892, 1831.

Suit for possession of hereditary office,—1830.

Suit for property appurtenant to office,—1894, 1835.

Adverse possession of personal right to manage property,—1894, 1835.

Claim to office and appurtenant property,—1894, 1836.

Co-trustees forming a collective trustee,—1894, 1836.

Extinguishment of title as trustee,—1894, 1837.

Starting point of limitation,—1901, 1844.

ARTICLE 125,—1902-1914, 1846-1859.**Alienation,—**

by Hindu or Muhammadan female,—

Declaratory suit not restricted to male reversioners,—1905, 1848.

Remedy of possession,—Art. 141. 1904, 1847.

Creation of occupancy rights by widow,—1912, 1856.

includes Court sale by collusive arrangement,—1912, 1856.

includes sham mortgage,—1912, 1856.

is an act which results in transfer of property,—1912, 1856.

The surrender of property by redemption to person not entitled is,—1912, 1856.

Conditions of applicability,—See SCOPE AND APPLICATION,—1906-1911, 1849-1855.

Corresponding provisions,—1902, 1846.

Explained,—

"*Alienation*," meaning of,—1912, 1855.

"*Land*," meaning of,—1913, 1857.

Land,—Applies to house property including site,—1913, 1857.

Legislative changes,—1902, 1846.

Scope and applicability,—

Alienation by a Hindu or Muhammadan female,—1911, 1854.

Alienation by a transferee of Hindu female,—1911, 1854.

Alienation by guardian of minor female,—1911, 1855.

Conditions of applicability of article.

(i) Alienation by a Hindu or Muhammadan female,—1911, 1854.

(ii) During the life of female life-tenant,—1906, 1849.

(iii) Title to possession on her death,—1907, 1849.

Suit by a remote reversioner, whether covered by the article,—1908-1910, 1850-1854.

Suit during the life of female life-tenant,—1906, 1849.

Suit for declaration by nearest reversioner at the date of institution of suits,—1907, 1849.

Suit for declaration during the life-time of a Hindu or Muhammadan female,—1903, 1846.

Title to possession on death of female life-tenant,—1907, 1849.

Starting point, of limitation,—1914, 1858.

ARTICLE 126,—1915-1924, 1860-1868.

"Alienation," of ancestral property,—1917, 1861.

includes gifts,—1917, 1863.

includes mortgage,—1917, 1862.

includes sale by Hindu father as guardian of his son,—1919, 1864.

Corresponding provisions,—1915, 1860.

Explained,—

"Alienation" of ancestral property,—1917, 1861.

Alienation includes gifts and mortgages,—1917, 1862-1863.

Father's alienation,—1919, 1864.

"Setting aside," involves consequential relief,—1918, 1863.

Scope, and application,—

Alienation by father in conjunction with an uncle,—1919, 1864.

Father executing sale as guardian,—1919, 1864.

Mitakshara doctrine,—1916, 1861.

Suit by a Hindu to set aside his father's alienation of ancestral property,—1859.

Suit for declaration and possession,—1918, 1863.

Suit for the annulment of the sale,—1918, 1863.

Starting point of limitation,—1920, 1865.

After born son not entitled to benefit of Ss. 6 and 7,—1924, 1868.

Minor plaintiff,—benefit of Ss. 6 and 8,—1921, 1865.

No fresh cause of action to after born son,—1923, 1867.

Suit by son born after date of sale,—1922, 1866.

ARTICLE 127,—1925-1938, 1868-1885.

Corresponding provisions,—1925, 1869.

Essentials of the article,—1927-1936, 1870-1884.

Exclusion from participation,—1933, 1880.

Suit between Muhammadan co-heirs,—1929, 1874-1877.

Suit by a member of joint-family,—1927, 1870-1872.

Suit regarding joint family property,—1928, 1872-1874.

Suit to enforce a right to share,—1930-1932, 1877-1878.

Exclusion from joint family property,—

on conversion to Islam,—1935, 1882.

Orders in mutation proceedings,—1935, 1882.

What is?—1935, 1882.

Exclusion from participation,—1933, 1880.

Illustrative cases,—1935, 1881.

Intention to exclude,—1933-1935, 1880-1881.

Knowledge of exclusion,—1934, 1881.

Non-participation in profits not sufficient,—1931, 1878.

Onus on defendant to prove exclusion,—1932, 1879.

Onus on plaintiff to prove title,—1932, 1879.

Physical possession as servant, etc.,—1935, 1881.

Question of exclusion one of fact,—1933, 1880.

Receipt of maintenance,—1935, 1881.

Explained,—

"By a person,"—1926, 1870.

"Joint family property,"—1926, 1870.

Legislative changes,—1926, 1870.

Scope and application,—

Essentials of the article,—1927-1936, 1870-1884.

Exclusion from participation,—1933, 1880-1881.

Exclusion from whole of joint family property,—1936, 1883.

Joint family property,—1928-1929, 1872-1876.

Division of status,—1928, 1873.

Partial partition,—1928, 1873.

Technical sense of—, 1929, 1876.

ARTICLE 127—(Contd.)**Scope and application—(Contd.)**

Moveable property,—1928, 1872.

Non-participation in profits, not sufficient,—1931, 1878.

Scope and applicability,—*Suits* between Muhammadan co-heirs,—1929, 1874.

by a member of joint Hindu family,—1927, 1870.

by a person excluded from joint family property to enforce a right to share therein,—1868.

Suit for partition,—1930-1932, 1877-1880.*Onus* on defendant to prove exclusion,—1932, 1879.*Onus* on plaintiff to prove title,—1932, 1879.*Suit* to enforce a right to a share,—1930, 1877.**Starting point of limitation**,—1937, 1884.

Minority of plaintiff,—1938, 1885.

ARTICLES 128, 129,—1939-1940, 1886-1888.

Corresponding provisions,—1939, 1886.

Scope and application,—Plaintiff's claim based on contract evidenced by a compromise decree,
—Cf. Art. 115. 1940, 1887.*Suit* by a Hindu,—1940, 1887.**Starting point of limitation,—***Suit* by son born after date of sale,—1922, 1866.**Suit** by a Hindu for arrears of maintenance,—Art. 128. 1885.by a Hindu for a declaration of his right to maintenance,—Art. 129.
1885.**ARTICLE 130,—1941-1946, 1888-1895.****Corresponding provisions**,—1941, 1889.

in English law,—1941, 1890.

under previous Acts, and Regulations,—1941, 1888-1890.

Scope and application,—Article does not apply unless and until the land is found to be
rent free,—1944, 1892.

Mere non-payment of rent not sufficient,—1944, 1892.

Relationship as landlord and tenant,—1942, 1891.

Rent-free land requisite,—1942-1945, 1890-1891.

Resumption or assessment of rent-free land,—1943, 1891.

Right to levy assessment upon rent-free land,—Extinguishable under
S. 28. 1945, 1893.*Suit* for resumption or assessment of rent-free land,—1888.**Starting point of limitation**,—1946, 1894.**ARTICLE 131,—1947-1955, 1895-1906.****Corresponding provisions**,—1947, 1895.**Explained**,—"Suit to establish",—1951, 1900.**Periodically recurring right,—**

Illustrative cases,—1949, 1896.

Pala or turn of worship,—1949, 1896.

Perpetual right,—1950, 1900.**Scope and application,—**

Malikana or annually recurring charges,—1949, 1896.

Periodically recurring right,—1948, 1896.

Perpetual right not governed by—, 1950, 1900.

Right to recover burial fees,—1949, 1898.

Suit for rent,—1949, 1898.*Suit* to recover money under periodically recurring right,—1949,
1897.*Suit* to establish a periodically recurring right,—1895.

ARTICLE 131—(Contd.)**Starting point of limitation,—**

Extinguishment of right,—1955, 1906.

Illustrative cases,—1953, 1904.

Non-payment within twelve years,—1954, 1905.

Refusal of the enjoyment of right,—1952-1955, 1903.

ARTICLE 132,—1956-2000, 1906-1958.**"Charge,"**

Comprehensive sense of—, 1972, 1923.

created by act of parties,—1974, 1926.

Intention to create a charge,—1974, 1926.

Interest charged on lands,—1975, 1927.

Mortgage deed executed by father when not enforceable against his sons,—1976, 1928.

Created upon immoveable property,—

Building contract,—Cf. Arts. 52, 56. 1977, 1929; also see 1972-A, 1925.

Handnote followed by security bond,—1972-A, 1925.

distinguished from a mortgage,—1971, 1922.

not within S. 100, T. P. Act,—1972-A, 1924.

on substituted security,—1986, 1934.

Illustrations,—1987, 1935.

under operation of law,—1978-1985.

contribution between co-mortgagors,—1983, 1931.

contribution whether a charge on immoveable property,—1985, 1933.

Dower-debt,—1978, 1930.

House-tax and water-tax,—1978, 1930.

Illustrative cases,—1987, 1935.

Maintenance of Hindu widows,—1978, 1929.

Maintenance of illegitimate sons,—1978, 1929.

mortgagee's charge on surplus of revenue sale,—1982, 1931.

Purchaser's lien,—1981, 1931.

Suit for contribution between co-sharers,—1984, 1933.

vendor's lien,—1980, 1930.

Corresponding provisions,—1956, 1908.

Decree making a sum of money charge upon immoveable property,—1972-A, 1925.

Explained,—*"Charged upon immoveable property,"*—1971, 1922.*"Immoveable property,"*—1988, 1937.*"Money"* "charged upon immoveable property,"—1970-1971, 1921-1922.**Explanation (a),—**Malikana and Haqq,—1989, 1939.**Explanation (b),—**Suit to enforce charge on agricultural produce,—1990, 1941.**Explanation (c),—**Equitable mortgage,—1991, 1942.**Immoveable property,—**

Decree for sale based on mortgage,—1988, 1938.

Mango grove apart from land is not—, 1988, 1939.

Standing trees are—, 1988, 1938.

Tenant's right in a grove of fruit-bearing trees,—1988, 1939.

Toda giras hak,—1988, 1938.

Turn of worship at a temple,—1988, 1938.

Legislative changes,—1957, 1908; also see 1956-1960, 1908-1910.

Maintenance as a charge upon immoveable property,—1972-A, 1924.

Maintenance of Hindu widows,—1978, 1929.

ARTICLE 132—(Contd.)

Maintenance of illegitimate sons,—1978, 1929.

Not applied,—

Suit against surety to enforce simple money bond,—Cf. Art. 116. 1972-A, 1926.

Suit by representatives of puisne mortgagee for redemption of prior mortgage,—Cf. Art. 148. 1969, 1920.

Sut for declaration of charge,—Cf. Art. 120. 1965, 1915.

Suit for personal remedy,—1962, 1912.

Suit to enforce charge upon moveable property,—Art. 120. 1966, 1915.

Previous History,—1958-1960, 1909-1910.

Scope and applicability,—

Charge created by act of parties,—1974, 1926.

Charge upon immoveable property,—1973, 1926.

Charge under operation of law,—1978, 1929.

Distinction between Art. 132 and Art. 148. 1969, 1919.

English mortgage,—1963, 1914.

Mortgage by conditional sale,—1964, 1915.

Not applied,—1962, 1969, and 1972-A, 1912, 1920 and 1926.

Suits against mortgagor or stranger in possession,—1968, 1916.

for account,—money charged upon immoveable property,—1972-A, 1925.

for personal remedy,—1962, 1912.

for sale on basis of mortgage by conditional sale,—1964, 1915.

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on simple mortgage,—1967, 1916.

to enforce charge against stranger or trespasser,—1968, 1918.

to enforce payment,—1961-1970, 1911-1921.

to enforce payment of money charged upon immoveable property,—1906.

Starting point of limitation,—1186, 1204.

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- Order 37, Rule 3,**—(Section 533, C. P. Code, 1882)—Summary procedure, *re* negotiable instruments,—**Art. 159.** 2368.
- Order 41, Rule 19,**—(Section 540, C. P. Code, 1882)—Re-admission of appeal,—**Art. 168.** 2385, 2435.
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- Order 45, Rule 2,**—(Sections 598 and 599, C. P. Code, 1882)—Privy Council appeal,—**Art. 179.** 2449, 2492.
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- capable of execution,—Art. 182. 2524, 2594.
- Consent—, and setting aside of—, on ground of fraud,—See Art. 95.
- Copy of—, Time requisite for obtaining a—, Art. 152. 2301, 2346.
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 - Starting point of limitation,—Art. 157. 2315, 2359.
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- Decree nisi* when made absolute,—Art. 148; also see Art. 181.
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 - against debtor and surety,—See Art. 182, Expl. I.
 - against a dead man, or wrong legal representative,—See Art. 182 (5).
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 - when governed, by Art. 181.
 - where there has been an appeal,—Art. 182 (2).
- Final, is the decree for execution,—Art. 182 (2). 2533, 2602.
- for accounts,—Suits to enforce obligations arising out of—, Art. 120,—Cf. Art. 64. 1826, 1779.
- for injunction,—Application for execution—Starting point of limitation,—Art. 182. 2523, 2591.
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- for partition,—See **Art. 181**.
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- for *personal* decree in mortgage suits for balance,—O. 34, Rr. 6 and 8-A,—See **Art. 181**.
- for pre-emption,—Application for execution—Starting point of limitation,—**Art. 182. 2523, 2592**.
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- for sale, on basis of mortgage,—Immoveable property,—**Art. 132. 1988, 1938**.
- Foreign—, See **Arts. 181, 182 (5)**.
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- incapable of execution, at the date of—, See **Art. 181**; also **Art. 182 (1)**.
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- Instalment—, with proviso:—Waiver of default,—See **Art. 182 (7)**; also see **Art. 75**: and **INSTALMENT DECREE**.
- Issue of—, Starting point,—Suit for attorney's costs,—**Art. 84. 1492, 1469**.
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- Mortgage—, See **Art. 181**: also **Art. 182 (1). 2525, 2595**.
- must be in proper Court,—See **Art. 182 (5). 2580-2584, 2651-2657**.
- Obtained by fraud,—**
 - against minor treated as of age,—Cf. **Art. 95. 1571-A, 1554**.
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 - Declaratory relief,—**Art. 120. Cf. Art. 95. 1571-A, 1552**.
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- of High Court in original jurisdiction,—See **Art. 183**.
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 - for gross negligence of guardian of a minor,—Suit for—, **Art. 120, Cf. Art. 95. 1833, 1781**.
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Plaintiff's application to bring in representative of deceased—, See Art. 177. 2473.

Severally liable—, Joint and several liability,—Art. 182. 2685, 2722.

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DEMAND

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DE SON TORT

- Executor—, See **Art. 123. 1884, 1820.**

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DEVISEE

- Suit by, for possession of immoveable property,—**Art. 140. 2083, 2048.**

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- does not generally prevent operation of limitation,—See **Art. 142. 2141, 2116.**
- wrongful possession determines on—, **Art. 142. 2141, 2116.**

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- Misfeasance of—, Starting point,—**Art. 120. 1857, 1794.**
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DISABILITY

- Subsequent—, Effect of—, Starting point of limitation,—**Art. 141. 2112, 2083.**
- with reference to the various starting points of **Art. 182. 2512, 2584.**
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- as to grant of equitable relief by specific performance of contract,—**Art. 113. 1686, 1658.**
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- implies previous possession,—**Art. 142. 2158, 2136.**
- Meaning of—, **Art. 3. 950, 1017;** also **Art. 142. 2150-2154, 2130-2134.**
- Onus of proving—, within 12 years on plaintiff,—**Art. 142. 2135, 2107.**
- Otherwise than in due course of law,—Specific Relief Act, S. 9. **940, 1009.**
- Permissive possession not a—, **Art. 142. 2154, 2134.**
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DISSOLUTION OF MARRIAGE

- and declaration as to divorce,—Suit for—, Starting point,—**Art. 120. 1859, 1797.**

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and injunction,—**Art. 32. 1180, 1198.**

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Minor not properly represented,—Art. 12. 1048-1052, 1102-1103.

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Patni sales when final,—Art. 12. 1074, 1120.

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 - acceptor of an accommodation bill against drawer,—Art. 79. 1446.
 - adopted son for possession,—Art. 144. Cf. Art. 141. 2097, 2063.
 - assignee of auction-purchaser to avoid an incumbrance or under-tenure,—Art. 121. 1864, 1803.
 - assured to recover premia paid,—Art. 87. 1490.
 - attorney or vakil for his costs,—Art. 84. 1467; also 1493, 1473.
 - auction-purchaser for refund of money for default on payment of vendor,—Art. 120. Cf. Art. 97. 1834, 1781.
 - auction-purchaser to avoid incumbrance or under-tenures,—Art. 121. 1863, 1802.
 - auction-purchaser to recover possession of land against trespasser,—Art. 121. 1869, 1807.
 - company to enforce liability of a shareholder,—Art. 115. 1708, 1678.
 - company to recover overdue call,—Art. 112. 1682, 1655.
 - consignor and consignee for loss or non-delivery of goods,—Arts. 30 and 31. 1173, 1191.
 - consignor for compensation,—Art. 115. 1710, 1680.
 - co-sharer to recover share of profits in a ferry,—Art. 120. Cf. Art. 115. 1711, 1682.
 - creditor to avoid an alienation,—Art. 120. 1799, 1756.
 - defendant for contribution,—Art. 61. Cf. Art. 115. 1711, 1682.
 - defendant partner to enforce rights,—Art. 106. 1637, 1619.
 - devisee for possession,—Art. 140. 2042.
 - executors, etc., under Act XII of 1855,—Art. 20. 1151.
 - executors, etc., under Act XII of 1855,—Art. 21. 1154.
 - executors for money spent on behalf of estate,—Art. 120. Cf. Art. 132. 1850, 1790.
 - heir against stranger,—Art. 144. Cf. Art. 123. 1886, 1823.
 - heir against tenant-in-common,—Art. 144. Cf. Art. 123. 1885, 1821.
 - heirs of a deceased partner,—Art. 106. 1642, 1622.
 - heir of a Muhammadan intestate, for possession of property,—Arts. 120, 144. Cf. Art. 123. 1883, 1818.
 - Hindu for arrears of maintenance,—Art. 128. 1885.
 - Hindu for declaration of right to maintenance,—Art. 129. 1885.
 - Hindu to set aside his father's alienation,—Art. 120. Cf. Art. 126. 1847, 1789.
 - holder of a bond to enforce his security against sons of the surety,—Art. 120. Cf. Art. 132. 1850, 1790.

SUIT by—(*Contd.*)

- judgment-debtor for damages,—**Art. 115.** 1710, 1680.
- landlord to recover possession from tenants,—**Art. 139.** 2032.
- lessee for refund of a part of the premium paid,—**Art. 62.** Cf. **Art. 97.** 1589, 1575.
- lessor for ejectment on a breach of condition,—**Art. 143.** Cf. **Art. 139.** 2164, 2147.
- liquidator for calls,—**Art. 120.** Cf. **Art. 112.** 1680, 1840; 1653, 1784.
- medical practitioner for fees,—**Art. 115.** 1703, 1672.
- member of joint Hindu family, excluded from joint family property,—**Art. 127.** 1927, 1870.
- Mahomedan for exigible dower,—**Art. 103.** 1605.
- Mahomedan heir,—Cf. **Art. 123.** 1883, 1819.
- Mahomedan widow for declaration of life estate,—**Art. 120.** Cf. **Art. 123.** 1883, 1818.
- mortgagee against mortgagor on a personal covenant,— **Art. 116.** 1741-1742, 1702.
- mortgagee for foreclosure or sale,—**Art. 147.** 2309.
- mortgage for money payable under a registered mortgage bond,— **Art. 116.** 1739-1747, 1701-1706.
- mortgagee for possession of immoveable property mortgaged,—**Art. 135.** 1999.
- mortgagor to recover surplus collections received by mortgagee,— **Art. 105.** 1612.
- one co-sharer against another for share of rent,—**Art. 120.** Cf. **Arts. 48, 62 and 109.** 1824, 1777.
- one partner for partnership accounts,—**Art. 120.** Cf. **Arts. 89, 100 and 116.** 1757, 1716.
- or against municipality,—**Art. 149.** 2288, 2333.
- or on behalf of any local authority for possession of a public street or road,—**Art. 146-A.** 2305.
- or on behalf of Secretary of State,—**Art. 149.** 2330.
- party bound by award, under Bengal Regulations, to recover property,—**Art. 46.** 1255.
- payee of a dishonoured bill,—**Art. 78.** 1443.
- person excluded from joint family property to enforce a right to share therein,—**Art. 127.** 1868.
- puisne mortgagee to redeem prior mortgage,—**Art. 148.** 2277, 2319; cf. **Art. 132.** 1969, 1920.
- principal against his agent for moveable property received and not accounted for,— **Art. 89.** 1493.
- purchaser at private sale for possession of immoveable property, sold,—**Art. 136.** 2012.
- purchaser at a sale in execution,—**Art. 137.** 2018.
- purchaser at a sale in execution when judgment-debtor in possession at date of sale,—**Art. 138.** 2021.
- purchaser's agent to recover monies due,—**Art. 115.** 1768, 1676.
- remainderman for possession,—**Art. 140.** 2042.
- reversioner for possession,—See REVERSIONER,—**Art. 140.** 2042.
- reversioner to have alienation by female declared void,—**Art. 120.** 1803, 1757; also Cf. **Art. 125.** 1846, 1789.
- reversioner to recover moveable property on death of a Hindu female,—**Art. 120.** Cf. **Art. 141.** 1851, 1791.
- shareholder of company for arrears of dividend,—Cf. **Art. 115.** 1711, 1682.

SUIT by—(Contd.)

- simple mortgagee to enforce charge against a purchaser for value,—
Art. 132. 1968, 1917.
- son born after date of sale,—**Art. 126.** 1922, 1866.
- stani* for possession,—Void alienation of hereditary office, etc.,—**Art. 124.** 1899, 1842.
- surety against a co-surety,—**Art. 82.** 1457.
- surface owner for damages,—**Art. 115.** 1710, 1681.
- tenant-in-common for an account of the profits,—**Art. 120.** Cf. **Art. 109.** 1658, 1634.
- vendee for refund of purchase-money on a void sale,—**Art. 97.** 1591, 1581.
- vendor against vendee,—Breach of contract,—**Art. 115.** 1708, 1679.
- vendor of immoveable property for personal payment of underpaid purchase money,—**Art. 111.** 1649.
- ward to have account of defendant's stewardship,—**Art. 120.** Cf. **Arts. 89, 90.** 1824, 1776.
- does not cover appeals or applications,—**Art. 84.** 1488, 1468.
- for account against gomashtha,—See **ACCOUNT**,—**Art. 115.** 1708, 1679.
- against a trustee,—**Art. 120.** Cf. **Art. 62.** 1824, 1774.
- and share of the profits of a dissolved partnership,—See **PARTNERSHIP**,—**Art. 106.** 1615; **Art. 120.** Cf. **Arts. 89, 100, 116.** 1757, 1716.
- money charged upon immoveable property,—**Art. 132.** 1972, 1925.
- of profits of joint property,—**Art. 120.** Cf. **Art. 62.** 1824, 1774.
- of profits of village management,—**Art. 151.** 1710, 1681.
- of trust property,—**Art. 120.** 1793, 1749.
- of outstanding collections by a divided member of Hindu family,—
Art. 120. Cf. **Art. 89.** 1830, 1780.
- and for money due against agent,—**Art. 89.** 1524, 1503.
- without dissolution of partnership,—Cf. **Art. 106.** 1634, 1616.
- for
 - any misfeasance against a director,—**Art. 120.** Cf. **Arts. 36, 115, and 116.** 1842, 1786; also 1711, 1683.
 - arrears,—of customary dues and cesses,—**Art. 120.** Cf. **Art. 110.** 1668, 1643.
 - of rent,—**Art. 110.** 1641.
 - of rent against co-owner tenant of part of joint property,—**Art. 120.** Cr. **Art. 110.** 1666, 1642.
 - balance of money advanced in payment of goods,—**Art. 51.** 1290.
 - due on a mutual open and current account,—**Art. 85.** 1471.
 - bill of exchange accepted payable at particular place,—**Art. 71.** 1403.
 - breaches of contract,—not protected by **Art. 2.** 930, 998.
 - to pay off mortgage,—**Art. 116.** 1762, 1720.
 - broker's commission,—**Art. 115.** 1768, 1676.
 - call by a company registered under any Statute or Act,—**Art. 112.** 1652.
 - cancellation of a will,—**Art. 120.** 1800, 1756.
 - compensation,—See **COMPENSATION**.
 - for act or omission in pursuance of an enactment,—**Art. 2.** 992.
 - for acts other than torts or breaches of contract,—**Arts. 120** Cf. **Art. 86.** 1817-1818, 1770.
 - for breach of a contract,—**Art. 120.** Cf. **Art. 115.** 1842, 1786.
 - contained in an unregistered receipts,—**Art. 115.** 1708, 1679.
 - in writing registered,—**Art. 116,** 1690.
 - not in writing registered,—1670.

SUITS for—(*Contd.*)**Compensation—**(*Contd.*)

- for breach of a contract—(*Contd.*)
 - registered contract,—**Art. 120.** Cf. **Art. 116.** 1843, 1787.
 - for deficient land,—**Art. 116.** 1754, 1714.
 - for false imprisonments,—**Art. 19.** 1149.
 - for infringing copyright,—**Art. 40.** 1225.
 - for injury to person,—**Art. 23.** 1155.
 - for libel,—**Art. 24.** 1165.
 - for loss of service of plaintiff's daughter or servant,—**Art. 26.** 1169.
 - for malfeasance, misfeasance or non-feasance,—**Art. 36.** 1206.
 - for malicious prosecution,—**Art. 23.** 1159.
 - for non-completion of land acquisition,—**Art. 18.** 1107, 1148.
 - for obstructing a way or water-course,—**Art. 37.** 1218.
 - for repairs,—**Art. 115.** 1710, 1681.
 - for short-delivery of goods,—**Arts. 30, 31.** 1177, 1196.
 - for slander,—**Art. 25.** 1167.
 - for use and occupation,—**Art. 120.** Cf. **Art. 110.** 1666, 1641.
 - for wrongful act or omission of local authorities,—**Art. 2.** 931, 1000.
 - for money not governed by **Art. 17.** 1105, 1147.
 - for money under land acquisition paid through fraud of defendant,—**Art. 95.** 1574, 1557.
 - of sums received by deceased agent,—**Art. 116.** 1755, 1714.
 - on re-marriage of a widow,—**Art. 115.** 1710, 1682.
 - scope of **Art. 2,—926, 923.**
- for contribution,—See **CONTRIBUTION**; also see **Arts. 61, 82, 99, 100 and 107; Art. 61.** 1346, 1326.
 - between partners,—**Art. 99.** Cf. **Art. 61-97.** 1606, 1596.
 - by lessee,—Cf. **Art. 99.** 1606, 1596.
 - by a trustee against estate of a deceased trustee,—**Art. 100.** 1601.
 - in respect of money paid by plaintiff,—**Art. 120.** Cf. **Art. 61.** 1823, 1773.
- for damages,—**Art. 61.** 1350, 1330.
 - against vendee failing to make payment to other person,—**Art. 115.** 1717, 1685.
 - for breach of contract to sell goods,—**Art. 115.** 1714, 1684.
 - for breach of covenant of title,—**Art. 116.** 1760, 1718.
 - for non-delivery,—**Art. 115.** 1714, 1684.
- for declaration,—See **DECLARATION**; also see **Art. 120.**
 - against Government,—**Art. 149.** 2287, 2332.
 - against official act or order,—**Art. 120.** Cf. **Art. 14.** 1813, 1768.
 - as to divorce,—**Art. 120.** 1859, 1797.
 - during lifetime of a Hindu or Muhammadan female, by reversioners,—**Art. 141.** 1903, 1846.
 - of charge,—**Art. 120.** Cf. **Art. 132.** 1965, 1915.
 - of right to maintenance,—**Art. 120.** Cf. **Art. 129.** 1848, 1789.
 - of title,—Cf. **Art. 2.** 929, 996.
 - that partnership existed,—Cf. **Art. 106.** 1635, 1618.
- for deferred dower,—See **DOWER**,—**Art. 104,** 1610.
- for dissolution and accounts of a partnership,—**Art. 120.** Cf. **Art. 106.** 1836, 1782.
- for dissolution of subsisting partnership,—**Art. 120.** Cf. **Art. 106.** 1633, 1616.
- for dower,—**Art. 115.** 1708, 1675.
- for ejectment and compensation,—See **EJECTMENT**,—**Art. 32.** 1180, 1199.

SUIT—(Contd.)

- and injunction,—**Art. 32.** 1180, 1198.
- under S. 25, cl. (2), and S. 155, B. T. Act,—**Art. 32.** 1180, 1198.
- for fees,—of a medical practitioner,—**Art. 115.** 1708, 1679.
- for hire
 - of animals, boats, or household furniture,—See **HIRE**,—**Art. 50.** 1289.
 - of water,—**Art. 115.** 1708, 1675.
- for injunction,—See **INJUNCTION**.
 - not covered by **Art. 2.** 929, 996.
 - perpetual and mandatory,—**Art. 120.** 1794, 1750.
- for joint possession,—See **POSSESSION**.
 - by a co-sharer,—**Art. 142.** 2161, 2138.
- for legacy,—or for a share of a residue,—**Art. 123.** 1817.
- for malikana,—**Art. 115.** 1768, 1677.
- for mesne profits,—See **MESNE PROFITS**,—**Art. 120.** Cf. **Art. 109.** 1824, 1775.
 - against trespasser,—**Art. 109.** 1658, 1633.
 - by one co-sharer against another,—**Art. 120.** Cf. **Art. 109.** 1658, 1633-1634.
 - collected by a co-owner,—**Art. 120.** Cf. **Arts. 62 and 109.** 1837, 1783.
- for money,—See **MONEY**.
 - based upon award,—Cf. **Art. 113.** 1690, 1662.
 - decree on mortgage-bond,—**Art. 120.** Cf. **Art. 132.** 1850, 1789.
 - due on a registered bond,—**Art. 116.** 1741-1742, 1702.
 - lent by sale of property pledged,—**Art. 120.** Cf. **Arts. 57, 59.** 1822, 1772.
 - lent payable within fixed time,—**Art. 115.** 1768, 1677.
 - lent under an agreement,—**Art. 59.** 1308.
 - paid by mortgagee,—**Art. 116.** 1757, 1717.
 - paid upon an existing consideration which afterwards fails,—**Art. 97.** 1566.
 - payable for loan by cheque,—**Art. 58.** 1307.
 - payable to plaintiff for money found due on account stated,—**Art. 64.** 1367.
 - payable for money lent,—**Art. 57.** 1300.
 - payable to plaintiff for money paid for defendant,—1321.
- for mortgage money,—due on a registered deed,—**Art. 116.** Cf. **Art. 113.** 1694, 1665.
- for partnership accounts,—based on agreement to distribute profits, **Art. 120.** Cf. **Art. 89.** 1832, 1781.
- for personal decree, in mortgage suit.—See **PERSONAL**,—**Art. 116.** 1761, 1720.
 - injury,—Abatement of,—**Art. 20.** 1117, 1153.
 - relief against mortgagor,—**Arts. 115, 116.** 1708, 1676.
 - remedy,—Cf. **Art. 132.** 1962, 1912.
- for possession,—See **POSSESSION**.
 - of hereditary office,—**Art. 124.** 1830.
 - of immoveable property mortgaged,—**Art. 135.** 2036, 2001.
 - of immoveable property or any interest therein,—**Art. 144.** 2149.
 - of immoveable property sold at a private sale,—**Art. 136.** 2012.
 - of immoveable property when plaintiff has been dispossessed or has discontinued possession,—**Art. 142.** 2086.
 - of land based on previous compromise,—**Art. 120.** Cf. **Art. 113.** 1693, 1665.
 - not governed by **Art. 92.** 1560, 1545.

SUIT—(*Contd.*)

for possession—(*Contd.*)

on the lease,—**Art. 114.** Cf. **Art. 113.** 1692, 1664.

for price,—See **PRICE.**

of food or drink,—**Art. 8.** 1031.

of goods after expiry of period of credit,—**Art. 53.** 1296.

of goods sold and delivered,—**Art. 52.** 1292.

of goods sold and delivered to be paid by bill of exchange,—**Art. 54.** 1298.

of lodging,—**Art. 9.** 1031.

of ornaments loaned for uses,—**Art. 115.** 1710, 1681.

of trees or growing crops,—**Art. 55.** 1298.

of work done by plaintiff at defendant's request,—**Art. 56.** 1299.

for proceeds of goods lost or acquired by conversion,—**Art. 120.** Cf. **Art. 48.** 1819, 1771.

for profits of immoveable property,—**Art. 109.** 1632.

for property

appurtenant to hereditary office,—**Art. 124.** 1894, 1835.

appurtenant to non-hereditary office,—**Art. 120.** Cf. **Art. 124.** 1894, 1835.

conveyed by plaintiff while insane,—**Art. 94.** 1550.

for recovery

of advance under contract for sale of land,—**Art. 97.** 1590, 1579.

of amount spent by Shebait out of private funds.—**Art. 120.** Cf. **Art. 132.** 1850, 1790.

for recovery,—See **RECOVERY.**

of arrears of rent against co-owner,—**Art. 120.** Cf. **Art. 115.** 1711, 1682.

of balance of money lent after deducting the value of work done,—**Art. 57.** Cf. **Art. 115.** 1711, 1682.

of consideration from vendee,—Cf. **Art. 116.** 1757, 1717.

of dower debt,—**Art. 116.** 1723, 1693.

of immoveable property,—**Art. 144.** Cf. **Arts. 113, 116 and 120.** 1691, 1663.

of land, not covered by **Art. 2.**—929, 996.

of mesne profits and interest,—**Art. 105.** 1629, 1613.

of money due on a decree assigned to plaintiff,—**Art. 120.** Cf. **Art. 29.** 1815, 1770.

of money on failure of consideration,—**Art. 116.** 1757, 1715.

of money payable under terms of any award,—**Art. 120.** Cf. **Art. 113.** 1841, 1784.

of money secured by a pledge,—**Art. 57.** 1324, 1386.

of profession tax,—**Art. 120.** Cf. **Art. 6.** 1809, 1765.

of sums advanced by shebait to trust,—**Art. 120.** Cf. **Art. 132.** 1850, 1790.

of sums to adjust difference in partition,—**Art. 120.** Cf. **Art. 111.** 1839, 1784.

of surplus profits,—**Art. 105.** 1627, 1612.

of water cess,—**Art. 16.** 1101, 1145.

for rectification,—See **RECTIFICATION.**

of an instrument,—**Art. 95 or 120.** Cf. **Art. 114.** 1699, 1670.

for refund,—See **REFUND.**

of amount advanced for building a well,—**Art. 115.** 1708, 1678.

of purchase-money based upon covenant of title,—**Art. 116.** Cf. **Art. 97.** 1592, 1583.

of purchase-money,—Void transfers,—**Art. 62.** Cf. **Art. 97.** 1589, 1575.

SUIT—(Contd.)

for refund—(Contd.)

of *tirvajasti* levied under Irrigation Cess Act,—Art. 16. 1101
1145.

for re-imbursement,—Cf. Art. 116. 1757, 1716.

for rent,—See RENT.

against co-owner,—Art. 120. Cf. Art. 110. 1838, 1783.

for rescission of a contract,—Art. 114. 1669.

for return of purchase money,—Art. 115. 1708, 1675.

for sale, on basis of a mortgage-deed,—Art. 132. 1963, 1914.

for share

of intestate estate,—Art. 120. Cf. Art. 123. 1844, 1787.

of moveable property,—Art. 120. Cf. Art. 49. 1820, 1772.

for short delivery—against carrier. Art. 115. 1708, 1679.

for solicitor's costs,—Order for taxation,—Art. 84. 1493, 1473.

for specific moveable property,—Lost or acquired by theft, etc.,—
Art. 48. 1271.

for specific performance of a contract,—Art. 113. 1657.

for title between co-owners or co-tenants,—Art. 32. 1184, 1201.

for value of work done,—Art. 115. 1708, 1679.

for wages, of a household servant,—Art. 7. 1026.

for which no period of limitation is provided for elsewhere in the
Schedule,—Art. 120. 1743.

for worship of a Thakur,—Arts. 124-144. 1892, 1831.

founded upon a statute for a penalty or forfeiture,—Art. 6. 1025.

in ejectment,—See EJECTMENT; also see Art. 3. 940, 946; 1010,
1013.

instituted in a Court not established by royal charter by a mortgagee
for possession of immoveable property mortgaged,—Art. 135.
1999.

involving damages in tort,—Cf. Art. 115. 1713, 1683.

question of validity of an adoption,—Art. 118. Cf. Art. 141.
2101, 2068.

not for compensation,—Cf. Art. 115. 1712, 1683.

Notice of—, under S. 80, C. P. Code,—Art. 2. 936, 1004-1006.

on administration surety-bond,—Art. 120. Cf. Art. 68. 1827, 1779.

an adjusted partnership account,—Art. 106. 1638, 1619.

a bond subject to a condition,—Art. 68. 1395.

a mortgage bond executed for a loan of paddy,—Arts. 116, 120.

Cf. Art. 132. 1850, 1789.

a policy of insurance, etc.,—Art. 86. 1487.

a promissory note given by the maker to a third person,—Art. 76.
1441.

a registered bond,—Arts. 66 and 116. 1724, 1693.

a registered instalment bond,—Arts. 74, 116. 1725, 1693.

a single bond,—where day is specified for payment,—Art. 66. 1387.

bill of exchange, etc., payable on demand,—See BILL OF EX-
CHANGE. 1405.

bill of exchange, etc., not herein expressly provided for,—Art. 80.
1447.

bill of exchange payable at fixed time after sight or after demand,
—Art. 72. 1404.

bond hypothecating cattle,—Cf. Art. 80. 1829, 1780.

foreign judgment,—Art. 117. 1765, 1724.

simple mortgage,—Art. 132. 1967, 1916.

Revival of—, Starting point of limitation,—Art. 172. 2406, 2456.

to alter or set aside order of Civil Court,—Art. 13. 1123.

to avoid, incumbrance or under-tenures,—Art. 121. 1801.

SUIT—(Contd.)

- to avoid sale of ancestral property by Hindu father,—**Art. 120.** 1805, 1759.
- to cancel or set aside an instrument not otherwise provided for,—**Art. 91.** 1513.
- to contest award of Board of Revenue,—**Art. 1.** 991.
an award under Bengal Regulations,—**Art. 45.** 1255.
- to declare the forgery of an instrument,—**Arts. 92, 93.** 1544, 1547.
- to enforce award,—**Cf. Arts. 113, 115.** 1842, 1786.
hypothecation of decree,—**Art. 120.** **Cf. Art. 132.** 1850, 1789.
a charge,—**Art. 132.** **Cf. Art. 89.** 1524, 1503.
a charge on agricultural produce,—**Expl. Cl. (b),—Art. 132.** 1990, 1941.
a charge on moveable property,—**Art. 120.** **Cf. Art. 132.** 1966, 1915.
a mortgage of a turn of worship,—**Art. 120.** **Cf. Art. 132.** 1850, 1790.
obligations arising out of decree for accounts,—**Art. 120.** **Cf. Art. 64.** 1826, 1779.
payment of money charged upon immoveable property,—**Art. 132.** 1906.
right of pre-emption,—**Art. 10.** 1032.
- to establish a periodically recurring right,—**Art. 120.** **Cf. Art. 131.** 1849, 1789.
a periodically recurring right,—**Art. 131.** 1895.
plaintiff's right to hereditary office,—**Art. 124.** 1892, 1833.
right to possession against order under Civil Procedure Code,—**Art. 11-A.** 1083.
right to property against order under Civil Procedure Code,—**Art. 11.** 1054.
right to property against order under S. 28. Provincial Small Cause Court's Act,—**Art. 11.** 1054.
- to make good out of the general estate of a deceased trustee the loss occasioned by a breach of the trust,—**Art. 98.** 1591.
- to obtain a declaration that an adoption is invalid,—**Art. 119.** 1739.
- to recover arrears of rent,—**Art. 116.** 1738, 1700.
damages resulting from a conspiracy,—**Art. 120.** **Cf. Art. 23.** 1814, 1769.
money due under registered mortgage on mortgagee being turned out of property,—**Art. 97.** 1591, 1581.
money paid in consequence of defendant's fraud,—**Art. 95** whether applied,—1574, 1558.
money set apart by defendant for ornaments,—**Art. 115.** 1708, 1676.
money under periodically recurring right,—**Art. 131.** 1949, 1897.
money wrongly distributed or paid,—**Art. 120.** **Cf. Art. 29.** 1816, 1770.
moveable property conveyed or bequeathed in trust,—**Art. 48-A.** 1276.
penalty under a contract not within **Art. 6.** 961, 1025.
possession as *dharmkarta* based on prescription,—**Art. 120.** **Cf. Art. 124.** 1893, 1834.
possession of immoveable property conveyed or bequeathed in trust, etc.,—**Art. 134.** 1959.
property released from attachment,—**Cf. Arts. 11, 13.** 1017, 1066.
property under summary order by magistrate,—**Art. 47.** 1269, 1267.

SUIT—(Contd.)**to recover—(Contd.)**

remuneration as *dwaris* of a temple,—Art. 120. Cf. Art. 102. 1835, 1782.

sale proceeds from agent,—Art. 120. Cf. Art. 89. 1831, 1781.

share of produce, or certain sum on default,—Art. 115. 1708, 1678.

a sum as emolument of an hereditary office,—Cf. Art. 144. 2172, 2162.

unpaid share of cost of shop,—Art. 115. 1708, 1678.

value of pledged goods sold by pledgee,—Art. 115. 1708, 1679.

to restrain waste,—Art. 41. 1227.

to set aside

act or order of officer of Government,—Art. 14. 1129.

an instrument,—Art. 120. 1798, 1755.

an award,—Art. 91, or Art. 95. 1574, 1557.

certain sales,—Art. 12. 1095.

decree obtained by perjury,—Cf. Art. 95. 1574, 1559.

decree on ground of gross negligence of guardian of a minor,—Art. 120. Cf. Art. 95. 1833, 1781.

decree,—Relief on ground of mistake,—Art. 96. 1580, 1563.

fraudulent sale in execution,—Art. 95. 1574, 1557.

sales,—Art. 120. 1801, 1756.

summary order,—Art. 47. 1263, 1262.

a transfer of immoveable property comprised in a religious or charitable endowment,—Art. 134-A. 1986.

void transfers,—Art. 44. 1244, 1246.

voidable transfers,—Art. 44. 1244, 1246.

under Indian Succession Act to compel a refund,—Art. 43. 1232.

Legal Representatives Act, 1855,—Arts. 33-35. 1205.

Special or Local Laws,—Art. 120. 1792, 1747.

Specific Relief Act, S. 9—Art. 3. 1007.

the summary procedure,—Art. 5. 1022; also see Art. 159. 2368.

the Employment and Workmen (Disputes) Act, 1860, S. 1.—Art. 4. 1021.

upon contract to indemnify,—Art. 83. 1459.

a foreign judgment,—Art. 117. 1722.

a judgment obtained in British India on a recognisance,—Art. 122. 1808.

a promissory note with special agreement,—Art. 120. Cf. Art. 73. 1828, 1779.

a statute, etc., for a penalty or forfeiture,—Art. 6. 1025.

SUMMARY CESS

Right to levy—, Interest in immoveable property,—Art. 144. 2171, 2160.

SUMMARY DECISION

Application to execute—, See EXECUTION OF DECREE,—Art. 181.

Meaning of—, Art. 182. 2504, 2577.

Suits to set aside—, See Art. 13.

SUMMARY ORDERS,—See Art. 11-A.**SUMMARY PROCEEDINGS**

Order in, as an obstacle to be removed,—Art. 11-A. 1036, 1089.

SUMMARY PROCEDURE

Civil Procedure Code,—O. 21, Rr. 97-99,—Art. 167. 2381, 2431; also see Art. 159. 2325, 2369.

Suit under—, Art. 159. 2368.

under O. 21, R. 97, optional,—Art. 11-A. 1039, 1092.

under S. 9, Specific Relief Act,—Art. 3. 940, 1010.

SUMMONS

Application for summoning of witnesses,—Step-in-aid,—Art. 182. 2612, 2682.

Service of—, See SERVICE OF SUMMONS,—Art. 164. 2355-2357, 2399-2400.

SUPERSTRUCTURE

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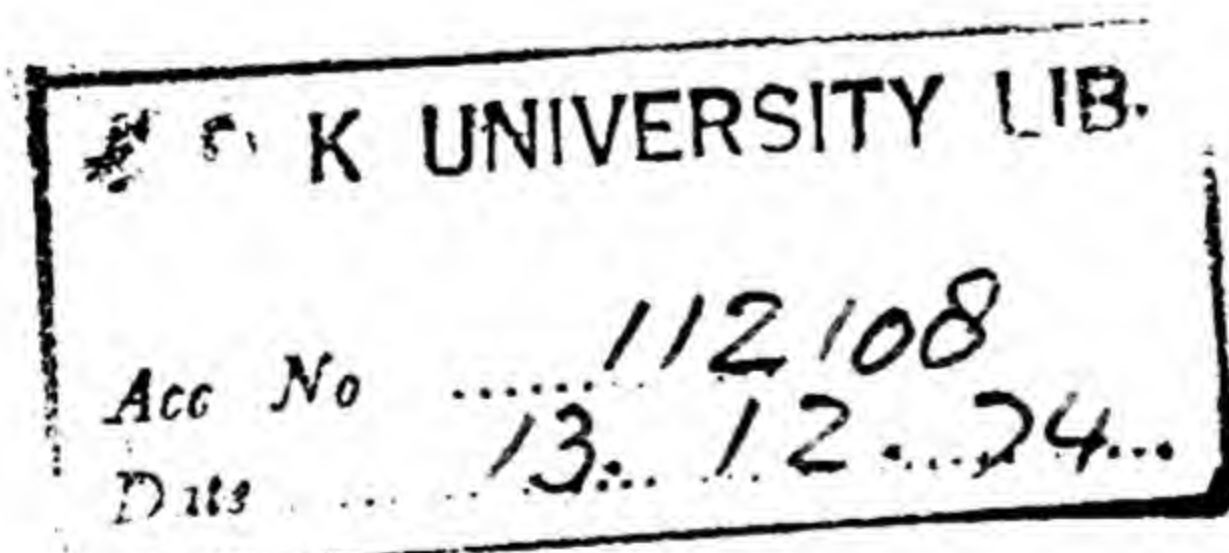
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